IN THE SUPREME COURT FOR THE STATE OF ALASKA

CITY OF VALDEZ Appellant/Cross-Appellee, v. POLAR TANKERS, INC. Appellee/Cross-Appellant.	)	Supreme Court No. S -12218/12223 Superior Court Case No. 3AN-00-9665 CI

APPEAL FROM THE SUPERIOR COURT
FOR THE STATE OF ALASKA, THIRD JUDICIAL DISTRICT
THE HONORABLE PETER A. MICHALSKI, PRESIDING

OPPOSITION AND REPLY BRIEF OF APPELLANT/CROSS-APPELLEE CITY OF VALDEZ

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Marilyn May, Clerk
By:
Deputy Clerk

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U.S. Const. art. I, §8

> **§ 8. Powers of Congress.** The Congress shall have the power . . . [T]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . .

U.S. Const. art I, § 10

> **§ 10. Restrictions upon powers of states. . . .** No state shall, without the consent of Congress, lay any duty of tonnage, . . .

U.S. Const. Amend. XIV

> **§ 1. Citizenship rights not to be abridged by states.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Alaska Const., art II, §1

> **Section 1. Legislative Power; Membership.** The legislative power of the State is vested in a legislature consisting of a senate with a membership of twenty and a house of representatives with a membership of forty.

Alaska Const., art IV §§1, 2, 3

> **Section 1. Judicial Power and Jurisdiction.** The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.
>
> **Section 2. Supreme Court.** (a) The supreme court shall be the highest court of the State, with final appellate jurisdiction. . . .

Section 3. Superior Court. The superior court shall be the trial court of general jurisdiction and shall consist of five judges. The number of judges may be changed by law.

Alaska Const., art X §§2, 8, 11

Section 2. Local Government Powers. All local government powers shall be vested in boroughs and cities. The State may delegate taxing powers to organized boroughs and cities only.

Section 8. Council. The governing body of a city shall be the council.

Section 11. Home Rule Powers. A home rule borough or city may exercise all legislative powers not prohibited by law or by charter.

Alaska Statute 22.05.010

Jurisdiction. (a) The supreme court has final appellate jurisdiction in all actions and proceedings. However, a party has only one appeal as a matter of right from an action or proceeding commenced in either the district court or the superior court.

Alaska Statute 29.45.070.

Mobile Homes. Mobile homes, trailers, house trailers, trailer coaches, and similar property used or intended to be used for residential, office, or commercial purposes and attached to the land or connected to water, gas, electric, or sewage facilities are classified as real property for tax purposes unless expressly classified as personal property by ordinance. This section does not apply to house trailers and mobile homes that are unoccupied and held for sale by persons engaged in the business of selling mobile homes.

Alaska Statute 29.45.500.

Refund of Taxes. (a) If a taxpayer pays taxes under protest, the taxpayer may bring suit in the superior court against the municipality for recovery of the taxes. If judgment for recovery is given against the municipality, or, if in the absence of suit, it becomes obvious to the governing body that judgment for recovery of the taxes would be obtained if legal proceedings were brought, the municipality shall refund the amount of the taxes to the taxpayer with interest at eight percent from the date of payment plus costs.

(b) If, in payment of taxes legally imposed, a remittance by a taxpayer through error or otherwise exceeds the amount due, and the municipality, on audit of the account in question, is satisfied that this is the case, the municipality shall refund the excess to the

taxpayer with interest at eight percent from the date of payment. A claim for refund filed one year after the due date of the tax is forever barred.
(c) The governing body may correct manifest clerical errors at any time.

AS 43.20.071(a)(4)

Sec. 43.20.071. Transportation carriers. (a) All business income of water transportation carriers shall be apportioned to this state in accordance with AS 43.19 (Multistate Tax Compact) as modified by the following:

. . . .

(4) the portions of the numerator of the property, payroll, and sales factors which are directly related to interstate mobile property operations are determined by a ratio which the number of days spent in ports inside the state bears to the total number of days spent in ports inside and outside the state; the term "days spent in ports" does not include periods when ships are tied up because of strikes or withheld from Alaska service for repairs, or because of seasonable reduction of service; days in port are computed by dividing the total number of hours in all ports by 24.

AS 43.20.130(g) repealed ch. 70, § 13 SLA 1975

(g) The value of vessels operating on the high seas and compensation of employees engaged in operating the vessels shall be apportioned to the state in the ratio which the number of days spent in ports inside the state bears to the total number of days spent in ports inside and outside the state. The term "days spent in ports" does not include periods when ships are tied up because of strikes or withheld from the Alaska service for repairs, or because of seasonal reduction of service. Days in port are computed by dividing the aggregate number of hours in all ports by 24. The value of aircraft and automotive vehicles operating as freight and passenger carriers from, to, and inside the state and compensation of employees so engaged are apportioned to the state in the ratio which the number of days during which the services are rendered inside the state bears to the total number of days during which the services are rendered inside and outside the state.

AS 29.45.050(b)(2)

(b) A municipality may by ordinance

(2) classify as to type and exempt or partially exempt some or all types of personal property from ad valorem taxes.

Haines Borough Code 16.16.090

16.16.090 Computation of annual fees.

Unless otherwise provided, annual fees for stall rentals and moorage shall be computed as follows: Annual fee = $0.95 x width x length. "Length" is the length of the stall rented or the actual length of the boat, whichever is greater. In no instance shall the annual fee for stall rent be less than $12.00 per foot of vessel length as required in the State of Alaska DOT/PF Boat Harbor Management Agreement.

Kenai Peninsula Borough Code of Ordinances §5.12.050

5.12.050. Valuation and flat tax appeal procedure.

A. A property owner or agent or assign of the property owner may appeal to the board of equalization for relief from an alleged error in valuation not adjusted by the assessor to the property owner's satisfaction, or, in the case of property subject to a flat tax, an alleged error in ownership or classification of property.

B. An appellant must, within 30 days after the mailing of the notice of assessment, submit to the assessor, by delivery to the borough clerk, a written appeal. The appeal must state the name of the owner, a legal description of the property, and the grounds for the appeal. If the party making the request is an assign of the record owner, documentation of the assignment must bear a stamp reflecting the recording district and the book and page number or serial number of the recorded assignment. If the party making the request is an agent of the property owner, the property owner=s signature granting the authority must be notarized and attached to the request. It must be submitted to the borough clerk within 30 days after the mailing of the notice of assessment, or the right to appeal ceases unless the board of equalization finds that the taxpayer was unable to comply. No appeal application may be accepted unless a filing fee of $30.00 for a property whose assessed value is less than $100,000.00, $100.00 for property whose total assessed value is at least $100,000.00 but less than $500,000.00, $200.00 for property whose total assessed value is at least $500,000.00 and less than $2,000,000.00, and $1,000.00 for property whose total value is $2,000,000.00 or greater, is received by the clerk at the time of filing. If the appeal results in a reduction from the original assessed value or if the appeal is withdrawn before evidence is due, then the filing fee shall be refunded. For purposes of this section, the appeal is submitted on the date it is received in the office of the clerk or, if delivered by first class mail, the date it is postmarked by the U.S. Postal Service. Appeal forms shall be available from the borough assessor's office, borough clerk's office, or city offices within the borough. The borough clerk will provide to the assessor each appeal within two days of receipt. An application to proceed with an appeal as an indigent may be filed with the borough clerk's office in accordance with the procedures and schedule described in KPB 21.20.250(B).

C. Taxpayer request for a finding that the taxpayer was unable to comply with the timely filing requirement of KPB 5.12.050(B).

1. A property owner or agent or assign of the property owner may request a finding that the taxpayer was unable to comply with the requirement to timely file an appeal as required in paragraph B of this section by filing a written request with the borough clerk within 14 days after the inability to comply ceased or within 14 days after the taxpayer should have become aware of the reason for filing the appeal, whichever is earlier.

2. The request for a finding of inability to comply must be based upon a serious condition or event beyond the taxpayer's control that resulted in the inability to timely file the appeal. For purposes of this subsection, a serious condition or event may include a serious medical condition or other similar serious condition or event that prevented the taxpayer from timely filing the appeal. Absent extraordinary circumstances, a failure to pick up or read mail or to make arrangements for an appropriate and responsible person to pick up or read mail or a failure to timely provide a current address to the Department of Assessing will not be deemed to result in an inability to comply.

3. A request for a finding of inability to comply is limited to an appeal of the notice of assessment for the current assessment year.

4. The written request must be submitted on a request form supplied by the borough clerk and must include the following:

a. Name of the property owner or agent or assign of the property owner;

b. The parcel number of the property;

c. If the party making the request is an assign of the record owner, documentation of the assignment must bear a stamp reflecting the recording district and the book and page number or serial number where the assignment is recorded;

d. If the party making the request is an agent of the property owner, the property owner's signature granting the authority must be notarized and attached to the request;

e. A description of the justification for the request must be subscribed and sworn or affirmed before a notary public or other official with similar authority by the property owner or duly authorized agent or assign;

f. Information sufficient to determine whether the request has been submitted within the time stated in KPB 5.12.050(C)(1);

g. An attached and properly completed and executed appeal form alleging one or more of the grounds for appeal stated in KPB 5.12.050(E).

5. A request bearing insufficient justification or information for evaluation constitutes a basis for final denial of the request by the BOE.

D. Determination by the chair whether a request meets the requirements for consideration by the BOE and procedure for board evaluation of the merits of the asserted justification and for scheduling a required hearing.

1. With the exception of determining the merits of the justification, the chair is delegated the authority to review the request for compliance with KPB 5.12.050(C)(4). If the chair determines that the request does not meet the requirements for consideration by the board, the chair will so indicate on the request, and that decision shall be final unless the chair refers the question to the full board. If referred to the full board, proper notice must be given. The decision by the chair or the full board shallbe final. The taxpayer shall have the right to appeal a negative decision under the rules of appellate procedure governing appeals from administrative agency decisions.

2. If the chair or the full board finds that the request meets the requirements for consideration of the inability to comply question by the BOE, the chair will so indicate on the request. The clerk shall notify the party making the request and shall schedule a time for the BOE to convene to consider merits of the request for a finding of inability to comply. The meeting shall be scheduled by the clerk after consultation with the assessor and at the direction of the BOE chair. The property owner or agent or assign of the property owner and the assessor shall be permitted to present additional evidence or testimony. The board may require additional evidence or testimony. The proceeding shall be recorded and all evidence must be submitted under oath.

3. If the BOE determines that the taxpayer has not proven an inability to comply, an appeal of the assessment to the BOE will not be allowed, and that decision shall be the final decision of the BOE. The clerk shall notify the parties in writing.

4. The taxpayer and borough shall have the right to appeal a decision under KPB 5.12.050(C) and KPB 5.12.050(D) to court under the rules of appellate procedure governing appeals from administrative agency decisions.

5. If the BOE determines that the appellant was unable to comply, the clerk shall schedule a hearing for the appeal and give the notices required by KPB 5.12.050(F). The matter shall proceed as provided in this Chapter.

E. The grounds for appeal are: unequal, excessive, improper or under valuation of the property not adjusted by the assessor to the property owner's satisfaction, or an error in ownership or classification of property. The potential validity or invalidity of asserted errors in assessment shall have no bearing on the determination of whether the taxpayer was unable to timely file an appeal.

F. After the time for filing valuation appeals has expired and after consultation with the assessor, and at the direction of the chair of the board of equalization, the borough clerk shall schedule meetings of the board of equalization. The clerk on behalf of the assessor shall schedule meetings of the board of equalization. The clerk on behalf of the assessor shall notify each appellant by mail of the time and place of hearing and board of equalization procedures at least 15 days before the evidence or documents required by KPB 5.12.055(A) and (B) must be provided to the borough clerk. A party can request a continuance of hearing only for good cause and the continuance must be requested no later than 15 days prior to the hearing date unless the reason for the continuance is a serious condition or event that prevented a timely request or that arose after the deadline. For the purposes of this subsection, a serious condition or event may include a serious medical condition, a serious family emergency requiring the presence of the party, a death in the family, or other similar serious condition or event. Additionally, a continuance shall not be granted if it will cause substantial prejudice to the other party. The chair of the board of equalization is given the discretion to determine whether to grant a request for a continuance. A continuance, however, does not extend the deadline for any party to file any documents or evidence under KPB 5.12.055 (A) or (B), if the application was not filed with the borough clerk before the original deadline for filing such documents or evidence. If the application for a continuance was filed before the original deadline for filing documents and the application is denied, the application for a continuance will not extend the original deadline for filing documents. A hearing shall be scheduled for all notices of appeal unless the notice is clearly not based on one or more of the grounds stated in KPB 5.12.050(E) as determined by the BOE chair. When a hearing is not scheduled, the borough clerk shall notify the person who submitted the notice that a hearing will not be scheduled.

G. A city in the borough may appeal an assessment to the borough board of equalization in the same manner as the property owner. Within 5 days after receipt of the appeal, the assessor shall notify the property owner of the appeal by the city. The property owner may appear and participate in an appeal of an assessment by a city.

City and Borough of Sitka General Code

4.12.020 Property subject to tax.

A. All property within the corporate limits of the city and borough, both real and personal, of every nature, not exempt under the laws of the United States or the state of

Alaska is subject to taxation for school and municipal purposes, and taxes upon such property must be assessed, levied and collected as provided herein, except the following property shall not be subject to taxation:

1. Personal property consisting of household goods, jewelry, intangibles and personal effects, including motorcycles and snowmobiles not used in business and all motor vehicles subject to the motor vehicle registration tax.

B. All boats and vessels located within the boundaries of the city and borough on January 1st of any given year shall be subject to taxation under the same procedures and with the same assessment dates and due dates as personal property, except that valuation and taxation shall be on the basis of registered and certified length according to the schedule set forth below:

Class and Vessel Size		Annual Property Tax
Class 1	Less than 15 feet in length	$20.00
Class 2	15 to less than 20 feet in length	$30.00
Class 3	20 to less than 30 feet in length	$50.00
Class 4	30 to less than 50 feet in length	$100.00
Class 5	50 or more feet in length	$200.00

Valdez Municipal Code 3.12.022 (A)

3.12.022 Taxation of real property.
A. Property Subject to Taxation. For the purposes of this chapter, real property subject to taxation includes, among other things, trailers and mobile homes, and lean-to and similar structures attached or contiguous thereto.

Valdez Municipal Code 3.12.010

Property subject to taxation generally.
All property not expressly exempt by the city, or exempted from taxation by the city under federal or state constitutional provisions, shall be subject to annual taxation at its full and true value based upon the actual value of the property assessed. (Prior code § 25-1)

Valdez Municipal Code 3.12.060

Determination of annual levy, due dates, etc.—Limitation on amount of levy.

The rate of levy of tax, the date of equalization of the tax and the date when taxes shall become delinquent shall be fixed by resolution of the city council, and the levy for school and municipal purposes shall be separately made and fixed, but the aggregate thereof shall not exceed two percent of the assessed value of the property assessed. This limitation does not apply to taxes required to fund the cost of judgments entered against the city or pledged to pay or secure the payment of the principal and interest on bonds. Taxes to pay or secure the payment of principal and interest on bonds may be levied without limitation as to rate or amount regardless of whether the bonds were in default or in danger of default. (Prior code § 25-3)

Valdez Municipal Code 3.12.170

Determination of tax rate and delinquent date—Tax statements—Penalties for delinquent payment.

A. The city council shall thereupon, by resolution, fix the rate of tax levy and designate the number of mills upon each dollar of assessed real and personal property that shall be levied, and shall levy such tax in accordance therewith and shall determine the date when taxes shall become delinquent. If the total tax assessed to any owner is less than one dollar, then the administration may delete such tax obligation from the tax roll.

B. The assessor shall then prepare and mail tax statements to the persons listed as the owners on the tax rolls. If the total tax assessed against the taxpayer is in excess of ten dollars, the taxpayer shall be given the right to pay such taxes in two installments. If the first half tax is not paid when due, the entire tax becomes delinquent and penalty and interest accrue as provided in this chapter. If the first half is paid when due, the second half of such taxes shall be payable on the date fixed by the city council for such second half, and if not paid shall be delinquent after such date.

C. A penalty not to exceed eight percent shall be added to all taxes delinquent until the due date fixed for the payment of the second half, and interest not to exceed the rate of fifteen percent a year shall be charged on the whole of the unpaid taxes, not including the penalty, from the due date until paid in full. After the due date for the payment of the second half, a total penalty not to exceed eight percent shall be added to all delinquent taxes, and interest not to exceed the rate of fifteen percent per year shall accrue as provided in this section upon all unpaid taxes, not including the penalty, from the due date until paid in full.

D. Property taxes, together with penalty and interest, are a lien upon the property assessed, and the lien is prior and paramount to all other liens or encumbrances against the property. (Ord. 00-13 § 1; Ord. 98-08 §§ 5, 6; prior code § 25-12)

Valdez Municipal Code 3.14.020

Residential users in the Valdez Small Boat Harbor.

A. Definitions. For the purposes of this chapter, the following words and phrases shall have the meanings respectively ascribed to them by this subsection: "Residential vessels" means those vessels which are used as a dwelling for more than ninety days in any calendar year.

B. Residence Surcharge. The owner of a vessel which is being occupied in the Valdez Small Boat Harbor and used, rented or leased as a place of residence, shall be charged an additional surcharge on an annual basis. A vessel which is occupied for more than ninety days in any calendar year shall be deemed to be used as a residence for the entire year unless:

1. The owner of the vessel is paying a daily transient moorage fee; or
2. The person occupying the vessel can prove to the satisfaction of the harbormaster that all persons residing on the vessel maintain a permanent place of residence onshore within the city. A city tax bill or assessment notice on improved residential property in the name of the person occupying the vessel or a rent receipt which can be verified for a residence in the city shall be prima facie proof that the person maintained a permanent place of residence onshore. The owner of such vessel shall be liable for the surcharge. It shall be the responsibility of the vessel owner to immediately notify the harbormaster when his or her vessel is being occupied and used, rented or leased as a place of residence. Once a vessel is used as a residence, the annual charge shall continue until the owner or person living aboard gives written notice to the harbormaster that the vessel is no longer being occupied as a residence.

C. The city council shall establish by resolution the surcharge for residential vessels in the Valdez Small Boat Harbor. (Ord. 00-12 § 1; Ord. 99-05 § 1 (part))

Valdez Ordinance No. 99-17

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, AMENDING CHAPTER 3.12 OF THE VALDEZ CITY CODE TO ENACT A PERSONAL PROPERTY TAX ON VESSELS.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, that:

Section 1: Section 3.12.020 of the Valdez City Code is hereby repealed and reenacted to read as follows:

3.12.020 Taxation of Personal Property

A. Property subject to taxation. Except as otherwise provided in this chapter, the following personal property which has a tax situs within the city is subject to taxation:

1. Boats and vessels of at least 95 feet in length for which certificates of documentation have been issued under the laws of the United States are subject to taxation at their full and true value unless the vessel is used primarily in some aspect of commercial fishing or docks exclusively at the Valdez Container Terminal where it is subject to municipal dockage charges.

B. Pro ration of personal property taxes. Personal property shall be assessed once a year as of January 1 of the assessment year. Assessments on personal property shall not be pro rated for the assessment year except as follows:

1. Vessels operated in intrastate, interstate or foreign commerce that have acquired a taxable situs elsewhere, shall be assessed on an apportionment basis. The assessor shall allocate to the City the portion of the total market value of the property that fairly reflects its use in the City. The assessor shall establish formulas for calculating the portion of the total market value allocated to the City. The assessment formula shall be approved by the city council.

C. Tax situs of personal property.

1. All personal property which has a tax situs within the city on January 1 of the tax year is subject to taxation. Tax situs means the principal place where an item of personal property is located or used, having due regard to the residence and domicile of its owner, the place where it is registered or licensed, whether it is taxed by other jurisdictions, and any other factors which may indicate the principal location of the property.

2. Tax situs shall be conclusively presumed to be within the city when the property, although not within the city on January 1 of the assessment year, either;

a. Has been or is usually, kept or used within the city, whether regularly or irregularly; or

b. Travels to or within the City along fixed and regular routes; or

c. Has been or is kept or used within the city for any ninety (90) days or more, whether consecutive or otherwise, in the twelve (12) months preceding the January 1 assessment;

d. Has been or is regularly kept or used within the city for any length of time preceding January 1 of the assessment year if such presence or use is intended to be permanent. The term "permanent", as used in this subsection means for ninety (90) days or more, whether consecutive or otherwise, within the assessment year.

e. Is necessary for business transactions or takes on cargo within the City of Valdez if such transactions or cargo have a cumulative value in excess of One Million Dollars ($1,000,000) during the tax year.

. . . .

Section 3: Section 3.12.030 of the Valdez City Code is hereby repealed and reenacted to read as follows:

3.12.030 Property Exempt from Taxation.

A. The following property is exempt from general taxation:

1. Property exempted by state or federal law including all properties listed in A.S. 29.45.030;

2. All other personal property not subject to taxation under Section 3.12.020(A)(1);

3. The real property owned and occupied as the primary residence and permanent place of abode by a resident sixty-five (65) years of age or older is wholly exempt from taxation. Only one exemption may be granted for the same property and, if two or more persons are eligible for an exemption for the same property, the parties shall decide between or among themselves who is to receive the benefit of the exemption. Real property may not be exempted under this subsection if the assessor determines, after notice and hearing to the parties, that the property was conveyed to the applicant primarily for the purpose of obtaining the exemption. This determination of the assessor may be appealed under A.S. 44.62.560-44.62.570.

a. An exemption may not be granted under subsection (A)(3) of this section except upon written application for the exemption on a form approved by the state assessor for use by local assessors. The claimant must file the application no later than January 15 of the assessment year for which the exemption is sought. The city council for good cause shown may waive during a year the claimant's failure to make timely application for exemption for that year and authorize the assessor to accept the application as if timely filed. The claimant must file a separate application for each assessment year in which the exemption is sought. If an application is filed within the required time and is approved by the assessor, the assessor shall allow an exemption in accordance with the provisions of this section. If a failure to file by January 15 of the assessment year has been waived as provided in this subsection and the application for exemption is approved, the amount of tax that the claimant has already paid for the assessment year

for the property exempted shall be refunded to the claimant. The assessor shall require proof in the form the assessor considers necessary of the right and amount of an exemption claimed under subsection (A)(3) of this section. The assessor may require proof under this section at any time.

. . . .

Section 7: This ordinance takes effect January 1, 2000.

Valdez Resolution No. 00-15

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA ESTABLISHING A METHODOLOGY FOR APPORTIONING THE PERSONAL PROPERTY TAX ON VESSELS OVER 95 FEET IN LENGTH

. . . .

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, that

Section 1: Personal property tax on a vessel over 95 feet that has established a tax situs in places outside of Valdez shall be apportioned as follows:

A. A vessel owner will pay the personal property tax based on 100 percent of the assessed value, times a ratio determined by the number of days spent in Valdez divided by the total number of days spent in all ports, including Valdez, where the vessel has acquired a situs for taxation;

B. The number of days in Valdez and other ports shall be determined by using the number of days spent in each port during the year prior to the tax;

C. Days in port do not include periods when a vessel is tied up because of strikes or withheld from the Alaska service for repairs;

D. The term "days in port" shall mean the time the vessel is within the city limits of the taxing jurisdiction until the vessel is outside that taxing jurisdiction's boundaries. Any portion of a day a vessel is within the taxing jurisdiction's boundaries, that vessel will be considered to be in the city limits for that entire day.

Section 2. If a taxpayer claims that in a particular case the apportionment formula approved in this Resolution does not reasonably represent the portion of the total value of the vessel that should be apportioned to the taxing situs of Valdez, the taxpayer may petition, or the assessor may require, the use of another

apportionment formula that will more fairly represent how the value should be apportioned among Valdez and other taxing jurisdictions.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, THIS 1st DAY OF May, 2000.

Alaska Rules of Civil Procedure 82(a)

Rule 82. Attorney's Fees.

(a) **Allowance to Prevailing Party.** Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

INTRODUCTION

The Valdez vessel property tax ("the tax") is constitutional. The tax is not a duty of tonnage, and the tax satisfies the requirements of the Due Process and Commerce Clauses of the U.S. Constitution. Polar has conceded that Valdez is a tax situs; Valdez has the authority under the Constitution to tax the Polar vessels.[1] Thus, the first prong of the *Complete Auto Transit* test of constitutionality under the Commerce Clause is met.[2] Polar has conceded that part of the second prong of the *Complete Auto Transit* test for determining fair apportionment under the Commerce Clause is satisfied. The Valdez vessel tax is internally consistent; if every other tax situs imposed a tax identical to the Valdez tax, there would be no multiple taxation.

Based on the record, Polar can prevail only if (1) the Court finds that the port-day apportionment formula is unconstitutional with respect to *property* (as opposed to *income*) taxes; and (2) the Court finds that the port-day formula is unconstitutional with respect to *vessels* (as opposed to *airplanes*). Polar admits that many different kinds of taxes are constitutional. Taxation categories Polar says are constitutional include: taxes on all personal property and taxes only on vessels.[3] According to Polar, ad valorem property tax apportionment formulas that are constitutional include ones based on voyage miles (miles in the jurisdiction divided by miles everywhere) and voyage days (days in

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[1] Polar has conceded that a "nexus" exists between Polar and the City of Valdez under the Due Process Clause, and that a "substantial nexus" exists between Polar and the City of Valdez under the Commerce Clause. Brief of Appellee/Cross-Appellant Polar Tankers, Inc. ("Polar Brief"), Supreme Court Case No. S-12218/12223 (November 15, 2006) at 21.

[2] *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977).

[3] Exc. 92.

the jurisdiction divided by days everywhere).[4] Polar even concedes, as it must, that the "port day" apportionment formula used by the City is constitutional in respect to *income* taxes.[5]

The factual record is clear and undisputed. The vessels of Polar and the other oil Shippers are not taxed as property in any other jurisdiction. The Shippers' vessels are a fleet dedicated to transporting oil from the Port of Valdez to other ports, mostly on the West Coast of the United States. All of the oil the vessels transport and deliver to other ports is loaded in Valdez. The vessels of Shipper SeaRiver have never been to their domicile in Texas.

Polar enjoys a multitude of benefits and protections provided by the City of Valdez. It uses and has access to Valdez police and fire protection, medical facilities and personnel and harbor security in Valdez, Valdez docking facilities, Valdez transportation infrastructure (roads and airport), oil spill contingency resources within the City, and the Alyeska Marine Terminal (financed by City tax-exempt revenue bonds).

The Valdez vessel tax accounts for approximately ten percent (10%) of the annual tax revenue for the City of Valdez.[6] Approximately 22 of the oil Shippers' vessels are assessed annually by the City. [7] An average of 20-26 persons are on board each vessel.[8] Twenty-five (25) crew members multiplied by 22 vessels annually equals 550 persons that are within the City of Valdez annually due to the oil Shippers' activities. This

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[4] Exc. 97 n. 45.
[5] *Sjong v. State, Dep't of Revenue*, 622 P.2d 967 (1981).
[6] Exc. 273.
[7] *Id.*
[8] *See* Valdez Brief at 20; Exc. 438.

accounts for a little more than ten percent (10%) of the City's year-round population of 4,500.[9] Therefore, the vessel tax, compared to all tax revenue of the City, has a reasonable correlation to the percentage of the population of the City attributable to the oil Shippers' activities.

The business of transporting oil impacts the City in a variety of ways as evidenced by the aftermath of the *Exxon Valdez* oil spill in 1989 and the December 2003 Code Orange national security alert that closed down the Port of Valdez. The oil Shippers, including Polar, sometimes make use of the "opportunities, benefits and protections" of Valdez even when they are not within the territorial limits of the jurisdiction.[10]

ARGUMENT: SECTION ONE – VALDEZ'S APPEAL

I. Valdez's Tax Is Constitutional Under The Due Process And Commerce Clauses.

A. Polar's Vessels Have A Substantial Nexus With Valdez. Valdez Has The Constitutional Right To Tax Polar's Vessels.

In its brief, Polar states,

> Polar has always acknowledged that its vessels have an actual situs in and a substantial nexus with the City of Valdez. The City has the jurisdiction to tax Polar's tankers, . . .[11]

Polar does not dispute any facts about the substantial ties of the corporation and its vessels to Valdez. Polar concedes that the Valdez tax satisfies the first prong of the test

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[9] Exc. 201.
[10] Exc. 323-25.
[11] Polar Brief at 21 (footnote omitted); *see also,* Polar Brief at 32.

of constitutionality under the Due Process and Commerce Clauses.[12] Thus, Valdez, a tax situs, levies a general revenue property tax on the Polar vessels.

B. The Valdez Tax Is Fairly Apportioned. Valdez Taxes Value That Is Attributable To Polar's Vessels' Presence And Activities In Valdez.

The Valdez port-day apportionment method fairly apportions the vessels' value attributable to their presence and activities in the City.[13] The question in this lawsuit is not whether there might be some overlapping taxation if the vessels' domiciles were to tax, but rather, whether the U.S. Constitution permits Valdez to use a port-day formula for the purpose of apportioning the value of the vessels reasonably attributable to their presence and activities in the City. Significantly, the requirement of fair apportionment under the constitution is couched in terms of *value* and not in terms of physical presence.[14]

Polar agrees that the port-day method is internally consistent.[15] There would be no duplicative taxation of the vessels if other tax situses levied a tax identical to Valdez's on the vessels.[16]

The central purpose of the fair apportionment requirement is to ensure that each state taxes only its fair share of an interstate transaction.[17] The constitutional test of external consistency test asks whether the taxing jurisdiction has taxed only the portion of the interstate activity that reasonably reflects the in-state component of the activity being

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[12] *See Complete Auto Transit,* 430 U.S. at 279.
[13] *Goldberg v. Sweet,* 488 U.S. 252, 262 (1989)(citation omitted).
[14] *Goldberg,* 488 U.S. at 262.
[15] Polar Brief at 33-34.
[16] *Id.*
[17] *Goldberg v. Sweet*, 488 U.S. at 260-61.

taxed.[18] The external consistency test is a practical inquiry.[19] "[I]n substance [it] is nothing more than another label for the fair apportionment requirement."[20] A tax for which the risk of multiple taxation is low and the risk of actual multiple taxation is obviated by flexibility in the law meets the external consistency requirement and will be upheld as fairly apportioned.[21]

Valdez has taxed only the portion of Polar's vessels' value that reasonably reflects their use in the City.[22] Polar's vessels are part of a fleet dedicated to transporting millions of barrels of oil from Alaska each year to other ports. In 1999, the Shippers' vessels loaded about 345 million barrels of oil at Valdez.[23] Valdez is the only port at which the vessels load oil. Each year, the Shippers transport billions of dollars worth of crude oil to refineries outside Alaska. Yet, in 2000, Polar paid the City about $440,000 in property tax on its tankers.[24] From 1977 through 1999, the City did not tax the Shippers' vessels, though they used City resources and impacted the City. Though virtually all of the vessels' value derives from their presence in Valdez, the apportionment formula allocates to the City only an average of 26 percent of the value. The Valdez vessel tax is not rendered unconstitutional by the limited possibility of some overlapping taxation on the vessels due to the application of different apportionment formulas by different taxing

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[18] *Goldberg,* 488 U.S. at 262, *citing Container Corp.*, 463 U.S. at 169-170.
[19] *Goldberg,* 488 U.S. at 264.
[20] J. Hellerstein & W. Hellerstein, *State Taxation* ¶ 4.15[2], 4-142 (3rd ed. 2005).
[21] *Goldberg,* 488 U.S. at 265 (citation omitted).
[22] *See Goldberg*, 488 U.S. at 262.
[23] Exc. 421.
[24] Exc. 273.

jurisdictions.[25] Through the Valdez tax, Polar and the other Shippers simply bear their fair share of costs for municipal services.

Polar erroneously contends that, in order to be fairly apportioned under the Due Process and Commerce Clauses, the Valdez vessel property tax must be calculated as a function of the ratio of the number of days the vessels spend in Valdez divided by the number of days everywhere, or the ratio of the number of miles the vessels travel in Valdez divided by miles everywhere.[26] This is a transparent attempt to engraft onto the fair apportionment test a "physical presence" requirement that is not constitutionally mandated.

The error of Polar's argument is illustrated by the following example. In its simplest terms, apportionment is the fair division of the total taxing possibility among the several possible taxing jurisdictions. The apportioning factors should add up to 1.0, so that the entire taxing possibility is allocated. The Valdez vessel tax is levied once a year for the preceding year. Three factors that have been proposed for use in calculating the Valdez apportionment fraction:

(V) = Days in Valdez;
(D) = Days in discharge ports;
365 = Days in a year.

A fourth factor, (S) = Sea days, is implicit. Days in Valdez plus days in discharge ports plus sea days total 365: (V) + (D) + (S) = 365.

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[25] *Goldberg*, 488 U.S. at 264.
[26] *See* Polar Brief at 45.

The Valdez apportionment fraction is (V)/ (V + D). The rest of the taxing possibility is apportioned to the discharge ports by the fraction (D)/(V +D). The Valdez apportionment formula relates like variables (port days). The formula takes into account time the vessels are physically present in all taxing jurisdictions during the year.[27] This includes the vessels' domicile, *if the vessels are physically present there at any time during the calendar year.* Valdez's apportionment ratio is based upon the days the vessels are *in Valdez* divided by the days the vessels are physically in all taxing jurisdictions. The sum of the two fractions in the Valdez port-day apportionment formula is 1.0, so the apportionment is fair and complete.

One of the apportionment formulas proposed by Polar is the voyage-day formula: days in Valdez /365. In the fraction, (V + D + S) can be substituted for 365, giving (V)/(V + D + S). Whereas the Valdez port-day formula has two fractions adding up to 1.0, Polar's suggested voyage-day formula must have three: (V)/(V + D + S), (D)/(V + D + S) and (S)/(V + D + S). While the first two fractions represent time the vessels spend in Valdez and in the discharge ports, the last factor represents time the vessels spend in international waters, which are not a taxing jurisdiction at all. The voyage-day formula "mixes apples with oranges" by adding days when the vessels are outside any particular taxing jurisdiction (i.e., in international waters) to days the vessels are in taxing jurisdictions (port days). This is not a correct apportionment formula.

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[27] This excludes time the vessels spend in dry dock.

C. Polar's Case Is Built Upon Hypothetical (and Non-Existent) Taxation Of The Vessels By The Domicile.

No jurisdiction, other than Valdez, taxes Polar's vessels.[28] Polar's domicile, California, does not tax the vessels.[29] There would be no multiple taxation of the vessels if the California domicile were to tax them and apportion vessel value using the voyage-mile formula (miles in California/miles everywhere), or the voyage-day formula (days in California/365), or even the port-day formula (days in California/days in all ports). Indeed, Polar agrees that there would be no multiple taxation of Polar's vessels if every other jurisdiction where the vessels had acquired tax situs were to tax the vessels using the port-day apportionment formula.[30] The *only theoretical possibility* of multiple taxation of the vessels in this case would be if the domicile taxed the vessels and apportioned vessel value in a manner completely unrelated to the vessels' physical presence and activities there. Significantly, an apportionment formula is not rendered unconstitutional merely because some overlapping taxation may result from the use of different apportionment formulas by different taxing jurisdictions.[31]

1. The domicile for mobile property is an artificial situs created to insure that the property does not escape taxation.

The parties agree that, historically, mobile property, including oceangoing vessels, could be taxed only at the domicile of the owner, or their "home port." In the eyes of the

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[28] Exc. 102.
[29] *See id.*
[30] Polar Brief at 33-34.
[31] *Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 277-81 (1978).

law, it was thought that "personal property, . . . , [had] no locality."[32] It was assumed, for tax purposes, that personal property went wherever its owner went.[33] The "home port" doctrine and the exclusive right of the owner's domicile to tax mobile property were shaped by two policy concerns. The first was that mobile property should be fully taxed, and should not escape taxation.[34] The simple solution to this policy concern was to permit the domicile to tax the full value of the mobile property where no other tax situs existed.[35] Thus, the courts created the "home port" of a vessel, *an artificial situs,* which controlled the place of taxation in the absence of an actual situs elsewhere.[36] The second policy concern was that the rules of taxing mobile property be straightforward and predictable. This was especially true of oceangoing vessels, which, historically, were thought not to have "a permanent situs anywhere:"[37]

> To determine [the vessels'] situs, for purposes of taxation by their longer or shorter stay in a particular port, or by their more or less frequent resort to it, would introduce perpetual uncertainty; it would, practically, subject them to taxation in every port, or exempt them in all.[38]

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[32] *Hays v. Pacific Mail Steamship Co.,* 58 U.S. 596 (1854).
[33] *Id.*
[34] *See Central Railroad Co. of Pennsylvania v. Pennsylvania,* 370 U.S. 607, 616-17 (1962).
[35] *Id.*
[36] *See* Note, *State Taxation of International Air Transportation*, 11 Stan. L. Rev. 518, 522 and n. 19 ("This 'exclusive situs' doctrine came to be adopted as a rule of convenience, to insure that a vessel, while protected from multiple taxation, did not escape taxation altogether."); s*ee also, Old Dominion S. S. Co.,* 198 U.S. 299 at 307.
[37] *Southern Pacific Co. v. Kentucky,* 222 U.S. 63, 74 (1911). The case of *Cream of Wheat Co. v. Grand Forks County,* 253 U.S. 325, 329-30 (1920), cited by Polar reflects the "anachronistic" home port view that oceangoing vessels "have no permanent situs anywhere."
[38] *Southern Pacific Co.,* 222 U.S. at 76, *quoting People ex rel. Pacific Mail S. S. Co. v. Tax & A. Comrs.,* 58 N.Y. 242, 246.

The "home port" doctrine solved these two policy concerns. Mobile property did not escape taxation, since it always was taxable in the "home port," or domicile of the owner. Moreover, the rule giving the owner's domicile the exclusive right to tax the full value of the property unless the property had established a permanent situs elsewhere was predictable and easy to apply.[39]

However, in *Japan Line, Ltd. v. County of Los Angeles,* the U.S. Supreme Court discarded the "home port doctrine" as the law governing taxation of mobile property.[40] The Court stated that the "home port doctrine" was not grounded in the Constitution, but rather, was a rule based on "common-law jurisdiction to tax."[41] In modern times, the rule of fair apportionment has replaced the home port doctrine.[42]

Polar describes the power of the domicile to tax as: "[T]he domicile's broad power to tax exists independent of the physical presence of the property, and is limited only by the existence of an actual situs [physical presence] in one or more other jurisdictions."[43] According to Polar, the domicile's power to tax is curtailed only when the property acquires an actual tax situs [physical presence] in another taxing jurisdiction. This power of the domicile, as described by Polar, is driven by the same two policy concerns that shaped the "home port doctrine." As stated in *Central Railroad,* "[I]n instances where it was ultimately found that a tax situs existed in no . . . State [other than

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[39] *Compare Southern Pacific Co.,* 222 U.S. 63 (1911) *with Old Dominion Steamship Co. v. Virginia,* 198 U.S. 299 (1905).
[40] *Japan Line, Ltd. v. County of Los Angeles,* 434 U.S. 441, 443 (1979).
[41] *Id.*
[42] *Standard Oil Co. v. Peck,* 342 U.S. 382 (1952); *Ott v. Missippi Valley Barge Line Co.,* 336 U.S. 169, 174 (1949).
[43] Polar Brief at 24.

the domicile] [mobile] property would escape this kind of taxation entirely."[44] Though the rule regarding the domicile's power to tax, as articulated by Polar, might be simple to apply and predictable, the power of the domicile to tax, like the home port, is based on "common-law jurisdiction to tax"; it is not grounded in the Constitution.[45]

The two policy concerns do not apply in this case. First, Polar vessels will not escape taxation. Obviously, this is not a case in which no tax situses other than the domicile exist. Polar has admitted that, due to the vessels' use, there are many tax situses in addition to Valdez: Washington, California (the domicile) and Hawaii.[46] Second, even if the "complementary" rules of domicile and non-domicile taxation proposed by Polar might be simple to apply and predictable, they do not accurately reflect the full scope of a *non-domicile's* power to tax as a matter of constitutional law. The rule of fair apportionment now applies.

Further, as explained below, under the common law, the power of the domicile to tax does not foreclose Valdez from using the port-day formula in this case.

2. The extent to which Valdez constitutionally may tax Polar's vessels does not depend upon what the domicile hypothetically may do, but on what Valdez has the constitutional power to do.

The common law rules regarding the scope of the domicile's power to tax do not define the full extent of the non-domicile's power to tax as a matter of constitutional law. Polar has cited no case that holds that a non-domicile tax situs, such as Valdez, constitutionally can apportion the value of movable personal property *only* based on time

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[44] *Central Railroad,* 370 U.S. at 617-18.
[45] *See Japan Line,* 441 U.S. at 443.
[46] Polar Brief at 22.

or mileage in the jurisdiction divided by time or mileage everywhere. As a rule, courts are reluctant to interfere with the power of local and state jurisdictions to tax. In large part, this is due to the limited role of the courts under the Constitution, and the fact that powers not specifically delegated to the federal government under the U.S. Constitution are reserved for states and local governments. With respect to taxes, courts simply refuse to engage in the substantial "judicial lawmaking" that would be required to enforce uniformity.[47] Thus, an apportionment formula is overturned as unconstitutional as applied only if the formula, when compared with the taxpayer's business transacted in the jurisdiction, has "led to a grossly distorted result."[48] The U.S. Supreme Court and state supreme courts therefore have approved or let stand a variety of property tax apportionment methods including: miles in the jurisdiction/miles in the system;[49] time in the jurisdiction/12 months;[50] and the average of three "productive means" ratios in the jurisdiction/the average of the same "productive means" ratios in the system.[51]

In an attempt to confuse the Court, Polar deliberately has blurred the distinction between the physical presence and contact requirement (nexus) necessary to confer taxing power on a non-domicile jurisdiction (tax situs), and the fair apportionment requirement under the Due Process and Commerce Clauses. With respect to property taxes, there is no question that the property sought to be taxed (or some fungible

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[47] *Moorman Mfg.*, 437 U.S. at 276-281.
[48] *Moorman Mfg.*, 437 U.S. at 274.
[49] *Ott*, 336 U.S. at 171 n. 2.
[50] *North Slope Borough v. Puget Sound Tug & Barge*, 598 P.2d 924 (Alaska 1979).
[51] *Braniff Airways v. Nebraska Board of Equalization and Assessment*, 347 U.S. 590, 593 n. 4 (1954).

equivalent) must be physically present in the jurisdiction at some time during the tax year in order to meet the threshold of taxability (nexus). The nexus requirement ensures that the property's connections with a locale are substantial enough to legitimate the locale's exercise of power over the property.[52] Polar concedes that the nexus requirement has been met here.

If there is a sufficient nexus between the property and the non-domicile jurisdiction, then the jurisdiction legally can tax the property. If a jurisdiction has the authority to tax, then it is a "tax situs" for the property.[53] Polar agrees that Valdez, a non-domicile, is a tax situs for its vessels. The tax situs for movable property then apportions the value of the property to fairly reflect the in-state component of an interstate activity. In accordance with the Constitution, Valdez has chosen to value the in-state component of Polar's activities by using the fraction represented by days the vessels spend in Valdez divided by the days the vessels spend in other taxing jurisdictions.

Polar relies primarily on *Central Railroad Co. v. Pennsylvania* in support of its "fair apportionment" argument.[54] Polar claims that the Court in *Central Railroad* allows the domiciliary state to tax what might be called "residual" or the "left over" property value, that is, value based on the property's physical presence in jurisdictions in which no tax situs is established. However, despite Polar's efforts to twist, torture and distort the U.S. Supreme Court's holding in *Central Railroad*, the Supreme Court did not grant the

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[52] *Quill Corp. v. North Dakota,* 504 U.S. 298, 312 (1992).
[53] According to BLACK'S LAW DICTIONARY, "[s]itus of property, for tax purposes, is determined by whether the taxing state has sufficient contact with personal property sought to be taxed to justify in fairness the particular tax." (6th ed. 1990), at 1387.
[54] *Central Railroad,* 370 U.S. 607 (1962).

property's domicile state a right to tax superior to that of non-domiciles when mobile property has more than one tax situs. Nor did it hold that a non-domicile state where the property has tax situs, such as Valdez, could only apportion property value based on the amount of time spent or miles traveled in the jurisdiction. Indeed, the Supreme Court has never reached this holding.

In fact, the *Central Railroad* decision offers no support whatever for Polar's legal position here. In *Central Railroad*, the Supreme Court held that the taxpayer failed to meet its burden of proving that tax situs existed in jurisdictions outside the domicile. The taxpayer was trying to escape taxation by the domicile, Pennsylvania, by showing that non-domicile jurisdictions had sufficient connection with the property such that they could tax it. The Supreme Court, in *Central Railroad,* framed the issue in these terms:

> Since the domiciliary State is precluded from imposing an ad valorem tax on any property *to the extent that it could be taxed by another State,* not merely on such property as is subjected to tax elsewhere, the validity of the [domiciliary State's] tax must be determined by considering whether the facts in the record disclose a possible tax situs in some other jurisdiction.[55]

The Court held that, with respect to the railway cars, the taxpayer had "failed to sustain its burden of proving that a tax situs had been acquired elsewhere."[56] Therefore, the domicile was permitted to tax the full value of all taxpayer's railway cars that were not run "along fixed and regular routes" in other states.[57]

Accordingly, *Central Railroad* is inapposite to the issue presented in this case. The issue in *Central Railroad* was whether the taxpayer had met its burden of proof in

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[55] *Central Railroad*, 370 U.S. at 614 (emphasis added).
[56] *Id.* at 618.
[57] *Id.* at 614.

establishing a non-domicile tax situs, not whether a property tax was fairly apportioned. *Central Railroad* does not address the issue here, which is the extent to which a non-domicile tax situs with substantial connections to the moveable property constitutionally can tax the property.

Polar cites *Johnson Oil Co. v. Oklahoma* for the proposition that the non-domicile's power to tax movable personal property is limited to the ratio of the property's physical presence in the non-domicile divided by the property's physical presence everywhere.[58] However, *Johnson Oil* is no more relevant to the issue of fair apportionment than was *Central Railroad. Johnson Oil,* like *Central Railroad,* was a tax situs, Due Process case. In *Johnson Oil*, the issue was whether Oklahoma, a non-domicile state, could tax as property the entire fleet of Johnson Oil Company's railroad tank cars.[59] On the one hand, the U.S. Supreme Court observed that the domicile state "has no jurisdiction to tax personal property where its actual tax situs is in another State."[60] On the other hand, the Court stated that it is legitimate for a non-domicile tax situs to impose upon movable personal property "its fair share of burdens of taxation imposed upon similar property used in like way by its citizens . . ."[61] The Court concluded that Oklahoma could tax "its proper share of the property employed in the course of business, . . ., and this amount could be determined by taking the number of

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[58] *Johnson Oil Co. v. Oklahoma*, 290 U.S. 158 (1933).
[59] *Id.* at 159.
[60] *Id.* at 161.
[61] *Id.* at 162.

cars which on the average were found to be physically present within the State."[62] In short, *Johnson Oil* simply reaffirmed the rule that the number of railroad cars in Oklahoma averaged over a period of time was one constitutional measure of the property's physical presence in the jurisdiction *for tax situs purposes*. *Johnson Oil* did not purport to address fair apportionment issues, and, in fact, was decided forty-four years before the *Complete Auto* Commerce Clause test even was articulated.

3. The power of Polar's vessels' domicile to tax them is limited by the maximum extent to which non-domicile tax situses, such as Valdez, can tax the vessels.

Polar admits that the constitution does not dictate a particular apportionment formula. But, having said that, Polar essentially argues that, in this case there are only two apportionment formulas constitutionally acceptable: days in port divided by 365 or miles in the jurisdiction divided by miles everywhere.

Polar bases its argument on the following flawed reasoning:

1. The property owner's domicile can tax, regardless of whether the property was ever or is present there.
2. The non-domicile jurisdiction can tax only in direct proportion to the property's physical presence in the jurisdiction divided by the property's physical presence everywhere (either days in the jurisdiction/365 or miles in the jurisdiction/miles everywhere).
3. The only limitation on the taxing power of the domicile jurisdiction is the property's actual physical presence of the property in another jurisdiction with the power to tax.

Polar reaches the following flawed conclusion based on the false assumptions:

> Since Valdez does not apportion its tax based on the vessels' time or miles in the jurisdiction divided by the vessels' time or mileage everywhere, its

[62] *Id.* at 163.

apportionment formula necessarily captures part of the vessels' value not reasonably attributable to their activities in the City.

If any one of the three assumptions is false, Polar's entire argument collapses like a house of cards.

The first proposition is simply incorrect as a matter of law. Under the *Union Refrigerator* case, not even the domicile can tax if the property never has been there.[63] The undisputed evidence is that none of the SeaRiver vessels ever has been in Texas, their state of domicile.[64] Therefore, the domicile of the SeaRiver vessels cannot tax them. Polar's first and third propositions are false as a matter of law and fact.

Polar's second proposition likewise is false. The constitutional test for fair apportionment is this: the non-domicile tax situs can tax *value* reasonably attributable to the property's presence and activities in the jurisdiction. Polar has cited no case that holds that a non-domicile tax situs, such as Valdez, constitutionally can apportion the value of movable personal property *only* based on time or mileage in the jurisdiction divided by time or mileage everywhere. On the contrary, property *value* can be apportioned in a variety of different ways: miles in the jurisdiction/miles in the system,[65] months in the jurisdiction/12 (months in the year),[66] or days in port in jurisdiction/days in port everywhere.[67] In *Braniff Airways,* the U.S. Supreme Court permitted transient

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[63] *Union Refrigerator Transit Co. v. Kentucky,* 199 U.S. 194, 198-99 (1905).
[64] Exc. 133-42, 151-65, 177-83; *see also,* Exc. 185-86.
[65] *Ott,* 336 U.S. 169 (1949).
[66] *North Slope Borough,* 598 P.2d at 924.
[67] *Luckenbach S.S. Co. v. Franchise Tax Board,* 33 Cal. Rptr. 544 (Cal. App. 1963) (the port-day formula was used to apportion the value of a shipping company's vessels in order to calculate the company's total property in the state).

airline property to be apportioned using measures other than time or distance.[68] The ad valorem property tax apportionment formula in *Braniff* used an average of three "productive measures," (arrivals and departures, revenue tons, and originating revenue).[69]

The port-day apportionment formula used by Valdez is identical to the property tax apportionment method approved by the Alaska Attorney General to be used by the State of Alaska when it considered taxing the oil tankers in 1977.[70] The port-day apportionment method also is used to apportion the business income of interstate water transportation carriers operating in Alaska under AS 43.20.071. That statute was at issue in *Department of Revenue v. OSG Bulk Ships, Inc.*[71] In *OSG Bulk Ships,* the Alaska Supreme Court viewed the port-day formula favorably, stating, "The days-in-port ratio adopted by AS 43.20.071 avoids multiple taxation of transportation carriers by formula

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[68] *See Braniff Airways,* 347 U.S at 591 n. 4.

[69] *Id.*

[70] House Bill 323 submitted to the Tenth Legislature on March 9, 1977, contained the following provisions for apportioning the value of "marine transportation":

> Sec. AS 43.56.065 Method of Apportionment. (a) The full and true value of the taxable marine transportation property shall be apportioned to this state by multiplying that value by the days-spent-in-port apportionment formula. The numerator of the fraction is the number of days spent in ports within the state loading or unloading gas or unrefined oil, and the denominator of the fraction is the number of days spent in ports both within the state and outside the state loading or unloading gas or unrefined oil.
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> (b) For purposes of this section, (1) 'days spent in port' does not include periods when ships are tied up because of strikes or withheld from service for repairs, or because of seasonal reduction of service; days spent in a port shall be computed by dividing the total number of hours in that port by 24 and rounding to the nearest day.

House Bill 323 (March 9, 1977) at 3, attached as Appendix D for reference.

[71] *Dep't of Revenue v. OSG Bulk Ships, Inc.,* 961 P.2d 399 (Alaska 1998).

apportionment."[72] Valdez, in using a port-day apportionment method, has taxed only the portion of the vessels' value that reasonably reflects their use in the City.

Even assuming *arguendo* that Polar's vessels' domicile has the power to tax "residually" property value, the "residual" value would be subject to the non-domicile's constitutional right to tax its "fair share" of the property value, and not the other way around.[73]

> Under the apportionment concept, a nondomiciliary state may tax a percentage of the value of transient personal property as computed by a formula designed to relate the tax, under due process principles, to the use of the property within the state. Where the taxing state is also the domiciliary of the taxpayer, multiple taxation is avoided by requiring [the domicile] to reduce its tax by the amount which other states constitutionally can levy.[74]

"In interstate commerce, if the domiciliary State is 'to blame' for exacting an excessive tax, this Court is able to insist upon rationalization of the apportionment."[75]

Under the constitution, a non-domicile tax situs can tax the portion of *value* that is reasonably attributable to the taxpayer's activities in the jurisdiction. Property *value* can be measured in a variety of ways, including port days.

The City's power to tax cannot depend upon whether and to what extent the Shippers' vessels' domicile can tax. This is because, on the one hand, the domicile of the Polar vessels presumably could tax them; while on the other hand, the domicile of the

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[72] *Id.* at 405.
[73] *Ott*, 336 U.S. at 171.
[74] Note, *State Taxation Of International Air Transportation*, 11 Stan. L. Rev. 518, 523 (footnotes omitted).
[75] *Japan Line,* 441 U.S. 434, 454 (1979).

SeaRiver vessels could not. Surely the constitutionality of the Valdez tax cannot depend upon whether and to what extent the vessels' domicile can tax them.

The Valdez tax is a constitutional, fairly apportioned property tax. The *Union Refrigerator* case relied on by Polar, does not compel a contrary result.[76] The *Union Refrigerator* and the cases upon which its relies discuss some of the circumstances under which the domicile of movable property loses the right to tax the property. In *Union Refrigerator*, the issue was whether a Kentucky corporation was "subject to taxation upon its tangible personal property [railway cars] permanently located in other states, and employed there in the prosecution of its business."[77] The Supreme Court concluded that the railway cars "so far as they were located and employed in other states than Kentucky," were "not subject to the taxing power" of Kentucky, the domicile.[78] In analyzing the issue, the Court relied on its earlier decision in *Delaware L. & W.R. Co. v. Pennsylvania*, which involved a tax upon the capital stock of the railroad company.[79]

In *Delaware,* the Court had recognized "the general proposition that tangible property permanently outside of the state, and having no situs within the state, could not be taxed."[80] However, the Court had concluded that the domicile, Pennsylvania, could not, in assessing the tax, include the value of certain property (coal), even though it had

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[76] *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 (1905).
[77] *Union Refrigerator*, 199 U.S. at 201.
[78] *Id.* at 211.
[79] *Delaware L. & W.R. Co. v. Pennsylvania,* 198 U.S. 341 (1905), discussed in *Union Refrigerator* at 209-10.
[80] *See Union Refrigerator*, 199 U.S. at 210.

been mined in Pennsylvania and transported to New York, where it was stored.[81] The Court had concluded that "[h]owever temporary the stay of the coal might be" in the "foreign jurisdiction," it was "forever beyond the jurisdiction of Pennsylvania."[82] Thus, the domicile had lost its taxing power over the coal, even though the coal had originated in the domicile.

The rationale the Court in *Union Refrigerator* used to deny the domicile the right to tax railway cars that were permanently located in other states applies equally to this case. According to the *Union Refrigerator* Court, "protection and payment of taxes are correlative obligations:"[83]

> The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares.[84]

Thus, "property which is wholly and exclusively within the jurisdiction of another state receives none of the protection for which the tax is supposed to be compensation."[85]

Like the railway cars in *Union Refrigerator,* the Sea River vessels are "permanently located" outside the domicile. The Sea River vessels have never been to their Texas domicile and there are numerous non-domicile tax situses for the vessels,

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[81] *Id.*
[82] *Id.*
[83] *Id.* at 204.
[84] *Id.* at 202.
[85] *Id.* at 204.

including Valdez.[86] Under these circumstances, Texas cannot tax the Sea River vessels. This view is consistent with Due Process requirements. Since the SeaRiver vessels never have been there, Texas offers the vessels no opportunities, benefits or protection. Taxation of the SeaRiver vessels by Texas, therefore, would be wholly "extraterritorial."[87]

Applying Polar's flawed assumptions would lead to an inconsistent result. On the facts of this case, the Polar vessels would be taxed on their full value, but the SeaRiver vessels would not. A portion of the value of the SeaRiver vessels would escape taxation altogether, since the SeaRiver domicile cannot tax the vessels. Under these circumstances, there would be a tax gap. This would defeat the very policy expressed in the *Central Railroad* case, of ensuring full taxation of mobile property. Simply put, the constitutionality of the Valdez apportionment formula cannot depend upon whether and to what extent the vessels' domicile can tax.

The City's apportionment formula should be evaluated according to the constitutional standard of fair apportionment. The Valdez formula is constitutional because the City has taxed only that portion of *value* that is reasonably attributable to the Shippers' vessels' activities in the jurisdiction. The Valdez apportionment formula fairly

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[86] SeaRiver non-domicile tax situses include Alaska, Washington, Oregon California and Hawaii. Exc. 133-42, 151-65, 177-83; *see also* Exc. 185-86.

[87] In concrete terms, under Polar's proposed apportionment scheme, SeaRiver's domicile of Texas would be able to tax 60% or more of vessel value, even though no SeaRiver vessel ever has been physically present in the domicile. For example, if a vessel spent 30 days in California, 10 days in Oregon, 50 days in Washington and 40 days in Valdez, Polar contends that the proper apportionment percentages would be: California 8% (30/365), Oregon 3% (10/365), Washington 14% (50/365), Valdez 11% (40/365), and the Texas domicile 64%.

taxes the Shippers for the "benefits, opportunities and protections" afforded them by the City.

4. Polar's foreign dry dock jurisdictions cannot tax the Polar vessels.

Polar poses a hypothetical to make its case of *possible* multiple taxation if Polar's dry dock jurisdictions were to impose a tax. Polar claims that if one of its dry dock jurisdictions were to tax one of the vessels, and if the dry dock jurisdiction were to use an apportionment formula different from that of Valdez, overlapping taxation would result. Thus, Polar argues, the Valdez vessel property tax is unconstitutional.

There is no risk whatsoever that Polar's vessels would be subject to multiple taxation, since Polar vessels' dry dock jurisdictions cannot tax them. Polar vessels are registered in the United States. However, Polar dry docks its vessels outside the United States, in Asia.[88] Since only the nation of a vessel's registry may tax it as property, the foreign jurisdictions where Polar dry docks its vessels cannot tax them.[89] Thus, with respect to the Polar vessels, overlapping taxation between Valdez and a dry dock jurisdiction is not possible, even theoretically.

Even assuming *arguendo* that a Polar dry dock jurisdiction were able to tax the Polar vessels, and were to apply an apportionment formula different from that of Valdez, the possibility of overlapping taxation is obviated by the flexibility built into the City's apportionment formula.[90] Valdez's tax law gives the City Assessor the power to apply a

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[88] Exc. 190.

[89] *See Japan Line,* 441 U.S. at 447 n.11.

[90] The theoretical possibility of overlapping taxation in Polar's hypothetical does not render the Valdez apportionment formula unconstitutional. Just as the overlap in taxation

formula other than the port-day formula "[i]f a taxpayer claims that in a particular case the [port-day] apportionment formula, . . ., does not reasonably represent the portion of the total value of the vessel that should be apportioned to the taxing situs of Valdez, . . ."[91] In short, there is virtually no risk, real or theoretical, that Polar's vessels might be subject to multiple taxation, even if a dry dock jurisdiction were to tax them.

5. Polar has failed to prove that the Valdez vessel tax is unconstitutional.

Polar has failed to meet its heavy burden of proving that the Valdez vessel tax is unconstitutional. The tax is presumed to be constitutional, and the taxpayer challenging the tax has the "heavy burden" of proving otherwise.[92] "[N]o court has . . . invalidate[d] an apportionment that reasonably reflects the opportunities, benefit and protection afforded by the taxing state."[93] The few times that the Court has struck down an apportionment formula, it has done so on the grounds that the particular apportionment formula in question produces a "grossly distorted result" or an apportionment is "out of

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in *Moorman Mfg.* was the result of the application of two different apportionment formulas, so too, would any theoretical overlap in taxation between Valdez and a dry dock jurisdiction. The hypothetical "overlapping taxation" simply would be the result of a system with non-uniform tax laws; it would not be unconstitutional. *Moorman Mfg.*, 437 U.S. at 277-81.

[91] Valdez Resolution No. 00-15, Section 2 provides: "If a taxpayer claims that in a particular case the apportionment formula approved in this Resolution does not reasonably represent the portion of the total value of the vessel that should be apportioned to the taxing situs of Valdez, the taxpayer may petition, or the assessor may require, the use of another apportionment formula that will more fairly represent how the value should be apportioned among Valdez and other taxing jurisdictions."

[92] *Norfolk & W.R. R. Co. v. Tax Commission,* 390 U.S. 317, 327 (1967).

[93] *Flying Tiger Line, Inc. v. County of Los Angeles*, 333 P.2d 323, 330 (Cal. 1958) (Traynor, J. dissenting).

all appropriate proportion" to the taxpayer's activities in the taxing state.[94] Polar has failed to meet the heavy burden of showing that the Valdez vessel tax produces a "grossly distorted result."

In a desperate attempt to bolster its Commerce Clause attack on the Valdez vessel tax, Polar strains to distinguish property taxes from income taxes, and even to distinguish between different kinds of movable property. Polar suggests that Commerce Clause analysis (especially as it relates to fair apportionment) depends upon such distinctions. Ironically, in their Summary Judgment Reply, the Shippers actually conceded that "the rules governing taxation of oceangoing vessels are the same as those governing the taxation of other mobile instrumentalities of commerce."[95]

From the standpoint of constitutional analysis, none of the apportionment cases applying the *Complete Auto Transit* Commerce Clause test remotely suggests that income taxes are treated differently from property taxes, or that particular kinds of property are treated differently from one another. To the contrary, cases analyzing property tax apportionment issues rely on income tax Commerce Clause cases and vice versa.[96] Indeed, the *Complete Auto Transit* case that establishes the modern test for constitutionality of a tax under the Commerce Clause involved sales tax. Further, cases determining the constitutionality of taxes on movable property refer to and rely upon cases involving a variety of kinds of movable property (such as airplanes, vessels and

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[94] *Norfolk & Western R. R. Co.*, 390 U.S. at 329; *Hans Rees' Sons v. North Carolina*, 283 U.S. 123, 135 (1931).
[95] Exc. 499.
[96] *Japan Line,* 441 U.S. at 454-55; *Moorman Mfg.*, 437 U.S. at 273.

rolling stock) without distinction.[97] As the Supreme Court noted in *Braniff Airways*, "We perceive no logical basis for distinguishing the constitutional power to impose a tax on such aircraft from the power to impose taxes on river boats."[98]

Ironically, Polar cites an income tax case for the proposition that the distinction between income and property taxes is significant in determining constitutionality under the Commerce Clause. The 1937 case of *Cohn v. Graves*, 300 U.S. 308 (1937) simply cannot be read to support this broad proposition. *Cohn* was not a Commerce Clause case; it was a Due Process case. *Cohn* was not a case about fair apportionment. *Cohn* did not involve movable property; it concerned taxation of income from real property. In short, *Cohn* is irrelevant to the issues in this case.

D. The Valdez Tax Does Not Violate The Commerce Clause.

Polar baldly asserts that the Valdez tax violates the Commerce Clause prohibition against discrimination because it is not fairly apportioned.[99] This assertion is incorrect both because it misconstrues the nature of Commerce Clause discrimination, and because the tax is fairly apportioned.

Discrimination under the Commerce Clause is concerned with imposing tax burdens on interstate commerce that are not imposed on intrastate commerce of the same

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[97] *Japan Line*, 441 U.S. at 444-46. Indeed, although *Central Railroad,* the case upon which Polar principally relies, concerned taxes on rolling stock, the constitutional analysis considered cases involving taxes on airplanes and vessels. *Central Railroad*, 370 U.S. at 613-17.

[98] *Braniff Airways,* 347 U.S. at 600.

[99] Polar Brief at 45-46.

nature.[100] The case relied on by Polar, *Armco, Inc. v. Hardesty*, expressly recognizes this important principle: "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State."[101] Indeed, a case discussed by the *Armco* Court, *Alaska v. Arctic Maid*, supports the conclusion that the vessel tax is a nondiscriminatory tax under Commerce Clause analysis.[102] In *Arctic Maid*, "the statute...merely laid a nondiscriminatory tax on a particular kind of business, operating freezer ships in Alaska. This was deemed a different business from operating a cannery in Alaska...."[103]

Similarly, here, the Valdez vessel tax is a "nondiscriminatory tax on a particular kind of business." As Valdez has exhaustively shown elsewhere, the tax treats non-resident oil transporters, such as the Shippers, precisely the same way it treats in-state oil transporters.[104] Accordingly, the tax is constitutional under the Commerce Clause.

In addition, the Valdez vessel tax is fairly related to the services provided to Polar and the other Shippers. Courts equate the "fair relation" criterion of the *Complete Auto* test with the "substantial nexus" criterion.[105] Polar has conceded that there is a substantial nexus between Valdez and the Shippers such that Valdez has the right to tax

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[100] *Complete Auto Transit*, 430 U.S. at 282.
[101] *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984).
[102] *Alaska v. Arctic Maid*, 366 U.S. 199 (1961), discussed in *Armco*, 467 U.S. at 643 n. 7.
[103] *Armco*, 467 U.S. at 643 n. 7, discussing *Arctic Maid*, 366 U.S. at 205.
[104] *See* Brief of Appellant/Cross-Appellee City of Valdez ("Valdez Brief"), Supreme Court Case No. S-12218/12223 (September 11, 2006) at 43-45.
[105] L. Tribe, *American Constitutional Law*, §6-15 at 443 (2nd Ed. 1988).

them.[106] Thus, the Valdez tax is fairly related to the many and substantive services Valdez provides Polar.

Finally, Polar incorrectly states that taxable vessel value must correspond precisely with time or mileage in Valdez divided by time or mileage everywhere.[107] This assertion is incorrect in two respects: as the City has amply demonstrated, the lion's share of the vessels' value is attributable to its activities in Valdez—the loading onto the vessels of Alaska North Slope crude oil. Further, as Valdez has also shown, the Shippers' activities beyond the political boundaries of the City have an actual and potential impact on the City's services: obviously, a catastrophic event such as the *Exxon Valdez* oil spill is one example. In other instances as well, however, the City is the closest port for which a vessel in distress could seek assistance, even though the vessel might be in international waters.

In sum, the Valdez vessel tax does not discriminate against the Shippers and it is fairly related to services Valdez provides the Shippers. The vessel tax fairly apportions the value of Polar's vessels to their activities in Valdez. The Valdez vessel tax is constitutional under the Due Process and Commerce Clauses.

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[106] Polar Brief at 21.
[107] Valdez Brief at 24.

II. The Final Judgment Is Defective.

There is no question that the courts have the power to determine whether a particular law passes constitutional muster.[108] If a law is unconstitutional, courts may strike it down, or they may interpret it in a way to satisfy constitutional standards.[109]

In this case, the Court upheld the Valdez tax as a constitutionally permissible exercise of the City's taxing power. However, the Court found that the particular apportionment formula that the City used, as applied to Polar and SeaRiver, was unconstitutional. The Court should have entered judgment accordingly.

Instead, the Court overreached its authority and ordered the City to adopt "a constitutional apportionment formula." However, the constitutionality of any apportionment formula can only be determined retrospectively by a court, upon challenge by an affected taxpayer. In this instance, the Court's ill-advised attempt to "legislate" a result exceeded its authority.

The decision relied on by Polar, *Alaska Dep't of H&SS v. Planned Parenthood*, is inapposite here.[110] In *Planned Parenthood*, plaintiffs challenged a regulation as unconstitutional, a violation of equal protection, because the regulation denied "funding for medically necessary abortions."[111] In contrast, Alaska's Medicaid program funded

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[108] *See, e.g., Alaska Department of Health & Social Services("H&SS") v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001).
[109] *See id.* and N.J. Singer, *Statutes and Statutory Construction*, § 44.1 (6th ed. Rev. 2001).
[110] *Alaska Department of H& SS v. Planned Parenthood*, 28 P.3d 904.
[111] *Id.*, at 905.

"virtually all [other] necessary medical services for poor Alaskans."[112] The Supreme Court correctly observed: "Legislative exercise of the appropriations power has not in the past, and may not now, bar courts from upholding citizens' constitutional rights."[113] In contrast, here, the Court upheld the City's taxing power, but concluded that, as to these taxpayers, the tax was not fairly apportioned in accordance with the constitution.

Moreover, in directing Valdez to "adopt a constitutional apportionment formula" before it could tax Polar and SeaRiver, the Court failed to abide by the well-established rule that laws should be construed to sustain their constitutionality when it is possible to do so.[114] The judgment below did not reflect the inherent flexibility found in the vessel tax under Resolution No. 00-15. Section 2 of the Resolution allows the Assessor to require the use of another apportionment formula if the port-day formula did not reasonably represent the portion of vessel value that should be apportioned to Valdez. The final judgment should have directed the City to apply a different formula, permitted by Section 2, to Polar and SeaRiver in this case.

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[112] *Id.*
[113] *Id.* at 914.
[114] *See* N.J. Singer, *Statutes and Statutory Construction*, § 44.1.

ARGUMENT: SECTION TWO – POLAR TANKERS' CROSS-APPEAL

III. The Valdez Tax Is Not A Duty Of Tonnage.

A. The Tonnage Clause Does Not Apply To Taxes Based On The Value Of The Property (Ad Valorem Taxes).

The City's Tax is not a duty of tonnage. A duty of tonnage is a fee imposed on a vessel, as an instrument of commerce, for entering, trading in or lying in port.[115] Tonnage duties are prohibited by the Constitution;[116] however the Tonnage Clause was intended to "protect the freedom of commerce, and nothing more."[117] "The prohibition ***only*** comes into play, . . . where the tax is imposed upon the vessel, the instrument of commerce, without reference to the value of the vessel."[118]

The Valdez vessel tax is not a tonnage duty. It is a fairly-apportioned, non-discriminatory ad valorem personal property tax, whose purpose it is to raise general revenue for Valdez. The City's tax is one based on the *value* of the vessels. Without exception, courts have recognized that a tax on a vessel's *value* falls wholly outside the Tonnage Clause.[119]

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[115] *Huse v. Glover,* 119 U.S. 543, 549-50 (1886).
[116] United States Constitution, Article I § 10 cl. 3.
[117] *Keokuk Northern Line Packet Co. v. City of Keokuk*, 95 U.S. 80, 87 (1877).
[118] W.H. Burroughs, *A Treatise on the Law of Taxation as Imposed by the States and Their Municipalities* § 63 at 91 (1877 ed.) (emphasis added), Exc. 603-08, attached hereto as Appendix B for reference.
[119] *In re State Tonnage Tax Cases,* 79 U.S. at 212-13 (1870); *Transp. Co. v. Wheeling,* 99 U.S. 273, 279-80 (1878); *see also, Mid-Continent Airlines, Inc. v. Nebraska State Board of Equalization & Assessment,* 59 N.W.2d 746, 751 (Nebraska 1953).

A constitutionally permissible tax on the *value* of a vessel always has been distinguished from a duty of tonnage.[120] Ad valorem property taxes, challenged as tonnage duties, have been upheld by numerous courts over the years.[121] *The North Cape*, *Wheeling,* and *Gunther* decisions involved the taxation of vessels that were home-ported in the jurisdictions that assessed the taxes. Each of the owners or part-owners of the taxed vessels was domiciled in the jurisdiction that levied the tax. In each case, the court reasoned that states and municipalities retain the power to tax, for general revenue purposes, all things that are not specifically prohibited by the U.S. Constitution.[122] While the Constitution clearly prohibits states from levying "duties of tonnage," it never has prohibited the assessment of property taxes on vessels in the owner's domicile, based upon the value of the property.[123] The court's ruling in each of these cases rested on the

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[120] *Inman S.S. Co. v. Tinker,* 94 U.S. 238, 243 (1877); *In Re State Tonnage Tax Cases,* 79 U.S. 204, 214 (1870) ("Annual taxes upon property in ships and vessels are continually laid, and their validity was never doubted or called into question, but if the States, without the consent of Congress, tax ships or vessels as instruments of commerce, by tonnage duty, . . ., they assume jurisdiction which they do not possess, as every such act falls directly within the prohibition of the Constitution.")

[121] *The North Cape*, 18 F.Cas. 342 (N.D. Ill. 1876); *Wheeling, Parkersburg and Cincinnati Transportation Co. v. Wheeling*, 27 Am.Rep. 552 (W. Virg. 1876) (and the same case at the U.S. Supreme Court level, 99 U.S. 273 (1878); *Gunther v. The Mayor and City Council of Baltimore*, 55 Md. 457 (Md. App. 1881), 1881 WL 7611 (Md.); *Mid-Continent Airlines, Inc. v. Nebraska State Board of Equalization and Assessment*, 59 N.W.2d 746 (1953) (and the same case at the U.S. Supreme Court level, *sub nom Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954); and *Japan Line, Ltd. v. Los Angeles County,* 132 Cal. Rptr. 531 (Cal. App. 1976) (opinion vacated), and its progeny at 571 P.2d 254 (Cal. 1977) and 441 U.S. 434 (1979)).

[122] *The North Cape,* 18 F.Cas. at 344; *Wheeling,* 99 U.S. at 276-77.

[123] *The North Cape,* 18 F.Cas. at 344-45; *Wheeling,* 99 U.S. at 279-80, 283-84; *Gunther*, 1881 WL 7611 (Md.).

premise that the property tax was not assessed against the vessel as an instrument of commerce, but rather, against the owner, based on the value of the property.[124]

The historical distinction between fairly-apportioned non-discriminatory property taxes and tonnage duties remains notwithstanding the repudiation of the home-port doctrine as a justification for taxation. In *Mid-Continent (Braniff)*[125] and *Japan Line*,[126] two state supreme courts sustained fairly-apportioned, non-discriminatory ad valorem property taxes against Due Process, Commerce Clause and Tonnage Clause challenges.[127] In *Japan Line,* the California Supreme Court upheld a county ad valorem property tax on foreign-owned cargo containers.[128] The Court's tonnage clause analysis followed the reasoning in *Michelin Tire Corp. v. Wages.*[129] In *Michelin*, the U.S. Supreme Court held that a state ad valorem property tax on imported tires and tubes did not violate the constitutional prohibition against state taxation of imports and exports.[130] Crucial to the Court's ruling was the distinction between "'imposts' and 'duties,'" which are taxes on the commercial privilege of bringing goods into a country, and property taxes, by which a state apportions the cost of such services as police and fire protection among the

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[124] *Wheeling,* 99 U.S. at 283-84; *Gunther*, 1881 WL 1776.
[125] 59 N.W.2d 746 (1953).
[126] 571 P.2d 254 (Cal. 1977).
[127] The U.S. Supreme Court did not consider the Tonnage Clause issue in either *Braniff* or *Japan Line*. In *Braniff Airways*, the issue was abandoned on appeal, and the tax in *Japan Line* was held unconstitutional on foreign commerce clause grounds. *Braniff Airways,* 347 U.S. at 597 n. 14; *Japan Line*, 441 U.S. at 439 n. 3 and 451-54.
[128] *Japan Line,* 571 P.2d at 254.
[129] *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976).
[130] *Id.* at 278-79.

beneficiaries according to their respective wealth.[131] Local imposts and duties are constitutionally prohibited; property taxes are not.

States may impose a property tax on moving instrumentalities of commerce on an apportioned basis in order to meet the expenses of services within the taxing jurisdiction.[132] In the words of the *Michelin* Court, non-discriminatory ad valorem property taxation is the *quid pro quo* for benefits actually conferred by the taxing sovereign.[133] Through such taxation, all consumers of services such as police and fire protection are made to pay their share of these costs.[134] However, the law does not require that the taxpayer actually use the particular services for which his taxes pay.[135]

Valdez offers many services that inure to the benefit of Polar and the other oil Shippers. The Shippers, including Polar, have never disputed the following facts. The Alyeska Marine Terminal is financed by City tax-exempt revenue bonds. The local police force, fire department and hospital and airport are available for the Polar's use.

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[131] *Id.* at 287.

[132] *Japan Line,* 571 P.2d at 258 (citations omitted).

[133] *Michelin,* 423 U.S. at 289.*Id.* at 287, 289.

[134] *Id.* at 287, 289. Even under traditional tonnage clause analysis, there is no requirement that the fees charged bear a dollar-for-dollar relationship to the costs of facilities or services provided. *Huse v. Glover*, 119 U.S. at 549 (the excess of fees collected over the cost of construction and maintenance of locks was deposited in the state treasury as general revenue). The questions of whether the owner or provider makes more or less revenue from the fee charged, whether the fee exceeds the cost of building and maintaining the facility or providing the service, or even the use to which the fees charged are ultimately put, are irrelevant to the tonnage clause issue. *Parkersburg & Ohio River Transp. Co. v. City of Parkersburg*, 107 U.S. 691, 699 (1883). As long as the charges are reasonable and not exorbitant, they will be upheld. *Id.*

[135] *North Slope Borough,* 598 P.2d at 928 (citation omitted); *Goldberg,* 488 U.S. 252, 267 (1989); *see also, Clyde Mallory Lines v. State of Alabama,* 296 U.S. 261, 266-67 (1935).

Harbor security is facilitated by the City. The oil tankers use the City Container Terminal as an alternate docking facility. Polar and the other Shippers hold meetings at the Valdez Civic Center. City employees are involved in oil spill contingency planning and drills. The Shippers' employees use the local shops and recreational facilities. In short, in Valdez, Polar and the Shippers enjoy "all the benefits of a civilized society." There is no reason why Polar should escape taxation for facilities and services that the City provides, which inure to the benefit of the shipping public.[136] Clearly, there is no constitutional impediment to Valdez's fairly-apportioned, non-discriminatory ad valorem vessel tax.

Polar has failed to cite a single case in which a court has struck down as a duty of tonnage a tax imposed by a tax situs, such as Valdez, based on the *value* (ad valorem) of the property. The case of *Oakland v. E.K. Wood Lumber Co.,* cited by Polar, is inapposite. The *E.K. Wood Lumber* case, decided by the California Supreme Court in 1930, involved the city's assessment of wharfage fees against vessels whether or not they landed at city docks.[137] In contrast with the Valdez tax, the tax in *E.K. Wood Lumber* involved the assessment of *fees*; it was not a tax based on the value of the vessels by a non-domicile tax situs. Significantly, *E.K. Wood Lumber* was decided 19 years before the U.S. Supreme Court, in *Ott v. Mississippi Valley Barge Line,* approved ad valorem taxation of vessels by a non-domiciliary jurisdiction such as Valdez.[138] Simply put, the *E.K. Wood Lumber* case does not apply to the issues in this case.

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[136] *See Michelin,* 423 U.S. at 287.
[137] *Oakland v. E.K. Wood Lumber Co,* 292 P. 1076, 1078 (Cal. 1930).
[138] *Ott,* 336 U.S. 155.

B. The City Taxes Polar Vessels *In The Same Manner* It Taxes Other Property.

The Tonnage Clause is not violated when vessels are taxed on their value in the same manner as other property.[139] The City taxes the vessels on their value in the same manner it taxes other property of its residents. Contrary to Polar's assertion, the City does not exempt all personal property except for large vessels from taxation.[140] The City taxes mobile homes and many recreational vehicles.[141] Whether the property is real or personal, the City first assesses the value of the property and then levies a tax at a set mill rate on the property's value.[142] The mill rate is the same for all property, including for Polar's vessels.[143] The City taxes the vessels *in the same manner* it taxes other real and personal property. The City's tax is not a duty of tonnage.

In addition, for many, if not most people, including the residents of Valdez, the most valuable property they own is their house. Valdez residents are subject to an ad valorem tax on their houses at the same mill rate as that set for large vessels.[144] Vessels,

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[139] W.H. Burroughs, *A Treatise on the Law of Taxation* § 63 at 91; *Wheeling*, 99 U.S. at 283-84 (emphasis added), Exc. 603-08, (attached hereto as Appendix B for reference) ("The prohibition [against a duty of tonnage] only comes into play where [the vessels] are not taxed in the *same manner* as other property of citizens of the State, but where the tax is imposed on the vessel, the instrument of commerce, *without reference to the value of the vessel.*")

[140] VMC § 3.12.022, § 3.14.020.

[141] *Id.* In order to conform local ordinances to Alaska Statutes, Valdez classifies mobile homes and similar structures and certain recreational vehicles as real property. *Compare* AS 29.45.070 *with* VMC § 3.12.022(A).

[142] VMC §§ 3.12.010, .060 and .170.

[143] *Id.*

[144] *Id.*

when they are used as house boats moored in the Valdez Small Boat Harbor, are subject to a residential fee surcharge.[145]

The Valdez vessel property tax does not unfairly single out large vessel owners to bear a disproportionate share of the municipal tax burden. For example, in 2000, Municipal tax revenues from the Shippers (including Polar) constituted roughly 10 percent of total Municipal tax revenues for that year.[146] Through property taxation, City residents bear a share of the tax burden commensurate with the value of the property they own. Polar should not be permitted to escape paying its fair share for municipal services it uses.

Polar attempts to "shoehorn" the Valdez vessel property tax into the Tonnage Clause prohibition in reliance on the language in *Transportation Company v. Wheeling*:

> [T]he prohibition [against a duty of tonnage] only comes into play where [vessels] are not taxed in the same manner as the other property of the citizens, or where the tax is imposed upon the vessel as an instrument of commerce, *without reference to the value of the property.*[147]

The language in *Wheeling*, however, cannot be read to mean that only taxes that tax most or all personal property, including vessels, will survive scrutiny under the Tonnage Clause. The U.S. Supreme Court, in the quoted passage in *Wheeling* actually changed the wording of the Treatise it was paraphrasing, and in so doing, cited the Treatise in a confusing manner. The relevant Treatise passage actually reads:

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[145] Valdez Municipal Code § 3.14.020.
[146] Exc. 273.
[147] *Transportation Company v. Wheeling,* 99 U.S. 273, 284 (1878) (emphasis added).

> We have seen heretofore, . . ., that vessels of all kinds, as property, were liable to taxation in the same manner as other personal property owned by citizens of the State. The prohibition only comes into play where they are not taxed in the same manner as other property of citizens of the State, **but** where the tax is imposed upon the vessel, the instrument of commerce, without reference to the value of the vessel.[148]

Polar would have the Court believe that the Tonnage Clause is implicated **either** (i) when a vessel is not taxed in the same manner as other property of the citizens; **or** (ii) where the tax is imposed upon the vessel as an instrument of commerce without reference to the value of the property. In fact, there are not two instances, but only *one* in which a tax is considered to be a duty of tonnage. The meaning of the passage in the Burroughs Treatise, and the correct meaning of the passage in *Wheeling,* is that the Tonnage Clause is implicated *only* when vessels are not taxed as other property based on their *value.* According to Burroughs, the tonnage duty prohibition then comes into play because the tax is considered to be upon the vessel as an instrument of commerce. Thus, in *Wheeling*, the Court merely recognized the historic distinction between a duty of tonnage, which is unconstitutional, and a tax on the *value* of a vessel, such as the City's tax here, which is constitutionally permissible. Subsequent case law has upheld against Tonnage Clause challenge taxes based upon the property value of movable property.[149]

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[148] W.H. Burroughs, *A Treatise on the Law of Taxation as Imposed by the States and Their Municipalities* § 63 at 91 (1877 ed.) (emphasis added), Exc. 603-08, attached hereto as Appendix B for reference. In paraphrasing the Burroughs' Treatise, the U. S. Supreme Court used the word "or" instead of the word "but."

[149] *Mid-Continent Airlines v. Nebraska State Board of Equalization and Assessment,* 59 N.W.2d 746, 751 (1953).

C. The City Has The Power To Single Out Particular Classes Of Taxpayers For Taxation.

Under the Alaska Constitution and Alaska statutes, the powers of local governments are liberally construed.[150] The judiciary should not be quick to imply limitations on the taxing authority of a municipality where none are expressed.[151]

Alaska Statute 29.45.050(b)(2) states: "A municipality may by ordinance . . . classify as to type and exempt or partially exempt some or all types of personal property from ad valorem taxes." Valdez has fashioned an ad valorem vessel tax that is consistent with Alaska statutes and the Constitution. Other municipalities in Alaska use a wide variety of classifications and exemptions for property taxation purposes. For example, Haines Borough, Kenai Peninsula Borough and the City and Borough of Sitka classify vessels by size or capacity and charge a fixed fee based upon the classification.[152] So long as the tax is fairly apportioned and does not "discriminate" against the taxpayer under either the Commerce Clause or the Equal Protection Clause of the U.S. Constitution,[153] it should be upheld.[154]

Polar's current position that the City must tax most or all personal property or have its tax held to be a duty of tonnage also flatly contradicts a position earlier taken by the Shippers. In their Motion for Summary Judgment, the Shippers conceded that the

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[150] *Liberati v. Bristol Bay Borough,* 584 P.2d 1115, 1120 (Alaska 1978).
[151] *Id.* at 1121.
[152] Haines Borough Code § 16.16.090; Kenai Peninsula Borough Code of Ordinances § 5.12.050; City and Borough of Sitka General Code § 4.12.020B.
[153] Polar has neither raised nor briefed an Equal Protection claim.
[154] The question of whether a tax, through its classifications and exemptions, unconstitutionally discriminates against a taxpayer is not part of Tonnage Clause analysis.

City has the power, constitutionally, to tax only a certain class of property.[155] Specifically, the Shippers stated that the City could tax *only vessels* and no other personal property, and such a tax could be constitutional. Now, however, Polar claims, based on *Wheeling*, that the City does not tax vessels "in the same manner as the other property of the citizens," and therefore, the City's Vessel Property Tax is a duty of tonnage.

The City taxes Polar's vessels *in the same manner* it taxes other property of its residents, both real and personal. The phrase "in the same manner" refers to the way in which the tax is applied (i.e., based on the property value). The phrase cannot—and should not—be interpreted to mean that the City must tax all or most personal property in order to be valid under the Tonnage Clause. The City's vessel property tax is not a duty of tonnage; it is a constitutionally permissible tax on the value of Polar's vessels.

D. Valdez's Tax Need Not Be One Of "General Application" In Order To Survive Constitutional Scrutiny.

The law does not require a state or municipality to tax all or even most taxable property or risk invalidation of the tax as unconstitutional. However, this is precisely what Polar suggests. The Alaska Supreme Court, in *K & L Distributors, Inc. v. Murkowski*, held that the constitution does not impose an "iron rule of equality prohibiting the flexibility and variety that are appropriate to reasonable schemes of . . . taxation."[156] Similarly, in *Atlantic Richfield*, the court concluded that legislative bodies

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[155] Exc. 92.

[156] *K & L Distributors, Inc. v. Murkowski,* 486 P.2d 351, 359 (Alaska 1971).

"have especially broad latitude in creating . . . distinctions in tax statutes."[157] The taxing authority must have a rational basis for a distinction, and must not resort to one that is palpably arbitrary.[158] However, courts apply a practical approach, when considering the question of the constitutionality of distinctions in tax statutes.[159] Generally, it is presumed that the legislature has not acted unreasonably or arbitrarily, and the party challenging a statute has the burden to establish its unconstitutionality.[160]

In *Braniff Airways,* for example, the U.S. Supreme Court affirmed the validity of a Nebraska property tax on mobile airline equipment.[161] The property tax in *Braniff* exempted many kinds of real and personal property.[162] The U.S. Supreme Court did not rule on whether the Nebraska tax was a duty of tonnage, but the Nebraska Supreme Court did. It held that the property tax, riddled with exemptions, was not a tonnage duty.[163]

In a similar vein, in *North Slope Borough v. Puget Sound Tug & Barge,* the Alaska Supreme Court upheld the Borough's general revenue property tax against constitutional challenge, though the tax was applied unequally.[164] In that case, the Borough "opportunistically" levied a property tax on barges owned by non-Alaskans when the barges became trapped off shore in pack ice for many months. The barge owners argued

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[157] *Atlantic Richfield Co. v. State of Alaska, 705* P.2d 418, 437 (Alaska 1985) (citation omitted).
[158] *See K & L Distributors*, 486 P.2d at 359.
[159] *Id.*
[160] *Katmailand, Inc. v. Lake and Peninsula Borough*, 904 P.2d 397, 401-02 (Alaska 1995).
[161] *Braniff Airways, Inc. v. Nebraska State Board of Equalization & Assessment,* 347 U.S. 590 (1954).
[162] Nebraska Revised Statutes of 1943 § 77-202, attached as Appendix C for reference.
[163] *Mid-Continent Airlines,* 59 N.W.2d at 751.
[164] *North Slope Borough,* 598 P.2d at 928.

that the Borough's application of the tax violated their equal protection rights, since the Borough did not tax either Alaskan airplane owners or Canadian barge owners.[165] The Alaska Supreme Court rejected the taxpayers' claim and upheld the Borough's tax, despite the fact that the Borough had not applied the tax equally. In short, a general revenue tax need not be one of general application to survive constitutional challenge. [166] The City's tax is not a duty of tonnage.

The "docking exemption" to the Tax does not show the Tax to be a tonnage duty, as Polar asserts. Vessels that dock exclusively at the City's Container Terminal are exempt from the tax.[167] However, this exemption is narrow and rationally based; it is not evidence that the City taxes Polar's vessels merely for entering the port. In 1999, when the Valdez City Council adopted the tax, most of the vessels that docked exclusively at the Valdez Container Terminal were foreign-flagged cruise ships.[168] The "Foreign Commerce Clause" of the U.S. Constitution precludes the City from taxing the cruise ships. The City rationally decided to tax large vessels, but exempt those that docked exclusively at the Container Terminal.[169] The City's desire to raise revenues to fund City

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[165] *North Slope Borough,* Appellees' Brief, Supreme Court No. 3858 (Alaska, June 26, 1978) at 32, 34-35.
[166] *See Liberati,* 584 P.2d at 1123 (Alaska Supreme Court rejected taxpayers' argument that sales tax was illegal because it was not a general tax, but instead was imposed on a specific commodity).
[167] VMC § 3.12.020(A)(1).
[168] Exc. 268.
[169] *Id.*

services and to spread the tax burden to businesses that use City services are legitimate public policy rationales for the Tax.[170]

The City levies the Tax on Ship Escort Response Vessel System ("SERVS") vessels that do not dock exclusively at the Container Terminal.[171] Polar tries to bolster its Tonnage Clause claim by suggesting that its tankers are similar to the SERVS tugs and barges.[172] Polar's tankers are not similar to the SERVS tugs and barges. Whereas Polar's tankers operate *interstate*, the tugs and barges are used only within Alaska waters. In fact, due to the substantial amount of time that many, if not most of the SERVS vessels spend in Valdez, it is arguable that they are *domiciled* in Valdez.[173] Polar's tankers are involved in commerce, but the tugs and barges are not. The tugs and barges carry neither people nor cargo from one port to another. The barges are anchored in the Prince William Sound and the tugs simply shuttle from Valdez to the Prince William Sound and back to Valdez. One of the purposes of the SERVS vessels is to protect Alaska's coastal communities from oil spills.[174] In sum, the vessel tax is applied to non-exempt vessels within the defined class, whether they operate in interstate or solely in intrastate waters, regardless of whether they are connected with the oil industry.

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[170] *See Katmailand,* 904 P.2d at 402.

[171] The SERVS vessel owners have challenged the City's Tax. The Valdez Board of Equalization has upheld the Tax. The SERVS vessel owners have filed suit in the Alaska Superior Court, *Crowley Marine Services, Inc. and Prince William Sound Oil Spill Response Corporation v. City of Valdez,* 3AN-04-13039CI. Not coincidentally, Mr. Leon Vance, Shippers' attorney in this case, also represents the SERVS vessel owners.

[172] Polar has no standing to raise alleged legal claims of the SERVS vessel owners, who are not litigants in this case.

[173] *Old Dominion Steamship Co. v. Virginia,* 198 U.S. 299 (1905).

[174] Exc. 599.

Polar has failed to prove that the Valdez vessel tax is unconstitutional. Polar's argument here is as illogical as that of the taxpayer who protests paying property taxes because either he does not have children or because his children do not use the public schools for which his property taxes pay.[175] The mere fact that "the weight of a tax falls unequally upon the owners of property taxed," which is "almost unavoidable under every system of direct taxation," does not render the tax "illegal by such discrimination."[176] "[A] general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit."[177] Thus, the issue of whether the taxpayer actually uses the services for which his taxes pay is irrelevant to the underlying validity of the tax.[178] Similarly, in this case, the issue of whether Valdez taxes all possible property taxpayers is irrelevant to the constitutional validity of the vessel tax in terms of Tonnage Clause analysis. As the trial court correctly noted after extensive briefing, "[t]he failure of the City to tax more property does not make its taxation of all property of [the defined] class an unconstitutional tonnage tax."[179]

Valdez taxes a portion of the value of the Polar vessels because it has the power and right—constitutionally—to do so. Polar has utterly failed to explain how the Valdez Tax is a charge for the privilege of "entering, trading in or lying in port," when: 1) Polar

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[175] As noted by the U.S. Supreme Court more than 100 years ago, "every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax though he have no buildings or personal property to be protected; or of a road tax though he never use the road." *Union Refrigerator,* 199 U.S. at 203.

[176] *Id.*

[177] *Id.*

[178] *North Slope Borough,* 598 P.2d at 928; *Goldberg v. Sweet,* 488 U.S. at 267.

[179] Exc. 701.

admittedly has used the full range of opportunities and services offered by Valdez; 2) Polar has conceded that there is a substantial nexus between the Polar vessels and Valdez; and 3) Polar has conceded that Valdez has the right to levy a property tax against its vessels. For Tonnage Clause purposes, it is simply irrelevant that the City has chosen, rationally, to exempt certain vessels from ad valorem taxation. The Valdez vessel tax is constitutional.

IV. The Trial Court Was Well Within Its Discretion In Holding That Neither Party Prevailed For The Purpose Of Awarding Attorneys' Fees.

Alaska Rule of Civil Procedure 82(a) provides:

> Except as otherwise provided by law or agreed by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

The purpose of Rule 82 is to compensate a prevailing party partially for attorneys' fees incurred in litigation.[180] The determination of which party prevails and is entitled to costs is within the broad discretion of the trial judge.[181] The appellate court will reverse the trial court's determination only for abuse of discretion.[182]

The prevailing party determination is grounded on which party prevails on the main issue in the case.[183] A party that receives an affirmative recovery is not necessarily the prevailing party.[184] In fact, it is reversible error for the trial court to rely solely on the

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[180] *Demoski v. New,* 737 P.2d 780, 788 (Alaska 1987).
[181] *Tobeluk v. Lind,* 589 P.2d 873, 878 (Alaska 1979).
[182] *Continental Ins. Co., v. U.S. Fid. Guar. Co.,* 552 P.2d 1122, 1125 (Alaska 1976).
[183] *Continental Ins. Co.,* 552 P.2d at 1125.
[184] *Id.*

factor of which party receives an affirmative recovery in determining the prevailing party for the award of attorneys' fees.[185]

Polar did not prevail in this litigation. The main issue in the case was whether Valdez constitutionally could tax Polar and the other Shippers. The City's right to tax the Shippers depended upon the constitutionality of VMC § 3.12.020, (Ordinance 99-17). The City won summary judgment on the Tonnage Clause and Commerce Clause claims related to its Ordinance. The trial court affirmed the constitutionality of the City's Ordinance, and the City retains the right to tax Polar.[186] Clearly, the City, not Polar, prevailed on the main issue in the case.

The simple question that determines prevailing party status is whether the party obtained the relief it sought.[187] Unquestionably, Polar did not obtain the relief it sought. Polar didn't merely want to pay *less* taxes, it wanted to pay *no* vessel tax at all.[188] Polar wanted Valdez's entire vessel tax to be stricken as unconstitutional. However, the Court did not strike down Valdez's vessel tax. To the contrary, the Court held that Valdez's vessel tax was not a tonnage duty, and thereby allowed the City to continue taxing Polar and SeaRiver.[189]

In addition, in purely monetary terms, the Polar and SeaRiver lost as much of the tax refund they claim to have gained. Assuming for the purposes of argument only that

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[185] *See Hayer v. National Bank of Alaska,* 619 P.2d 474, 477 (Alaska 1980).
[186] Exc. 696-701, 744-46 .
[187] *Alaska Center for the Environment v. State,* 940 P.2d 916, 922 (Alaska 1997).
[188] *See* Polar Brief at 18.
[189] The issue of *how much* the City could tax the Shippers, based on an apportionment formula, was a secondary issue, dependent upon the City's right to levy a tax in the first instance.

the City were to apportion the value of SeaRiver's and Polar's vessels from 2000 through early 2006 using the voyage-day (days in port/365) formula instead of the port-day formula, the City would keep roughly half of the taxes the Shippers paid under protest.[190] Under this scenario, the Shippers would receive approximately $5 million and the City would keep $5 million in back taxes. Under these circumstances, the trial court acted well within the limits of its broad discretion in ruling that neither party prevailed for the purpose of awarding attorneys' fees.

Finally, Polar is not entitled to attorneys' fees under AS 29.45.500(a) unless and until its right to a tax refund is established on appeal. Polar might only be entitled to attorneys' fees under AS 29.45.500(a) if this Court rules in favor of Polar and holds either Valdez's Tax Ordinance (VMC § 3.12.020) or its apportionment formula (Resolution 00-15) unconstitutional.

CONCLUSION

The Valdez vessel tax is constitutional. It is a fairly apportioned, ad valorem tax that constitutionally taxes Polar on the value of property based on its activities in and around Valdez. The Valdez vessel tax does not discriminate against interstate commerce, and the tax is fairly related to the services Valdez provides Polar. The Valdez vessel tax is not a duty of tonnage.

This Court should uphold the superior court's determination that the vessel tax is constitutional and is not a duty of tonnage. However, this Court should reverse the superior court's determination that the tax is not fairly apportioned, and reverse the grant

[190] Exc. 902-03.

of summary judgment to Polar on this issue. This Court also should reverse the superior court's denial of summary judgment to the City on this issue: the Court should hold that the tax is constitutional and allow the City to levy it against the Shippers as originally apportioned, by a port-day formula.

A TREATISE

ON THE

LAW OF TAXATION

AS IMPOSED BY

THE STATES AND THEIR MUNICIPALITIES,

OR OTHER SUBDIVISIONS,

AND AS EXERCISED BY

THE GOVERNMENT OF THE UNITED STATES,

PARTICULARLY IN THE

CUSTOMS AND INTERNAL REVENUE.

BY

W. H. BURROUGHS.

NEW YORK:
BAKER, VOORHIS & CO., PUBLISHERS,
66 NASSAU STREET.
1877.

of the general government.[1] And where the government of the United States imposes a license tax on the sale of liquors, or other business, it does not interfere with the right of the State to impose a similar license tax on the same business.[2] Where the State absolutely prohibits the sale of intoxicating liquors, it does not deprive its citizens of the privileges and immunities secured to them by the fourteenth amendment of the Constitution of the United States.[3]

The exception contained in the provision, that the State may impose such a tax on imports as may be necessary for executing its inspection laws, will be considered under the provision giving Congress authority to regulate commerce.

§ 63. *Tonnage Duty.*—The Constitution of the United States provides that "no State shall, without the consent of Congress, lay any duty of tonnage."[4] This prohibition, like the preceding one, and like the provision giving to Congress the power to regulate commerce, was designed to enable the government to give uniformity to the commerce of the States with foreign countries, and with each other. But it would have been useless to prohibit the taxing of imported goods, if the States retained the power of taxing the vessels, as such, which carried the goods. While this provision was necessary to carry out this scheme, it was not necessary to prohibit the States from taxing vessels as property in the same manner as other property of the State is taxed, and the provision has been so construed as not to interfere with such taxation.[5]

Congress has prescribed the rules of measurement and computation in ascertaining the tonnage of American ships and vessels. The word tonnage, in the light of these regulations, means the contents of the vessel expressed in tons of one hundred cubical feet each. A tax laid upon vessels graduated by this tonnage, is a duty of tonnage. It has been claimed that where the owners of the vessel reside in the State, and the tonnage is referred to as a mode to determine and ascertain the tax to be assessed, and to furnish a rule to govern the assessors in the performance of their duties, the provision is not violated, but unsuccessfully in the courts of the United States. The State of Alabama laid a tax "on all steamboats, vessels, and other water-crafts plying in the navigable waters of the State, at the rate of one dollar per ton of

[1] License Cases, 5 How. 404, 577. Smith v. Marston, 5 Texas, 426, criticising this decision, was made while Texas was a republic.
[2] License Tax Cases, 5 Wall. 462; Pervear v. Commonwealth, Id. 475.
[3] Bartemeyer v. Iowa, 18 Wall. 129. [4] Constitution of U. S. art. 1, § 10, par. 2.
[5] Perry v. Torrance, 8 Ohio, 521; Hays v. The Pacific Mail Steamship Co. 17 How. 598; State Tonnage Tax Cases, 12 Wall. 213.

the registered tonnage thereof," the tax to be assessed at the port where the vessels are registered, if practicable to be demanded of the person in charge of the vessel, and if not paid, the vessel to be seized and sold. Cox, a citizen of Alabama, the owner of a steamboat enrolled and licensed for the coasting trade, engaged in the navigation of the Alabama, Bigbee, and Mobile rivers, carrying freight and passengers between Mobile and points on these rivers, altogether within the limits of the State, paid the tax under protest and brought suit to recover it, on the ground that it was a tonnage tax, or duty of tonnage. The Supreme Court of Alabama thought this was a tax on the boats as property, and that their registered tonnage was referred to merely as a means of determining the amount of the tax to be imposed,[1] distinguishing it from a case in South Carolina, where the vessels were engaged in a coasting trade,[2] and from a case in Alabama, where the boats were used in transporting cargoes to and from vessels on Mobile bay engaged in foreign commerce.[3] In the Supreme Court of the United States, this decision was reversed, the court holding the tax to be a duty of tonnage, and that the fact that the steamboat was not only owned by a citizen of the State, but exclusively engaged in trade between places within the State, did not change the character of the tax.[4] It was said that the tax was laid on steamboats, wholly irrespective of their value as property, and exclusively on the basis of their cubical contents, and was therefore within the express terms of the prohibition.[5]

The oyster law of Virginia contained this provision: "Every captain or officer of a vessel which shall be employed in carrying oysters taken in the waters of Virginia, shall obtain from an inspector a license, for which he shall pay to said inspector a tax of three dollars per ton, for every ton said vessel may measure, according to the custom house enrollment or license." This was held to be a duty of tonnage, a tax upon the vessel, the vehicle of commerce.[6] And where the tax is not measured by the tonnage of the vessel, but is a fixed sum upon the ship, as where the wardens of a port are authorized to demand and receive five dollars for every vessel arriving in port, whether called on to perform any service or not, it is within the

[1] Lott v. Mobile Trade Co. 43 Ala. 578.
[2] Alexander v. Wilmington & Raleigh R. R. 3 Strobh. 594.
[3] Lott v. Morgan, 41 Ala. 266. [4] State Tonnage Tax Cases, 12 Wall. 204.
[5] Id. 217. See also Cannon v. New Orleans, 20 Wall. 577; s. c. 2 Cent. L. J. 86; N. W. U. Packet Co. v. St. Paul, 2 Cent. L. J. 427; s. c. Chicago L. N. July 3, 1875; Peete v. Morgan, 1 Cent. L. J. 413; s. c. 19 Wall. 581.
[6] Johnson v. Drummond, 20 Gratt. 419–422.

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001501

prohibition. It is the tax or duty upon the ships as vehicles of commerce, which is prohibited. Said Mr. Justice Miller, in Cannon *v.* New Orleans (*supra*): "Whatever more general, or more limited view may be entertained of the true meaning of this clause, it is perfectly clear that a duty, or tax, or burden imposed under the authority of the State, which is, by the law imposing it, to be measured by the capacity of the vessel, and is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, is within the prohibition."[1] This tax on tonnage, or on the vessel, is as much a tax as a tax on imports or exports, or as a tax on the goods themselves which are carried in the vessels, and the reason which induced the framers of the Constitution to withdraw imports and exports from taxation, apply as strongly to the vessels engaged in carrying the goods.[2]

We have seen heretofore, in § 47, that vessels of all kinds, as property, were liable to taxation in the same manner as other personal property owned by citizens of the State. The prohibition only comes into play where they are not taxed in the same manner as other property of citizens of the State, but where the tax is imposed upon the vessel, the instrument of commerce, without reference to the value of the vessel.

There is an important exception to this rule, in the matter of pilot fees and half-pilot fees. When the Constitution of the United States was adopted, the different States had each laws of their own for the regulation of pilots and pilotage. Under the power to regulate commerce, Congress had power to control this subject, and it exercised the power by the act of 1789,[3] which left the subject of pilots and pilotage to be regulated by the laws then in existence, and to be thereafter enacted by the respective States, until further legislation by Congress. With the exception of the act of 1837,[4] allowing the master of a vessel, entering or departing from a port situate upon waters the boundary between two States, to take a licensed pilot from either State, no further legislation was had until 1852. The earliest case on this subject arose out of a statute of Pennsylvania, requiring vessels arriving or departing from the port of Philadelphia, to take a pilot, requiring the master on arrival or departure to make report to the wardens of the port, and inflicting a penalty of sixty dollars for neglect or refusal, and in case the vessel refused to take a

[1] Steamship *v.* Joliffe, 2 Wall. 31, 34.
[2] 20 Gratt. 202, 422; 12 Wall. 216; Gibbons *v.* Ogden, 9 Wheat. 202.
[3] 1 Statutes, p. 54. [4] 5 Statutes at Large, 153.

pilot imposing a forfeiture of half-pilotage. It was held, that the mere grant to Congress of the power to regulate commerce, did not prevent the States from regulating pilots; that the action of Congress on the subject had been such as to leave the States free to make regulations without conflicting with the will of Congress, and that these regulations of Pennsylvania were not a duty of tonnage.[1] The claim for half-pilotage is placed upon the ground that pilots are a meritorious class, engaged in a service full of hardships and often of peril; that in the performance of their duties they are shut out from the pursuit of any other occupation, and that they are necessary to give security to life and property exposed to the dangers of a difficult navigation. If the selection of a pilot were left to the choice of a master, or the exertions of a pilot to reach a vessel and tender his services were without remuneration, this class, absolutely necessary to commerce, could not be sustained. All commercial States, from the earliest period, have had similar laws. The Romans and the Danes had such laws, and the Hanseatic ordinance of 1457 required the captain to take a pilot under the penalty of a mark of gold. The maritime code of the *Pays Bas*, and maritime law of France, of 1618, imposed penalties on captains refusing to take pilots; the latter also imposed corporal punishment.[2] Under the pilot laws of California, a licensed pilot offered his services to an American ocean steamer, registered at the custom house in the port of New York, and exclusively employed in navigating the ocean and carrying passengers and treasure between San Francisco and Panama. His services were refused, and he brought suit for the half-pilotage. It was claimed that not only did the statute of California violate the provision of the Constitution as a tonnage duty, but that the act of Congress of the 30th of August, 1852, "to amend an act entitled an act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," had established pilot regulations, and that Congress having exercised the power to regulate commerce through this law, all regulations by the States were inconsistent therewith, and void. The court held that it was not a duty of tonnage, and that the act of 1852 did not establish pilot regulations for ports, its object being to provide a system under which the masters and owners of vessels propelled in whole or in part by steam may be required to employ competent pilots to navigate such vessels on their

[1] Cooley v. Board of Wardens of the Port of Philadelphia, 12 How. 299.
[2] *Ex parte* McNeill, 13 Wall. 239.

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voyage.[1] The fee required by the ordinance of a city to be paid to the harbor master, for assigning a vessel its place at its wharf or in the harbor is not a duty of tonnage.[2]

§ 64. *Regulation of Commerce.*—The Constitution provides that "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."[3] There is, perhaps, no part of the Constitution as to which there has been more diversity of opinion among the first judicial minds of the country. No less a person than Chief Justice Taney,[4] held in a luminous opinion, that the taxing power of the States was not to be abridged by the mere affirmative grants of power to the general government. He regarded the prohibitions as to tonnage and import duties the only express limitations on the taxing power of the States. The limitation by affirmative grant of power, he characterized as a *new* doctrine, in opposition to the contemporaneous construction and the authority of adjudged cases, and one that might be extended in a way seriously to impair the taxing power of the States. The majority of the court took a different view of the subject, and the doctrine is now firmly established that the taxing power of the States, while it may be exercised upon all property within their limits, upon the goods carried or the instruments of commerce, as property, and thus indirectly affect commerce, yet where the tax law amounts to a regulation of commerce, it is void, because in conflict with the power granted to Congress, which, when exercised, is exclusive and supreme.

The earliest case on the subject arose out of a grant by the legislature of New York to Livingston and Fulton of the exclusive right to navigate the waters of the State in vessels propelled by steam. The case was twice before the courts of New York. The first time the court held that the internal commerce of the State, by land and water, remained exclusively under the control of the State, and that the power of the State to make such an exclusive grant as that under consideration was not divested, because Congress might make some future regulation of commerce inconsistent with the grant to Livingston and Fulton.[5] The second time, the defendant claimed a right to navigate the waters of New York in opposition to the grant, on the

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[1] Steamship *v.* Joliffe, 2 Wall. 450. Miller, Swayne and Clifford, JJ., dissented, holding that the act of 1852 was a regulation of pilots, and applied to pilots in ports as well as on a voyage. *Ex parte* McNeill, 13 Wall. 236, affirms previous cases as to the validity of half-pilotage.

[2] State *v.* City Council of Charleston, 4 Rich. (Law), 286.

[3] Art. 1, § 8, par. 3.

[4] Passenger Cases, 7 How. 482.

[5] Livingston *v.* Van Ingen, 9 Johns. 507.

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Comments: 77-201 was copied from the original 1943 issue of the Nebraska Revised Statutes. 77-1244-1250 was enacted in 1947 and copied from the 1949 Cummulative Supplement. 77-1250.01-77-1250.05 were not enacted until the late 1950s.

If you have questions, you can contact me at 402-471-3215 or dbridges@unicam.state.ne.us

Diana Bridges
Legislative Records Historian

77-201. Property taxable; actual valuation; basis of assessment. All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value.

Source: Laws 1903, c. 73, § 12, p. 390; R.S.1913, § 6300; Laws 1921, c. 133, art. II, § 1, p. 546; C.S.1922, § 5820; C.S.1929, § 77-201; Laws 1939, c. 102, § 1, p. 461; C.S.Supp.1941, § 77-201.

1. Taxable value
2. Property taxable
3. Miscellaneous

1. Taxable value

Evidence of sale price of other farm lands was not admissible to prove fair market value. Swanson v. Board of Equalization, 142 Neb. 506, 6 N.W. (2d) 777.

In determining actual value of farm property, taxing authorities must take into consideration the market value and all other elements. Boyd County v. State Board, 138 Neb. 825, 296 N.W. 157.

All nonexempt property is subject to taxation on its actual value, which means its value is in the ordinary course of trade. Nebraska State Building Corporation v. City of Lincoln, 137 Neb. 535, 290 N.W. 421.

Farm lands, for the purpose of taxation, shall be valued and assessed at their actual cash value, which is their value in the market in the ordinary course of trade. Schulz v. Dixon County, 134 Neb. 549, 279 N.W. 179, overruling Schmidt v. Saline County, 122 Neb. 56, 239 N.W. 203.

While evidence may not definitely show a market value of property in ordinary course of trade, values may be fixed from all the evidence. Yellow Cab and Baggage Co. v. Board of Equalization, 119 Neb. 28, 226 N.W. 810.

Party could not complain that property was not assessed at actual value and at same time claim that tax on intangible property was invalid. Sommerville v. Board of Commissioners, 116 Neb. 282, 216 N.W. 815.

Revenue act of 1921 changed the basis of assessment generally from twenty per cent of actual value to actual value. State v. Johnson, 116 Neb. 249, 216 N.W. 828.

Effect of change of taxation of property at its actual rather than assessed valuation was to increase the taxable value of the property fivefold. Drew v. Mumford, 114 Neb. 100, 206 N.W. 159.

Shares in foreign corporation, owned and possessed by resident, are taxable at actual value. Bute v. Hamilton County, 113 Neb. 230, 202 N.W. 616.

An assessment will not be set aside merely because all property has not been assessed at its actual value, where the assessment has been made with reasonable uniformity upon all classes of property. Chicago R. I. & P. R. v. State, 111 Neb. 862, 197 N.W. 114.

Assessment of one class of property at seventy-five per cent and another at one hundred per cent of cash value is unlawful discrimination. Chicago R. I. & P. R. v. State, 111 Neb. 862, 197 N.W. 114.

This section contemplates that all property be assessed at its true value. Sioux City Bridge Co. v. Dakota County, 105 Neb. 843, 182 N.W. 485.

Property is to be valued at its taxable value for purpose of making a levy to raise the tax provided for. Cunningham v. Douglas County, 104 Neb. 405, 177 N.W. 742.

Owner cannot require board to value property at seventy-five per cent of actual value on plea that it is custom to make such reduction. Lincoln Telephone & Telegraph Co. v. Johnson County, 102 Neb. 254, 166 N.W. 627.

Bridge company is denied equal protection of laws by assessment of its property at full value while the other property in the county is assessed at a fraction of its value. Sioux City Bridge Co. v. Dakota County, 260 U. S. 441, 67 L. Ed. 340.

2. Property taxable

Intangible property of nonresident owner is not taxable in this state. Massey-Harris v. County of Douglas, 143 Neb. 547, 10 N.W. 346.

Laundry owned and used by charitable institution in carrying on its work is exempt from taxation. House of Good Shepherd v. Board of Equalization, 113 Neb. 489, 203 N.W. 652.

Cause of action in tort is not a "right" in property and is not taxable. Seward County v. Jones, 105 Neb. 705, 181 N.W. 652.

Personal property in possession of owner at his place of residence in another state is not subject to taxation in this state. Preston v. Harlan County, 97 Neb. 667, 150 N.W. 1009.

When certificate is issued entitling company to patents, land is liable to taxation. Elkhorn L. & T. Co. v. Dixon Co., 85 Neb. 426, 53 N.W. 382; White v. B. & M. Ry., 5 Neb. 393.

Government bonds are not subject to taxation if held in good faith. Dixon Co. v. Halstead, 23 Neb. 697, 37 N.W. 621.

Notes belonging to nonresident, placed in hands of agent in this state for collection and reloaning, are taxable. Finch v. York Co., 19 Neb. 50, 26 N.W. 589.

Homestead may be taxed as soon as owner has right to complete title. Bellinger v. White, 5 Neb. 399.

3. Miscellaneous

Excessive valuation of nonexempt property may be corrected by proceedings in error to the district court. Eppley Hotels Company v. City of Lincoln, 135 Neb. 347, 293 N.W. 234.

Whether assessed on interest of mortgagor or mortgagee, taxes must be deemed assessed on land. Matthews v. Guenther, 120 Neb. 742, 235 N.W. 93.

Amount of assessment of bridge was proper. Meridian Highway Bridge Co. v. Cedar County, 117 Neb. 214, 220 N.W. 241.

Findings of board of equalization will not be disturbed unless manifestly wrong. Meridian Highway Bridge Co. v. Cedar County, 117 Neb. 214, 220 N.W. 241; Sioux City Bridge Co. v. Dakota County, 105 Neb. 843, 182 N.W. 485.

In assessing for taxation stock in domestic corporations, mortgages in which mortgagor agrees to pay tax, should not be deducted. J. B. Kelkenney Realty Co. v. Douglas County, 116 Neb. 786, 219 N.W. 140.

To secure equal taxation, property undervalued should be raised. Sioux City Bridge Co. v. Dakota County, 105 Neb. 843, 182 N.W. 485.

77-202. Property taxable; exemptions enumerated. The following property shall be exempt from taxes:

(1) The property of the state and its governmental subdivisions;

(2) Property owned by and used exclusively for agricultural and horticultural societies;

(3) Property owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user; and

(4) Household goods of the value of two hundred dollars to each family.

The increased value of land by reason of shade and ornamental trees planted along the highway shall not be taken into account in the assessment of such land.

(1949 Supplement)

77-1244. Personal property; taxation of air transportation carriers; definitions. As used in sections 77-1244 to 77-1246:

(1) The term "air carrier" means any person, firm, partnership, corporation, association, trustee, receiver, or assignee, and all other persons, whether or not in a representative capacity, undertaking to engage in the carriage of persons or cargo for hire by aircraft; any air carrier as herein defined, engaged solely in intrastate transportation, whose flight equipment is based at only one airport within the state, shall be excepted from taxation under this section, but shall be subject to taxation in the same manner as other locally assessed property;

(2) The term "aircraft arrivals and departures" means (a) the number of scheduled landings and takeoffs of the aircraft of an air carrier, (b) the number of scheduled air pickups and deliveries by the aircraft of such carrier, and (c) in the case of nonscheduled operations, shall include all landings and takeoffs, pickups and deliveries;

(3) The term "flight equipment" means aircraft fully equipped for flight and used within the continental limits of the United States;

(4) The term "originating revenue" means revenue to an air carrier from the transportation of revenue passengers and revenue cargo exclusive of the revenue derived from the transportation of express or mail; and

(5) The term "revenue tons handled" by an air carrier means the weight in tons of revenue passengers and revenue cargo received and discharged as originating or terminating traffic.

Source: Laws 1947, c. 266, § 1, p. 858; Laws 1949, c. 231, § 5. Effective date August 27, 1949.

77-1245. Personal property; taxation of air transportation carriers; assessment; collection. Any tax upon or measured by the value of flight equipment of air carriers incorporated or doing business in this state shall be assessed and collected by the Tax Commissioner. The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios: (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled by such carrier during the same period; *Provided*, that in the case of nonscheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such air carrier at airports within this state during the

preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and (3) the ratio which such air carrier's originating revenue within this state for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period.

Source: Laws 1947, c. 266, § 2, p. 859.
Effective date September 7, 1947.

77-1246. Personal property; taxation of air transportation; laws applicable. Real property and personal property, except flight equipment, of an air carrier shall be taxed in accordance with the applicable laws of this state.

Source: Laws 1947, c. 266, § 3, p. 860.
Effective date September 7, 1947.

77-1247. Personal property; taxation of air transportation carriers; annual report; contents. Each air carrier, as defined in section 77-1244, shall on or before June 1 in each year make to the Tax Commissioner a report, in such form as may be prescribed by the Tax Commissioner, containing the information necessary to determine the value of its flight equipment and the proportion allocated to this state for purposes of taxation.

Source: Laws 1949, c. 231, § 1.
Effective date August 27, 1949.

77-1248. Personal property; taxation of air transportation carriers; Tax Commissioner; report to State Board of Equalization and Assessment. The Tax Commissioner shall ascertain from the reports made, and from any other information obtained by him, the value of flight equipment of air carriers and the proportion allocated to this state for the purposes of taxation, as provided in section 77-1245, and shall make a report thereof to the State Board of Equalization and Assessment as to each air carrier.

Source: Laws 1949, c. 231, § 2.
Effective date August 27, 1949.

77-1249. Personal property; taxation of air transportation carriers; State Board of Equalization and Assessment; levy. The State Board of Equalization and Assessment shall each year make a levy for purposes of taxation against the value so ascertained and determined by the Tax Commissioner, as provided in section 77-1248, at a rate which shall be equal, as nearly as may be, to the average rate of all general taxes, state, county, municipal, school, and local, levied

throughout the several taxing districts of the state for the preceding year.

Source: Laws 1949, c. 231, § 3.
Effective date August 27, 1949.

77-1250. Personal property; taxation of air transportation carriers; levy; collection; payment. When levied, the tax shall be collected and paid in the same manner as the tax on car companies as provided in sections 77-629 to 77-631.

Source: Laws 1949, c. 231, § 4.
Effective date August 27, 1949.

ARTICLE 13

ASSESSMENT OF PROPERTY

Section.
77-1301. Real property; assessment, when made; real estate classification and reappraisal committee; appointment; duties; disqualification; report; reappraisal of land in cities, villages and school districts.
77-1302. Real property; assessment; employment of valuation experts in counties having a population of more than 200,000 inhabitants.
77-1303. Real estate; assessment; assessment books; how prepared.
77-1305. Repealed. Laws 1947, c. 250, § 46.
77-1306. Real estate; assessment; additional lands and improvements.
77-1307. Real estate; assessment; decrease in value by destruction of improvement.
77-1309. Repealed. Laws 1947, c. 251, § 42.
77-1310. Repealed. Laws 1947, c. 251, § 42.
77-1311. County assessor; duties as to assessment of property.
77-1314. Property; assessment; county assessor to follow rules prescribed; penalty for failure.
77-1315. Real estate; assessments; time of completion and filing of assessment books; notice of changes to owners.
77-1316. Real property; assessment; errors in description or quantity of land.
77-1317. Real property; assessment; omitted lands and improvements in previous years; exceptions.
77-1219. Real estate; assessment; lands taxable first time; list, where procured.
77-1320. Real estate; sales or transfers; report to State Tax Commissioner; forms.
77-1321. Real estate; sales and transfers; failure to report; expense of obtaining report; paid by county.

77-1301. Real property; assessment, when made; real estate classification and reappraisal committee; appointment; duties; disqualification; report; reappraisal of land in cities, villages and school districts. All real property in this state subject to taxation shall be assessed as of March 10 in each even-numbered year, which assessment shall be used as a basis of valuation for taxation until the next regular assessment, except as provided in this section and

Introduced: 3/9/77
Referred: Resources and Finance

IN THE HOUSE

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

CS HOUSE BILL NO. 323

IN THE LEGISLATURE OF THE STATE OF ALASKA

TENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the oil and gas exploration, production, and pipeline and marine transportation property tax; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 43.56.010(d) is amended to read:

CHAPTER 56. OIL AND GAS EXPLORATION, PRODUCTION, AND PIPELINE AND MARINE TRANSPORTATION PROPERTY TAXES.

(d) A tax paid to a municipality under AS 29.53.045 on or before June 30 of the tax year shall be credited against the tax levied under (a) of this section for that tax year. If, however, a tax is not paid to a municipality until after June 30 of the taxable year, the department upon application shall refund to the taxpayer the amount of tax paid to the municipality under AS 29.53.045. The credit or refund of taxes paid to a municipality may not exceed the total amount of tax levied by the department upon the taxpayer for the tax year, under (a) of this section. Current property taxes which are collected by one or more municipalities under AS 29.53.055 or any other authority which exceed the limitations set out in AS 29.53.045 or AS 29.53.050 are not allowed as a credit against, or refund of, the tax levied under this section. The credit or refund is only allowed for taxes paid for the current tax year.

* Sec. 2. AS 43.56.060(a) is amended to read:

Sec. 43.56.060. ASSESSMENT. (a) The department shall assess property for the tax levied under sec. 10(b) of this chapter and AS

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29.53.045 on property used or committed by contract or other agreement for use for the pipeline transportation of gas or unrefined oil, [OR] for the production of gas or unrefined oil, for refining of gas or unrefined oil, or for the processing, liquefaction, or manufacture of natural gas or oil products at its full and true value as of January 1 of the assessment year. The department shall assess property for the tax levied under sec. 10(b) of this chapter and AS 29.53.045 on property used or committed by contract or other agreement for use in the marine transportation of gas or unrefined oil during any portion of the previous calendar year at its full and true value as of January 1 of the previous calendar year as apportioned under sec. 65 of this chapter.

* Sec. 3. AS 43.56.060(e)(2) is amended to read:

(2) determined on each January 1 thereafter with due regard to the economic value of the property based on the estimated life of the proven reserves of gas or unrefined oil then technically, economically and legally deliverable into the transportation facility; [HOWEVER, IF THE PROVEN RESERVES OF GAS OR UNREFINED OIL THEN TECHNICALLY, ECONOMICALLY AND LEGALLY DELIVERABLE INDICATE AN ECONOMIC LIFE MATERIALLY SHORTER THAN THE ESTIMATED PHYSICAL LIFE OF THE TRANSPORTATION FACILITY, THE FULL AND TRUE VALUE IS THE ACTUAL COST REDUCED BY AN ANNUAL ALLOWANCE FOR DEPRECIATION ON A STRAIGHT LINE BASIS OVER AN ECONOMIC LIFE BASED ON THE ACTUAL ELAPSED LIFE FROM THE COMMENCEMENT OF FULL OPERATION TO THE DATE OF ASSESSMENT PLUS THE ESTIMATED REMAINING LIFE OF THE PROVEN RESERVES OF GAS AND UNREFINED OIL THEN TECHNICALLY, ECONOMICALLY AND LEGALLY DELIVERABLE INTO THE TRANSPORTATION FACILITY AS OF THE DATE OF THE ASSESSMENT;]

* Sec. 4. AS 43.56.060 is amended by adding new subsections to read:

(h) The full and true value of taxable property used or committed

by contract or other agreement for the refining of gas or unrefined oil or in the processing, liquefaction or manufacture of gas or oil products is determined on the basis of replacement cost less depreciation based on the useful life of the property.

(i) The full and true value of taxable property used or committed by contract or other agreement for the marine transportation of gas or unrefined oil is determined on the basis of replacement cost less depreciation based on the useful life of the property as apportioned under sec. 65 of this chapter.

* Sec. 5. AS 43.56 is amended by adding a new section to read:

Sec. AS 43.56.065. METHOD OF APPORTIONMENT. (a) The full and true value of the taxable marine transportation property shall be apportioned to this state by multiplying that value by the days-spent-in-port apportionment fraction. The numerator of the fraction is the number of days spent in ports within the state loading or unloading gas or unrefined oil, and the denominator of the fraction is the number of days spent in ports both within the state and outside the state loading or unloading gas or unrefined oil.

(b) For purposes of this section,

(1) "days spent in port" does not include periods when ships are tied up because of strikes or withheld from service for repairs, or because of seasonal reduction of service; days spent in a port shall be computed by dividing the total number of hours in that port by 24 and rounding to the nearest day;

(2) "port" includes a tanker terminal, dock, moorage, another vessel or any other facility, fixed or floating, from which gas or unrefined oil is loaded or unloaded.

* Sec. 6. AS 43.56.070 is amended by adding a new subsection to read:

(c) For purposes of this section, a return reporting marine

transportation values and days-spent-in-port information for the previous calendar year shall be submitted to the department on a date specified by regulation.

* Sec. 7. AS 43.56.210(6) is amended to read:

(6) "taxable property" means real and tangible personal property within this state used or committed by contract or other agreement for use [WITHIN THIS STATE] primarily in the exploration for, production of, [OR] pipeline transportation of, refining of, gas or unrefined oil, or in the processing, liquefaction or manufacture of natural gas or oil products, including [(EXCEPT FOR] property used [SOLELY] for the liquefaction [RETAIL DISTRIBUTION OR LIQUEFACTION] of natural gas [)], or in the operation or maintenance of facilities used in the exploration for, production of, [OR] pipeline transportation of, refining of, gas or unrefined oil, or in the processing, liquefaction or manufacture of natural gas or oil products, including machinery, appliances, supplies, equipment, drilling rigs, wells (whether producing or not), gathering lines and transmission lines, pumping stations, compressor stations, power plants, topping plants, processing units, refineries and refining equipment, gas processing plants and equipment, liquefied natural gas facilities, roads, tank farms, tanker terminals, docks and other port facilities, air strips and communication equipment and facilities, maintenance equipment and facilities, and maintenance camps and other related facilities; "taxable property" also means property used or committed by contract or other agreement for use primarily in the marine transportation of gas or unrefined oil including tankers, all classes of crude carriers, ships, barges or other marine vessels used in connection with the transportation of gas or unrefined oil; "taxable property" does not include permanent residences, office buildings requiring substantial local government services,

property used for retail distribution of gas, oil or oil products, or gas pipeline systems operated as utilities and regulated by the Alaska Public Utilities Commission;

* Sec. 8. AS 29.53.045(b) is amended to read:

(b) A municipality may levy and collect a tax on the full and true value of taxable property taxable under AS 43.56 as valued by the Department of Revenue at a rate not to exceed that which produces an amount of revenue from the total municipal property tax equivalent to $1,500 a year for each person residing within its boundaries. The commissioner of revenue shall adjust the limitation provided for in this section in accordance with changes in the Consumer Price Index for Anchorage, Alaska, published by the Bureau of Labor Statistics, United States Department of Labor. The adjusted limitation becomes effective on the January 1 following its adjustment and applies to taxes levied for that tax year. The Consumer Price Index for October 1976 is considered the initial Consumer Price Index. In making the adjustments under this section, the commissioner shall comply with the following procedure:

(1) after November 30 and before December 31 of each year the commissioner shall calculate the change in the October Consumer Price Index for the current year from the October Consumer Price Index for the previous year;

(2) the commissioner shall then

(A) compute the percentage increase or decrease for that period and

(B) adjust the most current limitation set out in this section by the same percentage increase or decrease, rounded to the nearest dollar;

(3) and report the adjusted limitation to each municipality

by January 15 of the following year.

* Sec. 9. AS 29.53.050(b) is amended to read:

(b) No municipality, or combination of municipalities occupying the same geographical area, in whole or in part, may levy taxes (1) which will result in tax revenues from all sources exceeding $1,500 [$1,000] a year, as adjusted in accordance with (c) of this section, for each person residing within their boundaries or (2) upon values which, when combined with the value of property otherwise taxable by the municipality, exceed the product of 225 per cent of the average per capita assessed full and true value of property in the state multiplied by the number of residents of the taxing municipality. If two or more municipalities occupying the same geographical area, in whole or in part, attempt to levy a tax (1) the combined levy of which would result in tax revenues from all sources exceeding $1,500 [$1,000] a year, as adjusted in accordance with (c) of this section, for each person residing within their boundaries or (2) upon value which, when combined with the value of property otherwise taxable by the municipality, exceed the product of 225 per cent of the average per capita assessed full and true value of property in the state multiplied by the number of residents of the taxing municipality, the commissioner of community and regional affairs shall apportion the lawful levy and equitably divide these revenues on the basis of need, services performed and other considerations in the public interest. For the purpose of this subsection, population shall be determined by the commissioner of community and regional affairs based on the latest statistics of the United States Bureau of the Census or on other reliable population data. For purposes of this subsection the average per capita assessed full and true value of property in the state shall be calculated without regard to the assessed value of taxable property

under AS 43.58.

* Sec. 10. AS 29.53.050 is amended by adding a new subsection to read:

(c) The commissioner of revenue shall adjust the $1,500 per person per year limitation provided for in (b) of this section in accordance with changes in the Consumer Price Index for Anchorage, Alaska, published by the Bureau of Labor Statistics, United States Department of Labor. The adjusted limitation becomes effective on the January 1 following its adjustment and applies to taxes levied for that tax year. The Consumer Price Index for October 1976 is considered the initial Consumer Price Index. In making the adjustments under this section, the commissioner shall comply with the following procedure:

(1) after November 30 and before December 31 of each year the commissioner shall calculate the change in the October Consumer Price Index for the current year from the October Consumer Price Index for the previous year;

(2) the commissioner shall then

(A) compute the percentage increase or decrease for that period and

(B) adjust the most current limitation set out in this section by the same percentage increase or decrease, rounded to the nearest dollar;

(3) and report the adjusted limitation to each municipality by January 15 of the following year.

* Sec. 11. If a provision of this Act relating to taxation of marine transportation property or any other provision of this Act is held invalid or unenforceable, it is the intent of the legislature that the invalidity or unenforceability of that provision does not affect the validity or enforceability of any other provision of this Act.

* Sec. 12. This Act is retroactive to January 1, 1977, except that