

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
TRISTEN AVIATION GROUP, LLC,) OTA NO. 18083553
)
 APPELLANT.)
)
)
)

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Tuesday, June 18, 2019

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Proceedings, taken at
355 South Grand Avenue, South Tower, 23rd Floor,
Los Angeles, California, 91401,
commencing at 10:00 a.m. and concluding
at 10:36 a.m. on Tuesday, June 18, 2019,
reported by Ernalyn M. Alonzo, Hearing Reporter,
in and for the State of California.

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APPEARANCES:

Panel Lead: Hon. JEFF ANGEJA

Panel Members: Hon. KENNY GAST
Hon. LINDA CHENG

For the Appellant: RICHARD LEVY
ALAN ABRAMS

For the Respondent: Department of Tax and
Fee Administration
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SCOTT CLAREMON
LISA RENATI

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I N D E X

OPENING STATEMENT

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(Department's Exhibits were received at page 6.)

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Los Angeles, California; Tuesday, June 18, 2019

10:00 a.m.

ADMINISTRATIVE LAW JUDGE ANGEJA: We're now on the record in the Office of Tax Appeals oral hearing in the appeal of Tristen Aviation Group, Case ID 18083553. I'm repeating that so we have it on the record. We're in Los Angeles, California. Today is Tuesday, June 18th, 2019. It's 10:00 a.m. I'm Jeff Angeja. I'll be the lead administrative law judge for this hearing. My fellow co-panelist today are Kenny Gast and Linda Cheng.

And for appellant, could you please introduce yourselves for the record.

MR. LEVY: Sure. Richard Levy.

MR. ABRAMS: Good morning. Allan Abrams.

ADMINISTRATIVE LAW JUDGE ANGEJA: All right. And for CDTFA?

MR. ALDRICH: Good morning. Josh Aldrich.

MR. CLAREMON: Scott Claremon.

MS. RENATI: And Lisa Renati.

ADMINISTRATIVE LAW JUDGE ANGEJA: All right. Thank you.

This appeal involves one issue, which is whether appellant has established that its purchase and use of the aircraft in California is exempt from use tax because the

1 aircraft was purchased for use and was used in common
2 carrier operations.

3 A couple of preliminary housekeeping matters.
4 During our prehearing conference, the parties agreed to
5 the admission into evidence of CDTFA's Exhibits A through
6 M. I'll do this in two parts. Appellant's Exhibits 1
7 through 13, I presume there's still no objection to those.
8 And if not, I will admit those exhibits into evidence.

9 (Appellant's Exhibits were received in
10 evidence by the Administrative Law Judge.)

11 ADMINISTRATIVE LAW JUDGE ANGEJA: And then we
12 received by June 3rd, which was the agreed upon deadline,
13 we received CDTFA's proposed Exhibits N and O. And
14 appellant's objections to the exhibits and the proposed
15 rebuttal exhibit, I had caused an e-mail to be sent to the
16 parties. I propose to add those as well. They were met
17 by the deadline. And in terms of prejudice, you guys
18 actually had response to it. So I'd rather let them in.
19 I'll note the objection, but I'm still going to let them
20 in.

21 (CDTFA's Exhibits were received in
22 evidence by the Administrative Law Judge.)

23 ADMINISTRATIVE LAW JUDGE ANGEJA: And then we had
24 also agreed in the prehearing conference neither party has
25 any witness testimony today. So it's just arguments from

1 both sides. The significance of that is we can't make
2 factual findings based on an argument that you would make.
3 We would be making factual findings based on evidence in
4 the record. So if you need us to reach certain factual
5 conclusions, tie it to the evidence in your argument.

6 And as we agreed, we'll begin with appellant's
7 argument, which should not exceed 30 minutes. CDTFA will
8 then be -- we'll call it the department. It's a little
9 easier on the tongue. The department will then be allowed
10 to ask questions if they wish, as well the panel of
11 judges. The department will make its presentation. They
12 had said they could do it in 15 minutes. And then
13 appellant or the panel may be allowed to ask questions if
14 they wish. And then we will give the appellant a
15 rebuttal, approximately five minutes.

16 If no one has any procedural questions, we can go
17 ahead and let you begin your presentation.

18
19 OPENING STATEMENT

20 MR. LEVY: Okay. I'll start. Richard Levy. I'm
21 a CPA, and I have clients in the aircraft charter
22 business, and I'm also a pilot. So with 13 years of this
23 case, I've grown intimately familiar with it.

24 The background of this case is Tristen Aviation
25 Group purchased the aircraft for charter purposes in

1 December of 2004 on the advice of the owner's friend, a
2 man named Malahd Herfat. The business was operated until
3 early 2006 when Malahd disappeared, and at the same time,
4 files and the airplane's radios also disappeared.

5 So the main issue on this case is, was the
6 aircraft exempt under Regulation 1593(c), common carrier
7 examination which states, "If the flight is authorized or
8 permitted by the governmental authority under which the
9 aircraft is operated." Also other things it states is, "A
10 one-year test period where more than 50 percent of the
11 flights are charter usage and gross income of \$50,000 or
12 more." That's per subsection (d).

13 So our evidence to support our claim is federal
14 income tax returns, Exhibit A, that shows we grossed more
15 than \$50,000. We have flight logs of every flight the
16 plane took during test period. That's Exhibit 5 and E.
17 That's from a third party. So it's an independent source
18 that those flight logs were taken from.

19 Exhibit F we have charter invoices showing the
20 plane -- that the billing to the different companies that
21 were the customers; affidavit from Pylon, which is one of
22 the affiliates, Chief Pilot Robert McGrath, confirming
23 that charter use, at least from June 30th. That's
24 Exhibit H. Insurance declaration from the company's
25 insurance showing charter usage, that's Exhibit J.

1 There were charter advertisements. That's
2 Exhibit K. The police report where Malahd, the manager,
3 stole files and equipment from the plane, that's
4 Exhibit L. Four examples of test periods all resulting in
5 over 50 percent charter use, the department kept changing
6 the test periods during this whole ordeal. They changed
7 the test period dates with the hope that we would fail one
8 of them, which we haven't.

9 Exhibits B, C, D, and M include the latest test
10 period. Exhibit M, by the way, passed with 56 percent
11 charter use. And regarding the test that -- that I only
12 counted flights where I can match the invoice with the
13 flight. If there was no invoice, it went under personal
14 flight. So I -- I was very conservative about that. And
15 the last, FAA pilot's licenses for two charter pilots,
16 that's Exhibit 14. And I'll get to that later.

17 So in the end of the day, we're missing one
18 document. And -- and a little background on that. To be
19 a legal charter operator, the aircraft, not the company,
20 but the aircraft itself needs to be on an FAA Part 135
21 certificate. Or it could be temporarily piggybacked onto
22 another charter company's certificate. It has to be one
23 or the other.

24 Now, per Exhibit I, the FAA prohibited
25 piggybacking, which was revoked. But it revoked -- they

1 prohibited the piggybacking as of December 28, 2006. That
2 was the effective date of their -- of their circular,
3 which is actually a year -- close to a year after the test
4 period. So I believe that part is irrelevant. So at the
5 time of the test period, piggybacking was allowed onto
6 another company's Part 135 Certificate.

7 So the only documentation we're missing here to
8 make our case perfect is the charter certificate listing
9 the aircraft for much of the test period -- for most of
10 the test period, from January 15th to October. We try to
11 contact other charter companies years ago that may have
12 held the plane's 135 Certificate, but almost all were no
13 longer in business due to the Great Recession in 2007
14 which all but destroyed the aircraft charter business.

15 So the missing 135 Certificate, this mysterious
16 certificate, existed during the charter operation because
17 per the invoices, Exhibit F, you'll notice that two-thirds
18 of the charter flights during the test period were
19 subcontracts from large operators such as Clay Lacy
20 Aviation, which is an international company, Pylon,
21 Execujets, Royal Jets. There were quite a few companies.

22 And these companies would require proof of a part
23 135 Certificate and insurance from Tristen Aviation Group
24 or any subcontractor before allowing charters. Nobody is
25 going to charter a plane with you unless you have a Part

1 135 Certificate. And that's because -- excuse me -- the
2 penalty for an illegal charter is \$5,000 per flight.
3 That's what the FAA assesses. And no operator would take
4 that chance.

5 So looking forward here, in 2015 the State Board
6 of Equalization, as it was, requested Freedom of
7 Information Act documents from the FAA on information on
8 Tristen's Aircraft, Pylon Charter, Schaffer Air and the
9 licenses of two pilots involved with Tristen Aviation
10 Group. That's Exhibit N. The FAA billing to the state --
11 or the Equalization stated their search was done manually.

12 Per exhibit N, the FAA sent documentation on
13 Pylon Charter's 135 Certificate only, which was the
14 company that they piggybacked on just for a brief period
15 of time from October through -- I don't remember where it
16 ended. There was no response from the FAA on anything
17 else requested, including the two pilots nor any other
18 operator that carried the plane's Part 135 Certificate.

19 I was able to access the two pilots and their
20 licenses on the FAA websites within five minutes. That's
21 Exhibit 14 that we just put in. Yet, the FAA did not
22 provide these simple to locate documents to the State
23 Board of Equalization. Thus, the FAA did an incomplete
24 job on the Freedom of Information Act request. And
25 because of that, it's reasonable to question the results

1 of what else did they neglect to find, perhaps the missing
2 Part 135 Certificates for our aircraft.

3 So in summary -- and I made this much under
4 30 minutes here for you -- except for that one missing
5 piece of paper, that one piece of paper missing, the sheer
6 volume of evidence provided by both parties indicates that
7 my client operated a legal Part 135 Charter. And again,
8 no charter operator would have hired this aircraft for
9 subcontract risking \$5,000 fines of the pilots and
10 passengers without having knowledge that the aircraft was
11 on a charter certificate. And that's why the aircraft
12 should be exempt from the use tax.

13 ADMINISTRATIVE LAW JUDGE ANGEJA: Does that
14 conclude -- that was much faster than the 30 minutes.

15 MR. LEVY: I'm trying.

16 ADMINISTRATIVE LAW JUDGE ANGEJA: I don't want to
17 cut you off. But if that concludes it, we'll turn it over
18 to the department.

19 Unless you have questions? I'll save mine for
20 now. Okay. Department go ahead.

21

22 OPENING STATEMENT

23 MR. ALDRICH: Good morning. I'm Josh Aldrich
24 from the California Department of Tax and Fee
25 Administration's legal department. With me today are

1 Scott Claremon and Lisa Renati who will be representing as
2 staff.

3 During the prehearing conference, the parties
4 stipulated in part as follows: The aircraft was purchased
5 on December 30th, 2004, in California. The first
6 operational use of the aircraft occurred on January 15th
7 when the aircraft was flown between Van Nuys, California
8 and Las Vegas, Nevada. The seller of the aircraft did not
9 hold, and was not required to hold, a seller's permit in
10 California. Based on these stipulated facts, appellant
11 owes use tax on the purchase and use of the aircraft
12 unless an exemption or exclusion applies.

13 There is one remaining issue, whether appellant's
14 purchase and use of the aircraft in California is exempt
15 from tax under Regulation 1593. Regulation 1593 provides
16 that neither sales nor use tax applies to the sale of/or
17 the storage use or other conception of aircraft sold,
18 leased, or sold to persons for the purpose of leasing the
19 aircraft to a person who operates the aircraft as a common
20 carrier of persons or property, but only if the person
21 operates the aircraft under authority of California,
22 United States or foreign government, and the person is
23 authorized or permitted by that person's government, the
24 person's governmental authority to operate the aircraft as
25 a common carrier.

1 If more than one half of the operational use of
2 an aircraft during the first 12 months after the first
3 functional use is used as a common carrier of persons or
4 property, the purchaser -- the purchasers or lessee's
5 principal use of the aircraft will be deemed to that of
6 the common carrier. As stipulated, the 12-month test in
7 this case begins January 15, 2005, through
8 January 17th, 2006.

9 A common carrier is any person who engages in the
10 business of transporting persons or property for hire or
11 compensation and who offers his or her services
12 indiscriminately to the public or some portion of the
13 public. Operational use refers to the actual time during
14 which an aircraft is operated and powered navigation in
15 the air. Each flight is examined separately for purposes
16 of determining common carrier use.

17 A flight qualifies as common carrier use of the
18 aircraft, only if the flight is authorized or permitted by
19 the governmental authority under which the aircraft is
20 operated and involves the transportation of persons or
21 property. Where the aircraft does not transport persons
22 or property, the flight does not qualify as a common
23 carrier flight. Likewise, where the aircraft is not
24 authorized, the flight does not qualify as a common
25 carrier flight.

1 Appellant is not entitled to a 1593 exemption
2 without evidence to prove the entitlement, Revenue and
3 Taxation Code 6091. Exemptions are strictly construed
4 against the taxpayer who has the burden of proving that
5 the statutory requirements have been satisfied. It's
6 appellant's responsibility to maintain accurate records
7 and make them available to the department.

8 And although the department first requested the
9 flight logs on August 25th, 2005, the appellant claims
10 that the complete flight logs are no longer in his
11 possession. In lieu of complete flight logs, appellants
12 submitted partial system flight logs marked as Exhibit 3;
13 flight aware documents marked as Exhibit 5; flight plan
14 documents marked as Exhibit 11; invoices for flights under
15 Tristen Aviation Group and Pylon International, LLC,
16 marked as Exhibit F; and a statement under penalty of
17 perjury from Robert McGrath marked as Exhibit H.

18 The Federal Aviation Administration has powers to
19 regulate all aspects of civil aviation in the nation,
20 including common carrier flights. As relevant here, the
21 FAA issues Part 135 Certificates to operator to authorize
22 private charter flights of common carriage. Appellant has
23 not claimed to have possessed a Part 135 Certificate.
24 Rather, appellant claims that it was listed or piggybacked
25 onto Part 135 Certificate of Pylon International as early

1 as its first claimed common courier flight, which occurred
2 on August 21st, 2005 until sometime in January of 2006.
3 The invoice for the August 21st, 2005, is marked as
4 Exhibit F, page 1.

5 In support of this assertion, appellant provided
6 a copy of Pylon's Part 135 specification, dated
7 October 24th, 2005, which include -- included said
8 aircraft's tag number N52LT, marked as Exhibit G. We
9 reiterate that it is appellant's burden to prove
10 entitlement to the exemption. And this single document is
11 insufficient to show that the flight's claim as common
12 carrier were authorized by the FAA, particularly for
13 flights prior to October 24th, 2005.

14 In addition to the Part 135 Certificate, the FAA
15 imposed an insurance requirement on Part 135 Common
16 Carriers to operate under the FAA's authority. The
17 insurance must reflect that it is the carrier, not the
18 owner, that is conducting the Part 135 revenue flights,
19 and that it is the carrier's actions or inactions that are
20 being insured, as noted in Exhibit I, page 44.

21 Appellant has not provided evidence that the
22 aircraft was insured by Pylon. Appellant provided a copy
23 of Part 135 insurance wherein appellant, not Pylon,
24 insured the aircraft marked as Exhibit J. Appellant has
25 not shown that the flights were authorized, according to

1 FAA insurance requirements. Regardless, the department
2 obtained a copy of all of Pylon's Part 135 operations
3 specification documents for the relevant period through
4 the Freedom of Information Act request made to the FAA,
5 marked as Exhibit N.

6 These include the operation specifications dated
7 December 8th, 2004, August 8th, 2005,
8 September 16th, 2005, October 24th, 2005, and
9 December 6th, 2005. The aircraft's tag number does not
10 appear on any of the operation specifications other than
11 the October 24th document. These documents clearly
12 establish that appellant's aircraft was not added to
13 Pylon's Part 135 Certificate until October 24th, 2005, and
14 was no longer on Pylon's Part 135 as of December 6, 2005.

15 Since appellant did not have its own Part 135
16 Certificate and has not provided evidence to prove that it
17 is operating under Pylon's Part 135 Certificate prior to
18 October 24th, 2005, only the common carrier flights from
19 October 24th, 2005, through December 6th, 2005, may be
20 considered authorized for the purposes of Regulation 1593.

21 Using all the flight records and invoices
22 provided by the appellant, the department calculates the
23 aircraft was flown for 246.89 hours during the test
24 period, and was flown for 36.2 hours for authorized common
25 carrier flights. Common carrier flights, therefore,

1 constitute 14.67 percent of the total flights -- flight
2 time during the test period, which falls well below the 50
3 percent threshold.

4 Accordingly, appellant is not entitled to
5 exemption from use tax set forth in 1593. We have
6 provided Exhibit O to show how we calculated those totals
7 from the flight records and invoices provided by
8 appellant. As summarized in Exhibit O, appellant's flight
9 summaries and invoices establish that even if all of the
10 claimed common carrier flights were authorized by the FAA,
11 common carrier flights only constitute 115.9 hours, which
12 is 46.97 percent of the total flight time during the test
13 period.

14 In other words, appellants still would not meet
15 the 50 percent threshold to qualify as a common carrier.
16 We note that our summary list all of the flights from
17 those sources and identifies where there are conflicts
18 between them. We generally reconcile the discrepancies in
19 favor of appellant. We also noted where flights listed on
20 appellant's source documents are not included on the
21 summaries that he has provided.

22 But to reiterate, appellant was only authorized
23 to operate as a common carrier from October 24, 2005,
24 through December 6th, 2005, and the flight time and the
25 transportation of people or property during that period

1 falls well below the 50 percent threshold as required by
2 Regulation 1593.

3 Based on the evidence in the record, appellant
4 has not proved he's entitled to the common carrier
5 exemption under Regulation 1593. Appellant's purchase and
6 use of an aircraft in California was subject to use tax.
7 Therefore, we respectfully request that you deny the
8 appeal.

9 ADMINISTRATIVE LAW JUDGE ANGEJA: Okay. I want
10 to have your rebuttal, but I want to ask a quick
11 clarifying question perhaps to -- because I think it'll
12 certainly help me understand everything that'll come from
13 this point forward.

14 These were subcontracts? In other words,
15 appellant leases the aircraft to, say, Pylon but then it's
16 Pylon that's actually conducting charter operations for
17 its own customers?

18 MR. LEVY: Not exactly. The Pylon or another
19 company prior to that, they just piggybacked on -- they
20 probably paid them something just to piggyback onto their
21 Part 135 Certificate. The two-thirds of the charters were
22 done as a subcontract. So when Pylon or Clay Lacy when
23 they had -- they didn't have a plane available in Van
24 Nuys. Let's say, they would subcontract with Tristen
25 Aviation group and actually charter the plane. So the

1 charter is a subcontract charter, and that's why insurance
2 isn't necessary. The plane has to have its own insurance.

3 ADMINISTRATIVE LAW JUDGE ANGEJA: Okay. And then
4 a question for the department. As consistent with the DNR
5 in your brief, you take the position that the piggyback
6 operation was legal until that notice -- the FAA notice
7 said that it was illegal? In other words, you're -- the
8 presentation you effectively conceded that the fact that
9 Pylon had a 135 Certificate means that Pylon's hours
10 qualify.

11 MR. CLAREMON: I think we conceded that they can
12 piggyback onto Pylon's certificate when they are listed
13 when it's -- the evidence that it's listed on, the Pylon
14 certificate.

15 ADMINISTRATIVE LAW JUDGE ANGEJA: Okay.

16 MR. CLAREMON: Prior to Exhibit I, which was
17 issued after this.

18 ADMINISTRATIVE LAW JUDGE ANGEJA: So just one
19 other note and this, again, is more factual. I'm not
20 trying to decide whether it was flown with a proper
21 certificate or not. But both parties have taken the
22 presumption -- taken the position that -- pick any given
23 invoice. Let's say 2.5 hours invoice to Pylon for a
24 charter. They've got a certificate, so that's a
25 qualifying 2.5 hours. Were ferry flights involved? In

1 other words, that aircraft had to get from Van Nuys to LAX
2 to pick up Britney Spears to go to Las Vegas.

3 MR. LEVY: Yes. The ferry flights were not
4 counted as charter flights.

5 ADMINISTRATIVE LAW JUDGE ANGEJA: But the
6 invoices don't break out the ferry flight portion. And I
7 know there's a ferry flight portion that generally gets
8 billed at the same hourly rate as a charter.

9 MR. LEVY: Correct. I didn't see a ferry
10 flight -- any ferry flight invoices.

11 MR. ALDRICH: Actually, there are a couple of
12 ferry flight invoices under Pylon, and we marked them as
13 non-carrier in their Exhibit O. Part of the problem with
14 the analyses with the subcontracting out is that we don't
15 know exactly which ones were transporting persons or
16 property. So that gives it -- makes a difficult position
17 of asserting that those are in fact common carrier
18 flights.

19 ADMINISTRATIVE LAW JUDGE ANGEJA: My concern is
20 that if we were to take -- if we were to conclude that all
21 of the subcontracting was under the authority of the
22 United States, Part 135, we still may not lack enough
23 precision. I don't know which way we'd come down on that,
24 but it might not be that 100 percent of the allegedly
25 qualifying hours are still qualifying hours.

1 But no one has argued that. I'm just asking
2 that.

3 MR. LEVY: It's possible.

4 ADMINISTRATIVE LAW JUDGE ANGEJA: Okay.

5 MR. CLAREMON: And again, in terms of our
6 summary, we've -- as Mr. Aldrich said, we've resolved all
7 ambiguities just to show the maximum time we believe. But
8 where they indicate it on the invoice that there was zero
9 passengers, that's where we didn't count those as common
10 carrier. And those are indicated on the invoice.

11 ADMINISTRATIVE LAW JUDGE ANGEJA: I'll ask the
12 last one since I'm in for a penny, in for a pound. And I
13 apologize for interrupting before you can rebut. The
14 position -- how do I say this? The department is
15 conceding that what the FAA says was illegal. The
16 piggyback operation was illegal. You're still concluding
17 that it was legal until the FAA notice said it was not.

18 In other words it's -- I'm just asking. It's
19 declarative of existing law. It says it's not legal to do
20 that, but for purposes of this hearing, you guys are
21 saying it's okay. Your position is that you would accept
22 that as flying as per the United States?

23 MR. CLAREMON: Yeah. Our position -- yeah. Our
24 position is that the extra requirements of operational
25 control set forth in Exhibit I consistent with appeals

1 decision -- our earlier appeals decision, didn't apply
2 prior to 2006 when they still had to be on a Part 135 --

3 ADMINISTRATIVE LAW JUDGE ANGEJA: Okay. I just
4 wanted to make sure.

5 MR. CLAREMON: -- when they actually piggybacked.

6 ADMINISTRATIVE LAW JUDGE ANGEJA: Okay. With
7 that I apologize the interruption. I'd like you to be
8 able to rebut and address anything I've asked as well.

9 MR. LEVY: Okay. Sure. As far as the insurance
10 issue goes, the insurance also follows the airplane. So
11 the airplane must be insured as well as the charter
12 company must be insured.

13 ADMINISTRATIVE LAW JUDGE ANGEJA: Okay. And
14 that's it for your rebuttal?

15 MR. ABRAMS: Well, the final point I wish to
16 reiterate is our objection, or at least bring your
17 attention to Exhibit N. I know it was admitted, but it
18 was provided to us the last minute, even though it was
19 available since 2015. And based on the invoice attached
20 to the document, it does show \$188 of charges for
21 photocopies. I don't know if the document, Exhibit N, is
22 a complete integrated copy of the FAA's response to the
23 request that was made based on Freedom of Information Act.
24 We had no chance to verify any of that.

25 So I would like to invite your attention to look

1 at the credibility of the document and when you weigh the
2 evidence in front of you.

3 ADMINISTRATIVE LAW JUDGE ANGEJA: Okay. I
4 understand the basis for that objection. The evidence is
5 relevant. So in that instance we will admit it, and then
6 we will weigh it and take that objection into account as
7 well.

8 MR. ABRAMS: Understood.

9 ADMINISTRATIVE LAW JUDGE ANGEJA: It's not
10 satisfactory for us to say we will let it in for what it's
11 worth, but we will let it in for what it's worth.

12 MR. CLAREMON: May we provide a response to that?

13 ADMINISTRATIVE LAW JUDGE ANGEJA: Sure.

14 MR. CLAREMON: We would just like to point out
15 again that it's the tax payer's burden to provide the
16 entitlement to the exemption. And we also point out that
17 this was a Freedom of Information Act request made to the
18 FAA, essentially, as a private citizen. These are
19 publicly available documents from the FAA. There's no
20 reason that we could obtain them and anyone else couldn't.

21 So they were available far before 2015. That's
22 when we got them. That's when the request was made. And
23 it is correct. It was a voluminous production, and these
24 were the ones that we were provided because they are
25 relevant to the issue of this case, which was whether they

1 were on Pylon's Part 135.

2 ADMINISTRATIVE LAW JUDGE ANGEJA: Okay. Does
3 either party have anything further to add?

4 MR. ABRAMS: At this point I would -- I think the
5 voluminous document, whether it was, should have been
6 attached as Exhibit N. That would have provided a better
7 basis for us to evaluate. I think based on the evidence
8 submitted and if you look at Exhibit N, the right
9 perspective, I think we have met our burden to prove that
10 this exemption does exist.

11 ADMINISTRATIVE LAW JUDGE ANGEJA: Okay.
12 Questions from my co-panelist?

13 ADMINISTRATIVE LAW JUDGE CHENG: Yes. Thank you.

14 ADMINISTRATIVE LAW JUDGE ANGEJA: Go ahead.

15 ADMINISTRATIVE LAW JUDGE CHENG: For the
16 appellant, I'd like to hear your response to the
17 department's calculation of the percentage that the
18 charter or the plane was used for common carrier flights,
19 specifically 14 percent, 14.67 versus 46.9 percent.

20 MR. LEVY: Sure. When I did the calculations for
21 the January 15th through January 17th, iteration of the
22 test period, I came out with 56 percent. And that is if
23 it was a legal charter operation from January 15th to
24 January 17th. The 14 percent or whatever the State came
25 out with, was the calculation if it in fact wasn't part

1 135 for the entire period. That's the difference.

2 ADMINISTRATIVE LAW JUDGE CHENG: But the State
3 calculated 46 percent for allowing for the piggyback
4 flights.

5 MR. LEVY: I don't know what the State did. I
6 got 56 percent. I'm not sure what they did. Yeah, if I
7 can add to that? If you look at page 4 of Exhibit 13, it
8 shows 119.4 charter hours out of a total of 212.8.

9 ADMINISTRATIVE LAW JUDGE ANGEJA: Hold on a
10 second so we can catch up.

11 MR. LEVY: Okay.

12 ADMINISTRATIVE LAW JUDGE ANGEJA: Okay. Go
13 ahead.

14 MR. Levy: Okay. On page 4, the total at the
15 bottom shows total hours at 212.8. And charter would be
16 119.4, and that's 56.1 percent.

17 ADMINISTRATIVE LAW JUDGE ANGEJA: Do you guys
18 want to respond to that?

19 MR. CLAREMON: I -- I think you can -- the
20 difference in -- sorry. I think the difference in the two
21 calculations can -- there's probably three different
22 factors. One, there appear to be flights -- non-charter
23 flights that are listed on some of the sources that
24 appellant has provided that weren't listed on their
25 summary, and we've indicated where those are. And again,

1 those are from appellant's sources they provide to us.

2 Two, there was a couple of flights that on the
3 invoice stated that there was no passengers on the plane
4 at the time. And it appears consistent with the flights
5 that looked like, you know, they dropped someone off and
6 went, picked someone up, dropped someone off. And so we
7 do not include those where the invoice explicitly stated
8 that there was no passengers.

9 And then three, there were a couple of other
10 instances where there were flights that were shown on the
11 summaries and included on the -- where flights that took
12 place that were on the summaries but were not consistent
13 with the information on the invoice. And it appeared that
14 appellant had included them under a specific charter
15 invoice, when in fact they were not related to that
16 invoice.

17 And again, we indicated anytime we made a
18 determination like that we indicated it. Otherwise
19 whenever there was a discrepancy, for instance on a
20 non-charter flight of any time, we would pick the lower
21 number which benefits the appellant in terms of this
22 calculation. And -- and we made similar, kind of,
23 determination in favor of the appellant while we were
24 looking at those little discrepancies in there.

25 ADMINISTRATIVE LAW JUDGE CHENG: Okay. Thank

1 you. That's helpful.

2 MR. LEVY: Can I respond to that?

3 ADMINISTRATIVE LAW JUDGE ANGEJA: Sure.

4 MR. LEVY: Oh, Section 11593 -- this paper is so
5 old -- 1593-C(1)(a) says, operational use means the actual
6 time during which the aircraft is operated and powered
7 navigation in the air. Operational use included
8 positioning or repositioning aircraft by flying the
9 aircraft from one point to another. Ferry flights -- is
10 what it says in parenthesis -- except when such flight are
11 solely for purposes of having the aircraft repaired.

12 So ferry flights are part of the operational use
13 of the plane.

14 ADMINISTRATIVE LAW JUDGE ANGEJA: Right. Part of
15 the denominator.

16 MR. LEVY: Yeah. It's part -- yeah. It is a
17 part.

18 ADMINISTRATIVE LAW JUDGE ANGEJA: A ferry flight
19 is not part of the numerator. A ferry flight does not
20 contribute to the 50 percent calculation. It's added to
21 the denominator, which is the base, the operational time
22 on here.

23 MR. LEVY: Except operational use as common
24 carrier as in (a). So they said, okay. So first
25 operational use, they're talking about what the first

1 operational use is.

2 ADMINISTRATIVE LAW JUDGE ANGEJA: Yes. All
3 right. Did you have questions?

4 ADMINISTRATIVE LAW JUDGE GAST: Yeah, I have a
5 question for the department just so I understand the
6 regulation a little better. Is a Part 135 Certificate
7 required by the taxpayer?

8 MR. ALDRICH: It's required, but the plane beyond
9 a Part 135, it could be for it to piggyback. But if
10 you're doing private charter flights for carrying persons
11 or property or authorization from the FAA, you need to be
12 on somebody -- the plane needs to be on somebody's Part
13 135.

14 MR. CLAREMON: Or some other type of -- I believe
15 there are other types of charter certificates as well.

16 MR. ALDRICH: It's based off of aircraft size,
17 passenger numbers, and things like that.

18 ADMINISTRATIVE LAW JUDGE GAST: So the taxpayer
19 itself doesn't need to have the certificate. The carrier
20 does, basically.

21 MR. ALDRICH: And the aircraft would need to be
22 on the carrier's Part 135.

23 ADMINISTRATIVE LAW JUDGE GAST: Okay.

24 MR. CLAREMON: And as Exhibit I shows, you know,
25 after Exhibit I was issued, it can -- it doesn't have to

1 be the certificate holder's, but there's significant
2 control in that the carrier has to -- the certificate
3 holder has to have over the aircraft.

4 ADMINISTRATIVE LAW JUDGE GAST: Okay. And this
5 is not a lease situation where Tristen, in your view,
6 bought the aircraft from the seller and leased it out to a
7 carrier. Would that change the Part 135 issue?

8 That's okay if you don't -- yeah. I don't know
9 if the taxpayer wants to respond to any of that? You
10 agree you would need a Part 135 Certificate? Sorry. Go
11 ahead.

12 MR. LEVY: If you were leasing the plane, no.
13 But if you're chartering it you do. So -- and in this
14 case there was no lease of any plane.

15 ADMINISTRATIVE LAW JUDGE GAST: Okay. Okay.
16 Thank you. All right. That's it for my questions.

17 ADMINISTRATIVE LAW JUDGE ANGEJA: I don't know if
18 it affects the case. But the piggyback operations,
19 they're not legal today as far as you're concerned, or the
20 FAA is allowing this and you would still take this
21 position today that I could charter my plane to any
22 company so long as they were certified under Part 135 for
23 that aircraft? It would qualify?

24 MR. CLAREMON: Again, our -- as far as we know
25 post 2006, piggybacking is allowed assuming it complies

1 with the strict guidelines set forth in Exhibit I, which
2 you can read it. The certificate holder has to exert
3 significant control over the operation of the aircraft.

4 ADMINISTRATIVE LAW JUDGE ANGEJA: Okay. I don't
5 think it doesn't bear on this case. I'm just curious. So
6 I don't have any additional question. If the parties
7 don't either, I think we can close the hearing. No
8 questions? All right. Then the hearing record is closed.
9 The hearing is closed.

10 Thank you for attending, and we have some
11 homework to do. We're required to issue a decision within
12 100 days of the close of evidence, which is today. So
13 okay. Thank you.

14 (Proceedings adjourned at 10:36 a.m.)
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I, Ernalyne M. Alonzo, Hearing Reporter in and for
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I further certify that I am in no way interested
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I have hereunto subscribed my name this 15th day
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