

STATE OF CALIFORNIA

105.0059

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:)	
)	
G--- A---, INC.)	No. SP UT XX XXXXXX-010
)	
)	
<u>Petitioner</u>)	

The Appeals conference in the above-referenced matter was held by Senior Staff Counsel James E. Mahler on September 25, 1992, in Van Nuys, California.

Appearing for Petitioner:

D--- B. S---
Attorney at Law

M--- E---
Chairman

Appearing for the
Sales and Use Tax Department

Ira Anderson
Supervising Tax Auditor

Jose Novo
Tax Auditor

Protested Item

The protested tax liability is measured by \$13,001,000, the purchase price of an aircraft.

Petitioner's Contention

The three flights in question were common carriage flights.

Summary

Petitioner is a corporation owned and controlled by [X---]. It purchased a new Challenger aircraft for \$13,001,000, accepting delivery in Canada on or about July 3, 1989. It flew the aircraft into California that same day.

On August 1, 1989, petitioner leased the aircraft to [Y---], a certified air carrier. Petitioner claimed exemption from the use tax under Revenue and Taxation Code Section 6366.1 on the ground that [Y---] used the aircraft in its common carriage business.

With certain exception not relevant here, subdivision (b) of Sales and Use Tax Regulation 1593 provides that a lessee will be deemed to have used an aircraft in common carriage if more than one-half of the "operational use" of the aircraft during a 12-month test period is common carriage. In evaluating petitioner's claim of exemption, the staff therefore examined the aircraft's flight log in detail.

The staff found that the operational use of the aircraft was 495.5 hours during the test period July 3, 1989, through July 2, 1990. (Petitioner uses a different test period and therefore a different total of operational hours, but the differences are minor and do not affect the outcome of this case.) The staff concluded that 240.3 of the hours were common carriage use, and since that is only 48.5 percent of the total hours, the staff disallowed the claimed exemption.

Petitioner contends that an additional 25.8 hours should be classified as common carriage use. This would bring the total common carriage use to 266.1 hours, more than enough to qualify for the exemption. Petitioner concedes that the remaining hours (495.5 minus 266.1 equals 229.4) were personal use by petitioner and do not qualify as common carriage.

The 25.8 disputed hours were accumulated on three separate flights. On each of these flights, the aircraft was piloted by [Mr. X]. Mr X was and is petitioner's president. He was not employed or paid by [Y---] and that is why the staff concluded that the flights were not common carriage use by [Y---].

Petitioner has submitted evidence showing that the purpose of each disputed flight was to carry passengers unrelated to petitioner. In each case, the passenger contracted with [Y---] for carriage. [Y---] billed the customer and the customer paid [Y---] at standard common carriage rates. Other than allowing Mr. X to serve as pilot, petitioner did not participate in these transactions in any way.

Petitioner explains that Section 4.5 of its lease agreement with [Y---] requires petitioner to pay for the pilot (and other crew members) when [Y---] uses the aircraft in common carriage. To avoid these charges, petitioner allows Mr. X to serve as pilot as often as possible. Also, Mr. X gains experience flying the aircraft on these flights, which is desirable since he also serves as pilot on those occasions when petitioner uses the aircraft for its own purposes.

Documents submitted at the Appeals conference prove that Mr. X passed FAA inspections to be certified as a common carrier pilot in 1988 and 1989. Mr. X also testified that he was under [Y---]'s direction and control when he piloted the aircraft on the disputed flights. That is, [Y---] dictated (in accordance with its customer's desires and FAA rules) the flight times, destinations and other details of the flights.

Analysis and Conclusions

The staff argues that the three disputed flights were not common carriage because the pilot was an employee of petitioner, not an employee of [Y---]. According to the staff, [Y---] was merely "leasing" the aircraft. In support of this argument, the staff cites Sales and Use Tax Annotation 105.0060 (5/26/69) which provides:

"A company operating under an 'air taxi/commercial operator' certificate, issued by the Federal Aviation Administration, providing air transportation to the public in an aircraft under control of the company's pilot at a rate based on mileage plus standby and other charges, on a nonscheduled basis, is a common carrier within the meaning of Sections 6366 and 6366.1."

The annotation says that a company is a common carrier when, among other things, the aircraft is controlled by the company's pilot. Contrary to staff's argument, the annotation does not state or imply that using a company employee as pilot is a prerequisite to common carrier status. Nor can we see any logical reason for such a rule.

The only issue is whether these flights were common carriage. The undisputed evidence shows that they were. In each case, the customer contracted with [Y---] for common carriage, [Y--] billed the customer and the customer paid [Y---]. The flights cannot be considered personal use by petitioner, even though the pilot was petitioner's employee, since the passengers were unrelated to petitioner.

For these reasons, we conclude that petitioner qualifies for exemption under Revenue and Taxation Code Section 6366.1.

Recommendation

Cancel the determination.

James E. Mahler, Senior Staff Counsel

10/13/92

Date