

STATE OF CALIFORNIA

105.0013

BOARD OF EQUALIZATION

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition)	
for Redetermination Under the)	DECISION AND RECOMMENDATION
Sales and Use Tax Law of:)	
)	
F--- I--- CORPORATION)	No. SP UT XX-XXXXXX-010
)	
)	
<u>Petitioner</u>)	

The Appeals conference in the above-referenced matter was held by Paul O. Smith, Staff Counsel on September 15, 1993, in San Diego, California.

Appearing for Petitioner: J. T--- E---, C.P.A.

Appearing for the Sales and Use Tax Department: Carole Millay Senior Tax Auditor

Protested Item

The protested tax liability for the determination of January 28, 1991, is measured by:

<u>Item</u>	<u>Amount</u>
The purchase price of an aircraft purchased for use in this state.	\$850,000

Petitioner's Contention

Petitioner contends the purchase of this aircraft is exempt because it was used principally in common carrier operations.

Summary

On February 28, 1989, petitioner F--- I--- Corporation, a California corporation, purchased a Cessna Citation ISP (serial number XXX-XXX; registration number -XX--) from B---, Inc., dba B--- I--- and O--- B--- P---, Inc. (hereinafter "seller"), for \$850,000.¹ The aircraft was deliverable to petitioner at Long Beach, California, or any other location mutually agreed upon. On April 3, 1989, petitioner, as lessor, entered into an "Airplane Lease Agreement" for the aircraft with M--- A--- T--- S---, Inc. (hereinafter "MATS"), as lessee. The agreement commenced April 1, 1989, and ended March 31, 1990, and allowed MATS to rent the aircraft to various individuals and entities on a per-trip basis. MATS paid \$300 per flight hour as rent, and petitioner paid MATS \$1,000 per month for the management and administration of the aircraft, including maintaining all logs, books and records required by the Federal Aviation Administration (FAA), or any other governmental agency. Petitioner paid for the repair and maintenance of the aircraft, and paid any and all taxes. MATS obtained insurance for the aircraft, and petitioner paid all other expenses. In a letter dated December 19, 1991, MATS stated that it operated the aircraft under its charter certificate, and that the aircraft was held available for charter by the public. MATS also stated: the aircraft's Hobbs read 2,802.5 on the purchase date; operational use of the aircraft began on April 18, 1989; and the aircraft was damaged on December 16, 1989, and remained grounded through June 1, 1990.² A review of MATS' aircraft logs, however, indicates that the aircraft began operations on March 15 or 16, 1989. Petitioner states the aircraft was sold on June 1, 1990. A computation provided by petitioner indicated that petitioner accounted for 27.94 percent of the aircraft's flight hours, and other entities or individuals accounted for 51.23 percent of the aircraft's flight hours.³ The record also indicates that substantially all of the flight hours were billed to petitioner, including those by other entities and individuals.⁴

On October 3, 1991, the Sales and Use Tax Department (Department), using these same logs determined that petitioner accounted for 80.6 percent of the aircraft's flight hours. In a letter dated October 4, 1991, the Department requested petitioner to explain its relationship to P--- L--- and C---.⁵ On December 19, 1991, MATS responded that "To the best of [its] knowledge, F---,

1 The purchase agreement shows that at the time of the sale the seller was located in Texas. Thus, for purposes of this Decision and Recommendation I shall assume that the aircraft was also located in Texas at the time of sale.

2 This statement conflicts with MATS billing statement of January 26, 1990. The billing statement shows the aircraft departed from San Diego on December 19, 1989, and after three stops returned to San Diego on this same date.

3 Petitioner's revised computation dated November 15, 1993, indicates that petitioner accounted for 22.17 percent of the aircraft's flight hours, and other entities and individuals accounted for 69.21 percent.

4 MATS billed petitioner whenever the trip was requested by petitioner, regardless who the passenger was.

5 Petitioner was billed by MATS for trips by these entities and other entities and individuals such as C--- H--- Corp., D--- C--- Travel, C--- A---, D--- R---, and the R--- Family. There were only nine trips (37.8 hours) by an entity or individual for which petitioner was not billed.

P--- L---, C--- A--- and C--- are unrelated parties for whom [it] provided charter services." The record indicates that the aircraft's crews were employed by MATS. For the period in which the aircraft was operated, petitioner's gross receipts from MATS exceeded \$56,000.

After lengthy correspondence with petitioner, the Department determined that MATS provided administrative services rather than common carrier service to petitioner. On January 28, 1991, the Department issued its Notice of Determination to petitioner, and on February 22, 1991, petitioner submitted a timely Petition for Redetermination.

Analysis and Conclusions

Revenue and Taxation Code section 6366.1 provides in relevant part that there are exempted from the tax, the gross receipts from the sale of aircraft which is sold to persons for the purpose of leasing such aircraft to licensed or certified common carriers of persons or property. This section also provides that it shall be rebuttably presumed that the aircraft is not regularly used in the business of transporting for hire property or persons if the yearly gross receipts of the lessor from the lease of the aircraft to persons using the aircraft as a common carrier of property or persons does not exceed 10 percent of the cost of the aircraft to the lessor, or \$25,000, whichever is less. (Rev. and Tax. Code, § 6366.1, subd.(c); see also Cal. Code Regs., tit. 18, reg. 1593, subd. (b)(1)(D).)

Sales and Use Tax Regulation 1593, promulgated to implement section 6366.1, further provides that the exemption will apply only if more than 50 percent of the operational use of the aircraft in the first 12 consecutive months (commencing with the first operational use) was for common carriage purposes. If the purchaser did not own the aircraft for 12 consecutive months, then only operational use during the period of ownership will be considered. The term "common carrier" means any 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. (Cal. Code Regs., tit. 18, reg. 1593, subd. (a); Civil Code § 2168; 49 USC 1301; 14 CFR 135.1.1; and Smith v. O'Donnell (1932) 215 Cal. 714). The term "operational use" means actual time during which the aircraft is operated, but excluding test flights, maintenance, personnel training and storage. (Sales and Use Reg., § 1593, subd.(b)(1).)

The Department does not question that during the relevant period MATS was a FAA certified air taxi, and I find no basis to question the Department's judgment. Use for air taxi purposes is common carrier usage. (See Sales and Use Tax Annotation 105.0060, May 26, 1969.) Because petitioner's gross receipts from the lease exceeded \$25,000, the provisions of subdivision (c) of section 6366.1 are satisfied. The Department, however, argues that petitioner is not entitled to the exemption provided by section 6366.1, because, in its opinion, MATS did not indiscriminately offer the aircraft to the public or some portion of the public. The Department reaches this conclusion because, here, all but nine of the aircraft's billable flights were billed to petitioner. These billings included trips by entities or individuals that may or may not have been affiliated with petitioner.

This Board has consistently regarded the charter of an aircraft to an owner of the aircraft as common carriage so long as the owner did not receive a preferential rate or some basis not available to the general public. Here, the invoices produced by petitioner showed that MATS billed all of its customers at the rate of \$700 per hour, regardless whether the aircraft was chartered by petitioner or the above entities or individuals. I cannot find any support, and the Department has not directed me to any, for the Department's determination that MATS billing practices preclude a finding that MATS offered its services indiscriminately to the public or some portion of the public. Certainly, the nine trips mentioned above were made by some portion of the public.

Obviously if the aircraft could only be used by petitioner and its affiliated companies or individuals selected by petitioner, then the aircraft would not be considered as offered indiscriminately to the public or some portion of the public. However, there is no evidence of such control of the aircraft. There is no evidence that the aircraft was ever under the possession and control of some entity other than MATS.

With respect to the principal use of the aircraft, if the trips billed to petitioner are considered as common carriage, and I see no reason for classifying them as otherwise, then more than 50 percent of the operational use of the aircraft in its period of operation (which was less than 12 consecutive months) was for common carriage purposes.

Recommendation

Grant the petition.

Paul O. Smith, Staff Counsel

Date