STATE OF CALIFORNIA

BOARD OF EQUALIZATION

105.0192

BUSINESS TAXES APPEALS REVIEW SECTION

In the Matter of the Petition for Redetermination Under the Sales and Use Tax Law of:	)	DECISION AND RECOMMENDATION
R--- R---	)	No. SP UT XX XXXXXX-110
Petitioner	)	

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

Appearing for Petitioners:	None, but petitioner's representative telephoned and spoke to the appeals attorney.
Appearing for the Sales and Use Tax Department:	Mr. Richard Evans District Principal Auditor

Protested Item

The protested use tax liability is measured by $57,000 paid for petitioner's alleged purchase of an aircraft.

Petitioner's Contention

The purchaser of the aircraft was only R--- E--- G---, Inc., not petitioner. Also, no tax applies because the aircraft was purchased for, and actually used in, common carriage operations until the aircraft was sold when the carrier went out of business.

Summary

The Sales and Use Tax Department ("Department") discovered that petitioner had caused a W--- U--- to transfer title to a 1977 Cessna 210 aircraft (- XXX--) on January 27, 1989 to R--- E--- G---, Inc. ("Group") in San Luis Obispo, although Group had been suspended by the Franchise Tax Board on May 1, 1987, for the failure to pay franchise taxes. A Notice of Determination was issued to petitioner as the principal in Group who the Department found had

been the true purchaser. The basis for the notice was that use tax had been incurred on the purchase from a retailer of this aircraft for use in California, without any exemption. A separate notice had been issued to Group which is final but unpaid. Group has not held a seller's permit. Group has since been reinstated by paying its franchise taxes. The registration documentation filed with the FAA indicates that Mr. U--- had acted as an "individual" and as a "partnership" in purchasing this aircraft on January 20, 1989, and as an "owner" in transferring it to petitioner on January 27, 1989.

Mr. U---, as president on behalf of A--- A---, Inc., and petitioner, on Group's behalf, signed a lease agreement dated January 27, 1989 allowing A--- A--- to lease this aircraft from Group at $115 per hour for charter use involving the carriage of passengers or freight for hire. Petitioner also had the right to subrent the aircraft from A--- A--- at $115 per hour. Petitioner contends that the aircraft was used solely for common carriage purposes until April 30, 1989; was repaired and inspected from May 1, 1989 to August 6, 1989; and was then only used for demonstration and display from August 7, 1989 until June 21, 1990 when it was sold.

On behalf of Group, petitioner signed an Aircraft Security Agreement dated April 13, 1989, granting a security interest in this aircraft to the --- Bank of San Luis Obispo. Group therein agreed not to use or lease the aircraft for any commercial purpose without the bank's written consent.

Mr. U--- wrote to the Board on August 25, 1989 regarding this case. The stationery identified A--- A--- as operating a charter service and a flight school. Mr. U--- indicated that the aircraft in question had been inactive since May 1989 due to an extensive annual inspection, and that A--- A--- was scheduled to recertify its pilots for Part 135 operations with the FAA in September 1989 after which common carrier operations would resume. He enclosed copies of three A--- A--- statements related to this aircraft for February, March and April 1989. These statements generally show 51.6 total hours, with 6.3 being owner's hours in February 1989 at no charge; 42.6 hours being "C--- hrs" at $115 per hour; and 2.7 as "C--- hrs" in April 1989 at $60 per hour. Other records show that as of August 6, 1989, 2.3 additional flight hours had taken place, but the Department has identified this as a test flight. By August 1, 1990, 47 more flight hours of use had occurred, but the specific dates and daily hours are not known to us.

Petitioner recently submitted a September 13, 1993 letter from Mr. U--- with enclosed copies of A--- A--- invoices dated from March 2, 1989 through May 30, 1989 for 10 trips. Two trips totaling 5.5 hours in April 1989 were for petitioner or Group. One other trip was for aircraft rental and flight instruction. Three "charter" trips were identified. Four other trips were made without the specific status of flight shown. The flight hours were not identified for six of these seven possible common carriage flights. Separate pilot fees were made only to petitioner/Group. The total monthly revenues from the invoices do not equal, or show and pattern with, the amounts identified on the above-mentioned A--- A--- statements which had been submitted in August 1989.

Petitioner represented that Group had encountered major mechanical problems with the aircraft, and that after A--- A--- ceased business, it decided to sell. Copies of several repair invoices for relatively small amounts were submitted.

Analysis and Conclusions

Since petitioner acted as the true principal in the purchase of this aircraft while Group was suspended, he is treated as the purchaser. The Board enacted a policy in June 1980 to issue a notice of determination against a corporate officer/stockholder of a closely held corporation for his or her personal liability for tax debts of the corporation which had been incurred for a period during which the corporation had been suspended by the Franchise Tax Board for failure to pay its franchise taxes, but only if sales tax reimbursement had been collected from customers. This policy was in effect in July 1992 when this notice was issued to petitioner, and is still applicable. It is not clear to us if the result of such policy is: to authorize personal liability notices only for corporate sales tax liabilities and not for use taxes; or to only restrict such notices to corporate sales tax liabilities, while allowing use taxes to be so noticed against individuals. The Department's interpretation since at least 1984 is that such policy allows it to impose personal liability for use taxes even without collection of tax or tax reimbursement. It has acted in this manner regarding petitioner. Since the Board has not curtailed such Departmental action, we will not recommend deletion of this determination on the grounds that Board policy was intended to be limited to sales tax. If this case reaches the Board, it will provide the Board the opportunity to clarify such policy.

Absent an exemption, use tax is imposed upon a person who purchases from a retailer tangible personal property, including aircraft, for use in California when he or she first uses that property here (Revenue and Taxation Code sections 6004, 6201, and 6202; and Regulation 1610(b)(1)(C)). Exemptions from use tax are strictly construed against the taxpayer who has the burden of proving that the statutory requirements have been satisfied (see 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). 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 statute 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 or her services indiscriminately to the public or some portion of the public (see Reg. 1593(a); Civil Code § 2168; 49 USC 1301; and 14 CFR 135.1.1). 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)(1)). "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)). It is the actual use of the aircraft which controls for the purposes of this exemption (Pacific Southwest Airlines v. State Board of Equalization (1977) 73 Cal.App.3d 32, 36).

One of the common carrier provisions which is relevant and which has been raised by petitioner is found in Part 135 of Title 14 of the Code of Federal Regulations. That specific type of operations is commonly referred to as "air taxi" or "Part 135". A Part 135 operator must comply with all the rules of Part 135 during air taxi operations (14 CFR 135.3(a)), and must maintain operational control of the aircraft in flight (14 CFR 135.77). When a Part 135 flight is to be made, various things must occur and exist before and during that flight which are not required in a flight which is solely pursuant to Part 91 (14 CFR 135). Part 91 governs general flights, such as non-common carriage operations (14 CFR 91.1). Both the rules of Parts 91 and 135 apply to Part 135 flights, but Part 135 rules do not apply to non-common carriage flights. In the aviation industry, many persons who are air taxi operators also conduct business renting aircraft, providing flight instruction with a pilot and an aircraft, providing pilots for a fee, etc. Thus the specific purpose of each particular flight must be examined; it is not sufficient to show that the air taxi operator was in general possession of the aircraft, such as pursuant to a lease. For example, when an aircraft is rented to a customer even with a pilot but for a separate fee, and the customer has ultimate control over the aircraft and pilot for passenger and/or cargo flights which are flown only pursuant to Part 91 rules, the customer's flights are not for common carriage purposes.

The evidence does not prove the application of the common carriage exemption. At least three, and possibly seven, Part 135 air taxi common carriage flights may have occurred, but we do not know the hours involved. The best evidence for petitioner tends to indicate a ultimate maximum possibility of 45.3 hours of common carriage use- -the total "C---" hours. But we still do not know the exact status of all the flights during those C--- hours. The evidence further appears to indicate that some of that use was for mere rentals with the flights conducted solely under Part 91 rules, including subrentals to petitioner/Group. Other flights for which no invoice has been submitted could have been conducted solely under Part 91 rules and still resulted in the revenues shown on the A--- A--- statements. Since even the full 45.3 hours out of the 98.6 operational hours constitute less than 50 percent, then even if all those C--- hours could be proven to have been common carriage operations, the required exemption test would still not have been met. We acknowledge that this computation includes all 98.6 operational use hours even though it is possible that some occurred after the 12-month test period. But due to the incomplete information regarding the specific dates of use, we cannot verify that any of these hours occurred after the 12-mont test period. Since petitioner has the burden to prove the exemption, it suffers the consequences of not being able to show specific dates of use. Also, petitioner's voluntary agreement on behalf of Group, with the bank on April 13, 1989 that no further commercial use would occur is contrary to its tax claim of intended and actual use in common carriage operations, and tends to create a credibility problem for petitioner.

The evidence does indicate however that Mr. U--- or some partnership in which he was apparently a general partner, may have operated in January 1989 as a dealer engaged in business selling aircraft or a person who was required to hold a seller's permit by reason of aircraft sales. He was the president of a corporation which operated in the aircraft industry. He purchased the aircraft in question on January 20, 1989 and immediately resold it to petitioner on January 27, 1989. He further listed himself with the FAA both as an individual and partnership during those seven days. If he individually or as a general partner for a partnership, was then an aircraft dealer or needed a permit for aircraft sales (see Rev. & Tax. C. secs. 6014, 6015, and 6066), then petitioner's purchase would have been exempt from use tax pursuant to Revenue and Taxation Code section 6401 because the seller would have been solely liable for (sales) tax (Rev. & Tax. C. sec. 6051: see also section 6283). The available evidence is not sufficient to prove this exemption, put petitioner may submit additional evidence relevant to this issue during a request for reconsideration process.

Recommendation

Redetermine without adjustment.

_____ 11-3-93

Stephen A. Ryan, Senior Staff Counsel Date