STATE OF CALIFORNIA

BOARD OF EQUALIZATION **105.0070**

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Late Protest of a Final Determination Under the Sales and Use Tax Law of:	)	DECISION AND RECOMMENDATION
A--- S---, INC.	)	No. SP UT XX-XXXXXX-010
Taxpayer	)	

The Appeals conference in the above-referenced matter was held by Senior Staff Counsel Stephen A. Ryan on September 9, 1993 in Van Nuys, California.

Appearing for Taxpayer:	Mr. C--- N--- Attorney
Appearing for the Sales and Use Tax Department:	Mr. Ira Anderson Supervising Tax Auditor

Protested Item

The protested tax liability is measured by $275,000 determined as the estimated cost of a helicopter purchased for use in California.

Taxpayer's Contentions

1. The purchase price is $173,500.

2. The Revenue and Taxation Code section 6366.1 exemption applies since more than 50 percent of the operational use in the test period was for common carriage operations.

3. The initial flight from Las Vegas to Van Nuys should not be treated as operational use because it was for the purposes of initially bringing it to its home base, having the helicopter modified and repaired so that it could meet airworthiness standards, and for Mr. A---'s pilot training.

4. The other use of the helicopter for Mr. A---'s pilot training was not operational use.

5. The "unaccounted for" hours were most likely flown by J--- in common carrier revenue hours, rather than by Mr. A--- personally or for any other non-common carriage use.

6. Some maintenance test flights must have occurred following the extensive modification and repair services; and such use was not operational use. The same applies to Mr. A---'s flights to move the helicopter to and from airports where modification and repair occurred.

7. Flights to reach a different airport in order to pick up a passenger are also common carriage uses since they are so closely related (see Annotation 570.0430).

8. The 55.7 hours of use by A--- Sports constituted common carriage use.

9. The 11.4 hours with Mr. A--- as pilot on December 4 and 5, 1984, constituted common carriage use.

10. 14 CFR Part 135.1(b) does not identify non-common carriage operations, but merely cites activities which are not within the jurisdiction of 14 CFR Part 135. There are other parts in 14 CFR which control other types of common carriage use which can qualify under Revenue and Taxation Code section 6366.1. Also, State law identifies common carriage (Civil Code section 2168, and Smith v. O'Donnell (1932) 215 Cal. 714). The Department did not consider this.

11. The Board has already cancelled this 1984 determined liability by crediting the amount to taxpayer in a 1984 Statement of Account, and removing it from the Board's accounts receivable system. The attempted reassessment in 1988 or 1989 is invalid. Pursuant to the statute of limitations, it is too late for the Board to legally issue a new notice of determination, and for the State Controller to sue taxpayer in court to seek payment of an erroneous refund/credit pursuant to Revenue and Taxation Code section 6961.

12. The Board should be estopped from recovering any applicable tax, interest and/or penalty since taxpayer relied upon the Board's 1984 Statement of Account to not retain and/or obtain relevant common carriage records beyond the required four-year period on the reasonable basis of reliance upon such Board advice that taxpayer did not owe the tax.

13. Petitioner should obtain relief pursuant to Revenue and Taxation Code section 6596 for the same reasons expressed in 12.

14. Appropriate action should be taken for the Department's acquisition in 1984 of personal financial records of Leonard A---, taxpayer's president, which have no relevancy to any tax debt of taxpayer-corporation.

Summary

This is an unusual case for several reasons. This late protest involves a determination that became final over nine years ago for use tax on the purchase and use by A--- S---, Inc. ("petitioner") of a 1979 Bell Jet Ranger III helicopter (-XXXX-). The Department initially mailed a Notice of Determination to petitioner on September 28, 1984 for use tax measured by a $275,000 estimated cost. No petition was filed and no payment was made. On November 13, 1984, the Department mailed a Demand for Immediate Payment to petitioner. Petitioner immediately contacted the Department's employees in the Consumer Use Tax Division in Sacramento, and submitted some records. Those employees then reviewed the records and decided to "cancel" the "billing" because of the common carrier exemption. On December 13, 1984, the Board mailed a Statement of Account to petitioner. A copy of that record is attached hereto as Exhibit 1, and is incorporated herein by reference. It shows a one cent "credit" balance due to a reduction as "less pending credit" to offset the determined tax. It also reads as follows:

> "The above liability based on the purchase of aircraft XXXX- is cancelled. Credit awaiting final approval. When approved by this Board, notice of credit will follow."

Unbeknownst to petitioner, the Board's Petitions Section soon thereafter notified the Consumer Use Tax Section by memorandum that the "billing" would not be cancelled. The Petitions Section requested the Consumer Use Tax Section to obtain additional records from petitioner to verify the exemption, including for the eleventh and twelfth months of the test period which had not been previously considered by the Consumer Use Tax Section. It appears from July 1988 notes of Consumer Use Tax Section employees that the determined tax liability had remained on the Board's accounts receivable balance for the next four years, but not on "aged" receivables. The apparent reason for the 1988 Department action on this case was the Franchise Tax Board's July 18, 1988 notice to petitioner to pay to the Board on petitioner's pending use tax liability a $650 income tax credit/refund to which petitioner was otherwise entitled. In the Board's file is an apparently internal record which is untitled but dated February 9, 1989. A copy is attached hereto as Exhibit 2, and is incorporated herein by reference. It lists the tax plus interest and a penalty, and a reference that it was "to reestablish liability". Communications between petitioner and the Department eventually led to the Department's acceptance of petitioner's February 25, 1991 letter as a "protest" of a final determined tax.

The substantive facts in this case commenced on December 18, 1983 when petitioner purchased for $173,500 and took delivery of this helicopter at a location outside California from a helicopter dealer. Petitioner's president, Mr. L--- A---, was then apparently a licensed private pilot for fixed wing aircraft, and a student pilot for helicopters. He did not possess a commercial pilot license for helicopters at any time within the next 12 months. He and a flight instructor flew the aircraft from outside California to Lancaster and on to Fullerton on

December 18, 1983, with entries made in Mr. A---'s pilot log book for certified flight instructor training.

The contents of several available records, including maintenance logs, some flight logs, repair orders, and the personal pilot log of Mr. A---, show the extent and type of most use which occurred in the next 12 months. Counting the first December 18, 1983 flight, Mr. A--- used the helicopter for at least 48.8 hours for pilot training through April 6, 1984 when he took a Federal Aviation Administration ("FAA") check ride and obtained his private rotorcraft (helicopter) license. In that period, there was another 16 hours of flight use, the purpose of which is not identified. Mr. A--- also thereafter used the helicopter for his own non-commercial personal pilot purposes for an additional 41.7 hours through December 17, 1984. An additional 5.3 hours of use in the 12-month test period after April 6, 1984 are not identified.

Petitioner alleges that an additional 71.4 hours of use was made in the 12-month test period by J---, Inc., a licensed Part 135 carrier, which leased the helicopter from petitioner on February 1, 1984. A total of 55.7 of these hours occurred from July 7, 1984 to August 12, 1984 involving A--- Sports and aerial camera filming for the Olympic Games in the Los Angeles area. The remaining 15.7 of the 71.4 hours occurred from October 4, 1984 to November 9, 1984, and were shown in a Bell Helicopter Log as flights for several identified businesses.

FAA records show that due to major alteration work on this helicopter before and after the Olympics to install and then remove side-mount and belly cameras plus a special windshield, this helicopter was restricted by the FAA to a Special Airworthiness Certificate limiting its use to an aerial surveying restricted category for the purpose of television production from July 16, 1984 to August 14, 1984 during which time the 55.7 --- Sports hours were accumulated. However, petitioner submitted a September 22, 1993 statement under penalty of perjury from a P--- J. M---, president and sole shareholder of J--- in 1984, wherein he represented that he and other J---' pilots had flown this helicopter for the A--- Sports flight pursuant to a "charter agreement" for $425 per hour (helicopter, pilot, and fuel); and that J--- had not engaged in "bare rentals" of helicopters.

The repair orders and the logs show that numerous maintenance and repair work was performed on this helicopter, but that only one .5-hour maintenance flight took place. Mr. A---'s pilot log also shows three entries for 1.2 total hours when he moved the helicopter for purposes of maintenance and inspection.

Petitioner contends that 12.7 hours of the total 90.5 hours which I listed as Mr. A---'s personal use constituted common carriage use. Petitioner submitted a February 26, 1993 letter from an A--- K--- representing that he worked for G--- T--- Company in December 1984, and hired J--- to fly him to Carmel on December 4 and 5, 1984 for a photographer to take aerial photos, and that Mr. A--- had acted as the pilot. Mr. A--- made entries in his pilot log book for that trip with him acting as pilot in command which included a purpose of looking for work and looking at cities.

Mr. Anderson has extensive experience in flying aircraft, including jets and jet helicopters. He indicated that jet helicopters are typically used only to produce revenue since they are so expensive to operate, and that they are usually not used for pilot training due to the more complex characteristics in addition to the high cost.

Analysis and Conclusions

Absent an exemption, use tax is imposed upon a person who purchases from a retailer tangible personal property for use in California when he first uses, stores, or otherwise consumes that property in this State (Rev. & Tax. Code §§ 6201 and 6202). Exemptions from tax are strictly construed against the taxpayer who has the burden of proving that the statutory requirements have been satisfied (H. J. Heinz Co. v. State Board of Equalization (1962) 209 Cal.App.2d 1). An exemption from tax cannot be granted just because the taxpayer says so (Paine v. State Board of Equalization (1982) 137 Cal.App.3d 438, 443; and People v. Schwartz (1947) 31 Cal.2d 59). Credible evidence must be presented to prove the exemption.

The Legislature has enacted Revenue and Taxation Code section 6366.1 on the subject of common carriage use of an aircraft. This provision provides that a sales or use tax exemption can arise when an aircraft is sold to a person for lease to a lessee who will use that aircraft as a common carrier of persons or property under the laws of California or the United States. A common carrier is a person who engages in business transporting people and/or property for hire while offering his services indiscriminately to the public or some portion of the public (see Regulation 1593(a); Civil Code § 2168; 49 USC 1301; 14 CFR 135.1.1; and Smith v. O'Donnell (1932) 215 Cal. 714).

The Board has promulgated Regulation 1593 on the subject of aircraft common carriage to implement section 6366.1. This regulation provides that the exemption will apply if more than 50 percent of the operational use of the aircraft in the first 12 months (commencing with the first operational use) was for common carriage purposes (see subsection (b)91)). "Operational use" is defined therein to mean "actual time during which the aircraft is operated", but excludes certain flights for maintenance, tests, and personnel training (Reg. 1593(b)(1)).

The relevant common carrier provisions which have been raised are found in Part 135 of Title 14 of the Code of Federal Regulations, and concern operations commonly referred to as "air taxi" or "Part 135". A Part 135 operator must comply with all the rules of Part 135 (14 CFR 135.3(a)). No person can operate an aircraft in Part 135 operations unless it obtains a certificate (14 CFR 135.5). The carrier is required to prepare and maintain a manual and other records containing operational specifications/ procedures, a list of each aircraft used in Part 135 operations, and a list of each pilot authorized to fly in such operations (14 CFR 135.21, .23, and .63(a)). Each carrier must have the "exclusive use" of at least one aircraft of each type authorized for use in its Part 135 operations (14 CFR 135.25(b)). This phrase is defined to mean that the carrier has "the sole possession, control, and use of it for flight..." (14 CFR 135.25(c)).

Each carrier must also maintain operational control of the aircraft in flight (14 CFR 135.77). When a Part 135 flight is to be made, various conditions must occur and exist before and during that flight which are not required in a flight which is solely pursuant to Part 91 general operating rules
(14 CFR 135). Part 91 governs general flights, such as non-common carriage operations (14 CFR 91.1). Part 91 rules also apply to Part 135 flights, but Part 135 flights are also subject to Part 135 rules. As examples of more stringent Part 135 rules, a written load manifest must be prepared prior to the flight, and must be retained; certain operating equipment must be part of the aircraft before the flight and/or during the flight; certain pre-flight briefings must be made to the passengers; and certain weather conditions cannot exist before the flight.

Only the .5-hour maintenance test flight is excluded from operational use as a maintenance test flight. The initial December 18, 1983 flight into California has not been shown to have been a maintenance flight as alleged. Mr. A---'s log proves his personal pilot training use of the helicopter for that flight for the purpose of obtaining his personal private pilot rotorcraft license. The helicopter must have then been airworthy or the certified flight instructor could not have allowed the use of the helicopter for flight instruction or signed off Mr. A---'s log book as having given legitimate flight instruction. No other flights have been satisfactorily proven to have been maintenance flights. Mr. A---s' 1.2 hour combined flights were logged as mere movement to and from the maintenance airports and not as maintenance test flights as he could have done on the initial flights following the maintenance work if he had conducted actual test flights if the work had affected the flight operations. Although there were many repairs made to this helicopter throughout the 12-month test period, the other usage was not related to ascertaining if the helicopter was in proper operating condition or if it would fly in accordance with specifications. The helicopter was always physically capable of being used for common carriage purposes except when he voluntarily allowed the camera modifications for ABC Sports, but he chose the uses as described, infra.

We find and conclude that satisfactory evidence exists under these circumstances to show by a preponderance standard that at a maximum, only 15.7 hours of the total 179.3 operational use hours were in common carriage operations. Those 15.7 hours are shown in the helicopter log as having occurred in October and November 1984, and having been for particular businesses. Since Mr. A--- did not log those flight hours in his personal pilot log book, we find he was not the pilot, and J--- thus operated the aircraft. Considering the Board's 4-year delay, we are willing to accept the entries of J--- in the helicopter log for the business names to indicate that common carriage operations probably occurred. Thus, since the 50 percent test was not met, petitioner was not exempt under section 6366.1 and Regulation 1593.

Even if the 55.7 hours of flights for A--- Sports were counted as common carriage operations as mistakenly contended by petitioner, the combined 71.4 hours would constitute only 39.8 percent of the total 179.3 operational use hours. Most importantly, those 55.7 hours constituted non-common carriage hours because the potential use and actual use was private between only J--- and A--- Sports during the Olympics rather than for the general public or a

portion thereof. J--- was incapable of using this helicopter for the general public under state and federal law since the helicopter was then greatly restricted by its special airworthiness certificate limiting the use to aerial surveying for television production. This situation was a subrental of a helicopter "wet", including fuel and pilot, by J--- to A--- Sports, and A--- Sports was probably in the ultimate control of the helicopter and pilots during these flights even if flown pursuant to some private, versus public, "charter agreement" as alleged by Mr. M---. This is somewhat different than a "bare rental" of an aircraft as was mentioned by Mr. M---. Lastly, aerial surveying flights are specifically excluded from Part 135 operations (14 FAR Part 135.1(b)(4)(iii)). Thus, J--- could not have legally flown such flights in Part 135 operations under its Part 135 certificate. Since we have no evidence that J--- was then licensed under any other FAR part involving common carriage operations, such as Parts 121, 125, or 127, we cannot find these flights to have been conducted in any common carriage operations.

The December 4 and 5, 1984 flights by Mr. A--- as pilot in command were not in common carriage operations. He did then not possess a commercial pilot's license and could not so operate the helicopter whether for himself or for J--- (14 CFR 61.121, and 61.131). He also did not possess an FAA certificate authorizing him personally to conduct common carriage operations, such as under Part 135 (14 CFR 135.5).

The total 19.3 hours of unidentified use have not been shown to be common carriage use. Petitioner has the burden to so prove. Further, these flights were not logged in the particular helicopter log wherein the other common carriage flights were listed for the businesses, which creates an inference that the probable actual use in these 19.3 hours was not by J--- for common carriage use. Although Mr. Anderson and Mr. N--- are probably correct that in typical situations, jet helicopters are not usually used for non-revenue purposes, the evidence in this apparently atypical case clearly shows that this helicopter was extensively used for Mr. A---'s personal training and pleasure.

There is no legitimate personnel training to be excluded from operational use under Regulation 1593(e) since the pilot training which took place was purely personal and private for Mr. A--- who was not even in possession of a commercial pilot's license and was thus not legally capable of then operating the helicopter in common carriage operations. Since Mr. A--- was not then a commercially-rated helicopter pilot, his training was not reasonably required for the purpose of allowing him to operate this helicopter in the anticipated common carrier operations.

Any flights by J--- before or after an actual common carriage flight in order to get to or return from the carriage flight airports are not common carriage operations. No persons or property were then carried for hire. The pilot was not required to fly pursuant to FAR Part 135 rules on those flights, but only needed to follow the general Part 91 rules since he/she was not carrying persons or cargo for hire. BTLG annotation 570.0430 [1-7-74, & 3-23-84], is irrelevant since it does not deal with common carriage issues.

It is our finding and conclusion that the Board did not actually cancel or otherwise extinguish this liability which became final on October 28, 1984. The notice dated December 13, 1984, is arguably ambiguous since it reads and shows that the liability "is cancelled", but it also shows both that the "credit" awaits final approval and that the Board would issue to petitioner a notice of credit once approved "by the Board". No such Board approval thereafter occurred, and no notice of credit was thereafter issued by the Board to petitioner. The liability remained and still remains, irrespective of the 1989 entry to "reestablish" the liability. No statute of limitations problem exists since the Board issued the notice of determination within one year of the purchase (see Rev. & Tax. Code § 6487 which allows for a three-year period), and the Board does not need to sue to recover any erroneous refund or credit.

Revenue and Taxation Code section 6596 is not applicable. The Board did not provide any written advice to petitioner prior to December 18, 1983 upon which it relied to not pay tax on its December 18, 1983 purchase and use of this helicopter.

We cannot recommend that the Board be estopped from collecting tax, interest or penalty due to the Department's failure to submit to the Board the proposed credit in accordance with the December 13, 1984 Statement of Account.

This is not the forum for discussion of discipline against Board employees for alleged misconduct in acquiring a credit report on Mr. A---.

Recommendation

Reduce the final liability to tax measured by the $173,500 price. Adjust for any payment received from the Franchise Tax Board. No other adjustments are recommended.

Stephen A. Ryan, Senior Staff Counsel Date

Attachments: Exhibits 1 and 2