OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18083553
	) CDTFA Case ID: 359778
TRISTEN AVIATION GROUP, LLC	) CDTFA Account No. 84-079720
	)
	) Date Issued: July 25, 2019
	)
	)

OPINION

Representing the Parties:

For Appellant:	Richard Levy, C.P.A. Robert Silverman, Attorney
For Respondent:	Joshua A. Aldrich, Tax Counsel Scott Claremon, Tax Counsel IV Lisa Renati, Supervising Tax Auditor
For Office of Tax Appeals:	Lisa Burke, Business Taxes Specialist III

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561, Tristen Aviation Group, LLC (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant's timely petition for redetermination of a Notice of Determination (NOD), issued on June 22, 2006, which assessed a use tax liability of $109,314, plus accrued interest. CDTFA issued the NOD based on its disallowance of appellant's claimed exemption from use tax on its purchase of a 1982 Cessna Citation II 550 aircraft for $1,325,000.

Office of Tax Appeals (OTA) Administrative Law Judges Jeffrey G. Angeja, Linda C. Cheng, Kenneth Gast held an oral hearing in this matter in Los Angeles, California, on June 18, 2019. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

ISSUE

Whether appellant has established that its purchase and use of the aircraft in California is exempt from tax because the aircraft was purchased for use and was used in common carrier operations.

FACTUAL FINDINGS

1. The parties agree that: 1) appellant purchased the aircraft in question on December 30, 2004, in Van Nuys, California; 2) the aircraft was first functionally used in California; 3) the seller of the aircraft did not hold, and was not required to hold, a seller's permit in California; and that 4) the first operational use of the aircraft after its purchase occurred on January 15, 2005, when the aircraft was flown round-trip between Van Nuys, California, and Las Vegas, Nevada.
2. The parties also agree that for purposes of the claimed common carrier exemption, the applicable 12-month test period began on January 15, 2005. The aircraft underwent repairs or maintenance on April 8, 2005, April 21, 2005, and April 30, 2005, prior to its alleged first use as a common carrier. Thus, the 12-month test period is extended by three days, and encompasses January 15, 2005, through January 17, 2006.
3. As relevant herein, during the test period, appellant "chartered" (i.e., leased) the aircraft to third-party aircraft operators such as Pylon International, LLC (Pylon); Viking Aviation, LLC; Executive Jet Charter; and Royal Jets. During the test period, these aircraft operators leased appellant's aircraft and used it to provide common carrier operations for their own customers. Appellant charged the operators based on an hourly rate and the flight time of the charter, among other items.
4. There is no evidence that appellant held a Federal Aviation Regulation (FAR) Part 135 certificate (see 14 C.F.R. § 119.1 et seq.) issued by the Federal Aviation Administration (FAA) authorizing appellant to offer common carrier services.
5. Pylon obtained a Part 135 certificate to operate appellant's aircraft for the period October 24, 2005, through December 6, 2005. There is no evidence that any of the remaining operators to whom appellant leased its aircraft held a Part 135 certificate for this aircraft during the test period.

6. CDTFA determined that appellant provided insufficient documentation to support an exemption from use tax, and, on June 22, 2006, issued a NOD to appellant for use tax on appellant's purchase and use of the aircraft in California. Appellant timely petitioned the NOD. This appeal followed.

DISCUSSION

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. (R&TC, §§ 6201, 6202). R&TC section 6366(a)(1) provides an exemption from use tax on the purchase of an aircraft for use in common carrier operations, and R&TC section 6366.1(a) provides an exemption from use tax on the purchase of an aircraft for the purpose of leasing it to lessees who will use the aircraft in common carrier operations. Both statutes provide that in order to qualify for the exemption from use tax, the person using the aircraft as a common carrier must operate under the authority of the laws of this state, the United States, or a foreign government. (R&TC, §§ 6366(a), 6366.1(a).)

California Code of Regulations, title 18, section (Regulation) 1593 was promulgated to implement R&TC sections 6366 and 6366.1. Regulation 1593(a)(2) defines the term "common carrier" as any person who engages in the business of transporting persons or property for hire or compensation and who offers the services indiscriminately to the public or to some portion of the public. It is rebuttably presumed that an aircraft is not used in common carrier operations if the yearly gross receipts from the use of the aircraft as a common carrier do not exceed the $50,000 threshold that applies to this aircraft. (Reg. 1593(c)(1)(D - E).) Regulation 1593(c)(1) provides for a 12-month test period, commencing with the first operational use of the aircraft, during which use of the aircraft in common carriage for more than one-half of its operational use is deemed to demonstrate that the aircraft was purchased for use in common carriage. "Operational use" means the actual time during which the aircraft is operated in powered navigation in the air. (Reg. 1593(c)(1)(A).) For the test period, each flight of the aircraft is examined separately for purposes of determining common carrier use. (Reg. 1593(c)(1)(B).)

A flight qualifies as a common carrier use of the aircraft for purposes of the exemption only if the flight is authorized or permitted by the governmental authority under which the aircraft is operated and involves the transportation of persons or property. (Reg. 1593(c)(1)(C).) FAR section 119.33(b) provides that a person other than a direct air carrier may not conduct any

commercial passenger or cargo aircraft operation for compensation or hire under FAR Part 121 or Part 135 unless that person (1) is a citizen of the United States; (2) obtains an Operating Certificate; and (3) obtains operations specifications that prescribe the authorizations, limitations, and procedures under which each kind of operation must be conducted. FAR Part 121 applies to scheduled air carriers (i.e., airliners), and FAR Part 135 applies to commuter and on-demand operations, such as the type of business that appellant claims to have operated. Clearly, common carrier "on-demand" operations are not authorized by the FAA unless the operator has obtained a Part 135 certificate. Therefore, in order to demonstrate that any common carrier flights were authorized or permitted by the governmental authority under which the aircraft was operated (in this case, the FAA), a Part 135 certificate is required.

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). Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

On appeal, appellant asserts its use of the aircraft is exempt from use tax because its lessees' qualifying common carrier use of the aircraft totaled 56 percent of the operational use during the test period. In support of its position, appellant states that Pylon obtained a Part 135 certificate to operate appellant's aircraft for the period October 24, 2005, through January 31, 2006. Appellant contends that the remaining operators to whom it leased the aircraft must have held Part 135 certificates to operate the aircraft, because they would have been subject to severe penalties from the FAA if they operated the aircraft without the Part 135 certificate. Appellant claims that the other operators' Part 135 certificates "probably were included" with documentation stolen by its former general manager, and appellant argues that the lack of a Part 135 certificate in evidence should not preclude a finding that the aircraft legally was operated as a common carrier under Part 135 throughout the test period.

Next, appellant submitted a schedule showing flights from January 15, 2005 through January 17, 2006, illustrating its contention that the qualifying common carrier use of the aircraft totaled 56 percent of the operational use during the test period. According to appellant, all of the flights shown in its schedule were shown in FlightPlan.com data and only flights with corresponding invoices were categorized as Part 135 charter flights.

Here, the only Part 135 certificate in evidence for this aircraft is the Part 135 certificate obtained by Pylon for the period October 24, 2005, through December 6, 2005. There is no evidence that any other operator held a Part 135 certificate for this aircraft, and appellant's assertion that the other operators must have done so lacks any substantiating evidence. Nevertheless, during the hearing, CDTFA stipulated that if at least one of appellant's lessees held a Part 135 certificate for a given period with respect to this aircraft, then all of the common carrier hours flown by appellant's lessees during that period would qualify as having been flown under the authority of the United States.[1] Thus, since Pylon held a Part 135 certificate for this aircraft from October 24, 2005 through December 6, 2005, CDTFA concedes that all of appellant's claimed common carrier flight hours during this period qualify. Using appellant's Exhibit 13, we compute that appellant claimed 38 common carrier hours from October 24, 2005 through December 6, 2005, which is 17.85 percent of appellant's total claimed 212.8 operational hours during the test period. Accordingly, we find that appellant has failed to establish that its aircraft was used in common carrier operations for more than 50 percent of the test period, and therefore the purchase and use of the aircraft does not qualify for the exemption.

[1] As noted above, each flight of the aircraft is examined separately for purposes of determining common carrier use (Reg. 1593(c)(1)(B)), each flight must be flown under the authority of the governmental authority under which it is operated (Reg. 1593(c)(1)(C)), and FAR Part 119.33(b) requires every operator of an aircraft engaged in common carrier operations to hold a Part 135 air carrier certificate. Thus, absent CDTFA's stipulation, we would conclude that only Pylon's flight hours during the period October 24, 2005, through December 6, 2005, qualify as having been flown under the authority of the United States. Since this distinction does not affect our resolution of this appeal, we decline to further address it.

HOLDING

Appellant failed to establish that its purchase and use of the aircraft in California is exempt from tax because the aircraft was purchased for use and was used in common carrier operations.

DISPOSITION

CDTFA's action in denying appellant's petition for redetermination is sustained.

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Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

We concur:

DocuSigned by:
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Linda C. Cheng
Administrative Law Judge

DocuSigned by:
Kenneth Gast
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Kenneth Gast
Administrative Law Judge