

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

TEMSCO HELICOPTERS, INC.,

Plaintiff,

vs.

UNITED STATES of AMERICA,

Defendant.

UNITED STATES of AMERICA,

Counterclaimant,

vs.

TEMSCO HELICOPTERS, INC.,

Counter-defendant.

Case No. 5:07-cv-00001-JWS

[Re: Motions at Dockets 32 & 40]

ORDER AND OPINION

I. MOTION PRESENTED

On March 31, 2007, Temsco Helicopters, Inc. (Temsco), filed a complaint claiming that the Internal Revenue Service wrongfully assessed taxes against it from 2001 - 2004.¹ The defendant filed an answer and a counterclaim, seeking back taxes, on May 21, 2008.² The parties have now filed motions for summary judgment.³ Oral argument was heard on October 31, 2008.

The question at issue is whether the flights offered by Temsco are considered taxable flights under 26 U.S.C. § 4261 as being operated on “established lines,” or

¹ Doc. 1.

² Doc. 3.

³ Docs. 32, 40.

whether the flights were not operated on established lines and are therefore exempt from the Air Transportation Excise Tax as provided under 26 U.S.C. § 4281.

II. STANDARD OF REVIEW

Summary judgment is appropriate only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law.”⁴ The party moving for summary judgment has the initial burden of showing the absence of a genuine issue of material fact.⁵ The court must view all evidence and draw all inferences therefrom in the light most favorable to the nonmoving party.⁶ The burden then shifts to the nonmoving party to “set forth specific facts demonstrating that there is a genuine issue for trial.”⁷ However, there must be more than a mere “scintilla of disputed evidence.”⁸ As explained by the Supreme Court, “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.”⁹

III. FACTS

The undisputed facts in evidence are as follows:

The Internal Revenue Service (IRS) audited Temsco in 1994, and recognized that its operations were no longer subject to the Air Transportation Excise Tax (since Temsco had eliminated a portion of its previous business),¹⁰ but that Temsco was

⁴ See Fed. R. Civ. P. 56(c)

⁵ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

⁶ See *Scott v. Harris*, 127 S.Ct. 1769, 1774, 1775 (2007); *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000).

⁷ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

⁸ *Id.* at 252.

⁹ *Id.* at 248.

¹⁰ Doc. 32-7 at 5 (June 11, 1979, Air Carrier Certificate); Doc. 32-8 at pp. 8-9 (Hicks Depo at pp. 68-69); Doc. 43-8 at pp. 7-9, Doc. 41-36 at pp. 8-15, and Doc. 45-6 at pp. 9-10

instead responsible for paying the Aviation Fuel Excise Tax. The IRS advised Temsco of this by letter from the Acting District Director dated April 5, 1994, and Temsco has been paying the Aviation Fuel Excise Tax in compliance with IRS written instructions since April of 1994.¹¹

Temsco has since been in the charter helicopter business, and offers flight-seeing tours on helicopters weighing less than 6000 pounds.¹² Temsco offers both charters of (a) an entire aircraft on an hourly basis; and (b) flight-seeing tours on a per seat cost, with payment for at least a 3-person minimum.¹³ It has an Air Carrier Certificate from the Federal Aviation Authority (FAA) authorizing it to operate charter flights, but not regularly scheduled flights.¹⁴ The flights operate only on the demand of its customers, and if there is insufficient demand, Temsco does not fly.¹⁵

(Berto Depo at pp. 81-88); Doc. 4-39 at p. 19 (Hicks Depo at p. 70).

¹¹ Doc. 32 at pp. 4-5; Doc. 32-2 at p. 2 (1994 IRS letter); Doc. 32-2 at pp. 7-10, 13, and Doc. 41 at pp. 10-15 (Berto Depo at pp. 78, 81-89); Doc. 41-39 at pp. 17-18 (Hicks Depo at pp. 68-69).

¹² Doc. 32 at p. 4; Doc. 32-2 at p. 5 (Berto Depo at p. 30); Doc. 32-3 at p. 8 (IRS 2005 letter); Doc. 40 at pp. 3-4; Doc. 32-8 at p. 4 (Hicks Depo at p. 63).

¹³ Doc. 32-8 at p. 15 (Horton Depo at p. 26); Doc. 41-34 at pp. 9-11 (McDonnell Depo at pp. 29-31); Doc. 45-5 at pp. 7, 9-10 (McDonnell Depo at pp. 34, 39-40); Doc. 45-6 at pp. 3-4 (Berto Depo at pp. 29-30); Doc. 41-36 at p. 7 (Berto Depo at p. 36); Doc. 43-8 at p. 4 (Berto Depo at p. 41); Doc. 45-8 at p. 3 (Schultz Depo at p. 24); Doc. 41-37 at pp. 8-9 (Schultz Depo at pp. 43-44); Doc. 43-14 at p. 4 (Schultz Depo at p. 51); Doc. 41-37 at p. 30 (Schultz Depo at p. 118); Doc. 41-2 (Schultz e-mails); Doc. 45-7 at p. 3 (Horton Depo at p. 15); Doc. 45-9 at pp. 3-4 (O'Brocta Depo at pp. 32-33); Doc. 45-10 at p. 3 (Herbig Depo at p. 19); Doc. 41-39 at pp. 5-7, 10 (Hicks Depo at pp. 30-32, 39).

¹⁴ Doc. No. 32-7 at p. 7 (Aug. 3, 2001 FAA Operations Specifications); Doc. 32-8 at p. 3 (Hicks Depo at p. 61); Doc. 45-6 at 8 (Berto Depo at p. 85).

¹⁵ Doc. 43-13 at pp. 4-6 (Hicks Depo at pp. 65-67); Doc. 43-8 at pp. 4-6 (Berto Depo at pp. 41-42, 75); Doc. 32-8 at pp. 15, 16-18 (Horton Depo at pp. 26, 42, 57-58); Doc. 45-8 at pp. 14-15 (Schultz Depo at pp. 51, 56); Doc. 41-37 at pp. 11-12 (Schultz Depo at pp. 58-59); Doc. 45-9 at 3 (O'Brocta Depo at p. 32); Doc. 43-15 at p. 3 (O'Brocta Depo at p. 101); Doc. 45-16 at p. 7 (Blythman Depo at p. 34).

Cruise ship passengers make up about ninety-eight percent of Temsco's flight-seeing business.¹⁶ The flight-seeing tours are run out of Juneau, Skagway, and Petersberg, Alaska.¹⁷ Temsco provides flight-seeing charters to cruise ship passengers through the cruise lines,¹⁸ but the cruise lines, not Temsco, offer the tours to the cruise ship passengers.¹⁹ The cruise lines mark up the price of the tours to their passengers and are free to charge what they want to their passengers. Temsco is not privy to what the passengers are charged for the tours. The cruise lines then pay a set rate to Temsco.²⁰ The Air Transportation Excise Tax is not included in the amount paid by the cruise lines to Temsco.²¹

Someone who is not a cruise ship passenger may book a tour in advance.²² And tourists can book a tour on their own, if they pay at least the 3-person minimum cost for

¹⁶ Doc. 32-15 at p. 9 (Schultz Depo at p. 56); Doc. 41-36 at p. 6 (Berto Depo at p. 33); *compare* Doc. 41-38 at pp. 6-8 (Burns Depo at pp. 19-21, where Burns is encouraged to try to guess at the percentage, agreeing that the cruise ship charters make up more than 75 % of the flight-seeing business, but not being asked to guess any higher. Burns began working at Temsco in 2005, after the audit periods in question. Doc. 41-38 at p. 14 (Burns Depo at p. 43)).

¹⁷ Doc. 41-39 at pp. 12-13 (Hicks Depo at pp. 48-49).

¹⁸ Doc. 43-11 at p. 4 (Blythman Depo at p. 13).

¹⁹ Doc. 32-10 at pp. 11-12 (Stoll Depo at 96-97); Doc. 43-17 at p. 5 (Stoll Depo at p. 102); Doc. 32-11 at p. 3 (Blythman Depo at p. 12); Doc. 43-11 at pp. 9-12 (Blythman Depo at pp. 72-74, 91); Doc. 43-9 at pp. 8-10 (Day Depo at pp. 130-132); Doc. 45-17 at p. 14 (Day Depo at p. 217); Doc. 43-10 at p. 7 (Burzynski Depo at p. 48); Doc. 43-12 at p. 4 (Huston Depo at p. 71); Doc. 41-34 at p. 24 (McDonnell Depo at p. 50); Doc. 41-13 (descriptions provided to NYK Cruise Lines for selling Temsco's tours to its customers).

²⁰ Doc. 32-9 at pp. 7-10, 12, 16-22, 24 (McDonnell Depo at pp. 52-53, 61-62, 66, 126-127, 130-131, 145, 161-162, 171); Doc. 41-34 at pp. 29-31 and Doc. 41-35 at pp. 18-20 (McDonnell Depo at pp. 62-64, 176-178); Doc. 45-5 at p. 17 (McDonnell Depo at p. 165); Doc. 32-10 at p. 13 (Stoll Depo at p. 102); Doc. 32-11 at pp. 12-14 (Blythman Depo at pp. 71-73); Doc. 32-12 at pp. 3-4 (Burzynski Depo at pp. 12-13); Doc. 32-14 at pp. 3, 10 (Day Depo at pp. 20, 53); Doc. 32-15 at pp. 7, 17-18 (Schultz Depo at pp. 33, 111-112); Doc. 41-37 at pp. 34-35, 42 (Schultz Depo at pp. 123-124, 211); Doc. 45-6 at p. 4 (Berto Depo at p. 30).

²¹ Doc. 32-13 at pp. 13-14, 17-19 (Huston Depo at pp. 81-82, 115-117).

²² Doc. 41-34 at p. 12 (McDonnell Depo at p. 32); Doc. 41-37 at p. 22 (Schultz Depo at p. 91); Doc. 41-21 (booking on Aug. 22 for Aug. 30, 2002 at 9:30 a.m.); Doc. 41-22 (booking on Aug. 16 for Aug. 31, 2002 at 12:30 p.m.).

one of the tours.²³ Also, dockside vendors may book flights for individuals on the day of a tour, if there are any unfilled seats in the allotments given to the cruise ships that day.²⁴ Temsco occasionally combines passengers from the cruise lines with other passengers, but it tries not to.²⁵

Temsco's flights operate frequently during the summer tourist season, from May through September – normally on the hour, the half-hour, and quarter-hour.²⁶ Although the pilots have actual physical control the helicopter,²⁷ the tours for cruise ship passengers are operated as contracted with the clients.²⁸ Temsco agrees to offer the cruise ships a certain number of seats at particular departure times – allocations – nine to ten months before the season starts, and the seats are held for the cruise ship up until the time the tour actually departs from the dock.²⁹

²³ Doc. 45-5 at pp. 6-7, 9 (McDonnell Depo at pp. 33-34, 39); Doc. 32-9 at p. 25 (McDonnell Depo at p. 217); Doc. 41-38 at pp. 13, 16 (Burns Depo at pp. 39, 46); Doc. 45-8 at p. 14 (Schultz Depo at p. 51); Docs. 41-21, 41-22 (bookings for independent passengers).

²⁴ Doc. 43-7 at 11 (McDonnell Depo at p. 201); Doc. 45-8 at pp. 7-8 (Schultz Depo at pp. 37-38); Doc. 41-37 at pp. 42-43 (Schultz Depo 211-212); Doc. 41-38 at p. 19-20 (Burns Depo at pp. 55-56).

²⁵ Doc. 45-8 at pp. 7-8 (Schultz Depo at pp. 37-38); Doc. 43-14 at p. 3-4 (Schultz Depo at p. 51); Doc. 32-15 at p. 13 (Schultz Depo at p. 72); Doc. 41-35 at pp. 8-9 (McDonnell Depo at pp. 112-113).

²⁶ Doc. 43-7 at 5 (McDonnell Depo at p. 64); Doc. 41-35 at pp. 21, 26-27 (McDonnell Depo at pp. 184, 210-211); Doc. 45-7 at p. 8 (Horton Depo at p. 81).

²⁷ Doc. 32-12 at pp. 11-12 (Burzynski Depo at pp. 116-117).

²⁸ Doc. 32-15 at p. 8 (Schultz Depo at p. 54); Doc. 41-34 at pp. 33-35 & Doc. 41-35 at pp. 1-7 (McDonnell Depo at pp. 79, 83-86, 90, 93, 96-97, 104); Doc. 32-16 (Agreement between Carnival Cruise Lines and Temsco); Doc. 32-17 (Agreement between Crystal Cruises, Inc. and Temsco); Doc. 32-18 (Agreement between Princess Cruises and Temsco); Doc. 41-20 (2007 Juneau Temsco Helicopter Allocations for *M/S Norwegian Star*); Docs. 41-16, 41-17, 41-24, 41-25, 41-26, 41-32 (Agreements).

²⁹ Doc. 32-9 at pp. 13-15 (McDonnell Depo at pp. 70-72); Doc. 32-11 at pp. 9-11, 15-17 (Blythman Depo at pp. 36-38, 77-78, 110); Doc. 32-13 at p. 4 (Huston Depo at p. 15); Doc. 43-14 at pp. 3, 5-8 (Schultz Depo at pp. 37, 56-57, 236-237); Doc. 41-37 at pp. 13-23, 26-27 (Schultz Depo at pp. 77-78, 82-87, 89, 91-92, 96, 103); Doc. 32-15 at p. 14-16 (Schultz Depo at pp. 93-95); Doc. 41-40 at p. 9 (Burzynski Depo at p. 104).

Temsco schedules its tours to begin 30 minutes after a cruise ship arrives in port and returns the passengers to the ship 30 minutes before the ship departs.³⁰ The cruise lines control when the ships arrive and depart.³¹ And Temsco's charters run as required by the needs of the cruise lines, including accommodating the last-minute final number of passengers for the various tours, and working around late arrivals.³² Although the pilots have physical control over the helicopters,³³ any deviation from the agreed upon routes, destinations, and the cruise ships' time requirements may be viewed by the cruise lines as a breach of contract by Temsco.³⁴

The "Pilot's Choice" tour, however, includes 50 minutes of flight time and landings on two separate glaciers that the Temsco pilot chooses.³⁵ Temsco has declined to contract to provide a new tour for the cruise lines, when that particular tour would not be cost-effective.³⁶ Also, on one occasion, Temsco declined to take a nudist

³⁰ Doc. 32-9 (McDonnell Depo at 166); Doc. 32-15 at 20 (Schultz Depo at p. 225); Doc. 43-10 at pp. 8-9 (Burzynski Depo at pp. 52-53); Doc. 45-16 at p. 10 (Blythman Depo at p. 79).

³¹ Doc. 45-15 at p. 10 (Burzynski Depo at p. 53).

³² Doc. 32-10 at 11 (Stoll Depo at 96); Doc. 32-15 at pp. 9- 10 (Schultz Depo at pp. 56-57); Doc. 41-37 at pp. 29-34 (Schultz Depo at pp. 117-121, 123); Doc. 43-9 at pp. 3-6, 12-14 (Day Depo at pp. 25-26, 47-48, 207, 211-212); Doc. 32-14 at p. 11 (Day Depo at p. 140); Doc. 32-12 at pp. 9-10 and Doc. 43-10 at 3-4 (Burzynski Depo at 27-30); Doc. 43-11 at pp. 5-7 (Blythman Depo at pp. 32-34); Doc. 43-16 at p. 4 (Herbig Depo at p. 116).

³³ Doc. 43-9 at p. 11 (Day Depo at p. 157); Doc. 45-15 at pp. 11-12 (Burzynski Depo at pp. 116-117).

³⁴ Doc. 32-11 at pp. 4-8, 18-21 (Blythman Depo at pp. 24-28, 120-123); Doc. 32-12 at pp. 7-8, 11-15 (Burzynski Depo at pp. 23-24, 116-119, 122); Doc. 32-13 at pp. 5-10, 15-17 (Huston Depo at pp. 20-25, 81, 113-115); Doc. 45-17 at pp. 4-8, 16-18 (Day Depo at pp. 39-42, 45, 219-221); Doc. 41-23 at pp. 2-3 and Doc. 41-24 at pp. 2-3 (2003 & 2004 memos from Crystal Cruises to Temsco stating that is "reserves the right to reduce net excursion costs payable to any Operator in which unauthorized/unscheduled shopping stops are made by individual guides.").

³⁵ Doc. 41-34 at p. 13 (McDonnell Depo at p. 36).

³⁶ Doc. 41-35 at pp. 31-36 (McDonnell at pp. 222-225, 227-228); Doc. 41-39 at pp. 14, 15 (Hicks Depo); Doc. 41-40 at pp. 7-8, 10-13 (Burzynski Depo at pp. 92, 103, 105-109); Docs. 41-10, 41-11 (e-mails regarding Icy Straight proposals); 41-12 (correspondence regarding

group from Holland America to the Mendenhall glacier to take nude Christmas photos, because it did not want to expose its employees.³⁷ The cruise lines, of course, are also free to contract for the tours it wants to offer its passengers.³⁸

Temsco's flights begin and, eventually, end at the same place.³⁹ The flights often land at scenic destinations for a period of time for an activity (included in the price), before ultimately returning.⁴⁰ Temsco pays the company providing the activity (such as dog sledding), or the price for the any necessary licenses or permits, and those amounts are built into the price of the tour.⁴¹ Temsco has also paid a bus company to transport passengers from the dock to the helicopters.⁴²

possible Sitka excursion).

³⁷ Doc. 41-35 at pp. 23-25 (McDonnell Depo at pp. 191-193).

³⁸ Doc. 32-12 at pp. 12-14 (Burzynski Depo at pp. 117-119); Doc. 32-13 at pp. 11-12 (Huston Depo at pp. 26-27); Doc. 32-14 at pp. 12-14 (Day Depo at pp. 217-219); Doc. 32-15 at p. 8 (Schultz Depo at p. 54); Doc. 41-39 at p. 15 (Hicks Depo at p. 58); Doc. 41-34 at pp. 8-9, 27 (McDonnell Depo at pp. 27, 29, 55); Docs. 41-13, 41-14, 41-15, 41-16, 41-17, 41-18, 41-27, 41-28, 41-29, 41-31.

³⁹ Doc. 45-6 at p. 11 (Berto Depo at p. 100, explaining that Temsco takes off and lands at airports in some communities, and does not use airports in others).

⁴⁰ Doc. 32-9 at p. 3, Doc. 41-34 at pp. 14-15, 18, Doc. 43-7 at p. 3, and Doc. 45-5 at pp. 8, 10-14 (McDonnell Depo at pp. 32-33, 36, 38-39, 40-43, 48-49 describing the Mendenhall Glacier and Guided Walk Tour, Pilot's Choice (landing on 2 glaciers), Dog Sledding and Glacier Flightseeing Tour, Glacier Discovery by Helicopter, Skagway, and the Valley of the Glaciers by Helicopter Tour); Doc. 32-12 at pp. 6-7 (Burzynski Depo at pp. 22-23, describing 15 minute narrated helicopter ride to glacier, 25 minute narrated glacier walk, and 15 minute return); Doc. 32-13 at p. 9 (Huston Depo at p. 24, describing 25 minute ride to glacier, and 20 minutes on the glacier, before the return flight); Doc. 45-8 at pp. 4-6, 8-13 (Schultz Depo at pp. 30-32, 38-43); Doc. 45-17 at pp. 3-7 (Day Depo at pp. 38-42); Doc. 41-9 (Temsco's brochures, describing various tours); Doc. 41-30 (tour descriptions); Doc. 41-33 (Holland America 2004 Tour Data Form).

⁴¹ Doc. 45-5 at pp. 10-12 (McDonnell Depo at pp. 40-42); Doc. 32-9 at p. 23 (McDonnell Depo at 166); Doc. 45-6 at 13-14 (Berto Depo at pp. 107-108).

⁴² Doc. 32-15 at pp. 19-20 (Schultz Depo at pp. 224-25); Doc. 45-5 at pp. 15-16 (McDonnell Depo at pp. 162-163).

In 2005, the IRS decided that Temsco owed the Air Transportation Excise Tax for flight-seeing charters in 2001 - 2004.⁴³ Temsco protested the assessment, paid a portion of the taxes the IRS claimed was due in calendar quarters in 2001 - 2004, and requested a refund, arguing that it was exempt from taxation because it operated helicopters of 6000 pounds or less, and that its flight-seeing charters were not operated on an “established line.”⁴⁴ This was after Temsco had paid the Aviation Fuel Excise Tax for eleven years without objection by the IRS.⁴⁵ The April 2005 assessment did not credit Temsco for the amounts already paid during the Audit Period, and did not make any allowance for Temsco’s expenses.⁴⁶ Nor is there any evidence that the IRS made any demand upon the cruise lines for payment of any air transportation excise tax owed by its passengers for flight-seeing tours with Temsco during the audit period, or that the cruise lines paid any such tax during that period.⁴⁷

⁴³ Doc. 32-2 at pp. 7 -10 (Berto Depo); Doc. 32-3 (April 25, 2005 IRS letter to Temsco, claiming Temsco owes taxes); Doc. 45-24 at p. 2 (April 18, 2005 IRS letter to Temsco, reflecting receipt of March 31 letter correcting “supposed discrepancies.”).

⁴⁴ Doc. 45-23 at pp. 6-17 (March 31 letter in response to IRS letter of February 24, 2005, correcting “factual inconsistencies”); Doc. 45-18 and Doc. 45-19 (Temsco’s May 26, 2005 protest letter to IRS, protesting the assessment, notifying IRS of its claims and, *inter alia*, that its flight-seeing tours were conducted on an established line); Doc. 32-5 (Temsco’s August 4, 2006 letter with checks for divisible air transportation excise taxes for calendar quarters in 2001 - 2004, made under protest, and claiming a refund is due); Doc. 32-6 (Temsco’s September 5, 2006 letter with checks for divisible payments for air transportation excise taxes in calendar quarters in 2001 and 2004, made under protest, and requesting a refund); Doc. 32-7 at p. 2 (IRS application of Temsco’s 2008 overpayment to the June 30, 2002 tax period); Docs. 41-3, 41-4, 41-5, 41-6, 41-7, 41-8 (Certificates of Assessments, Payments and Other Specific Matters, showing Temsco’s payments under protest).

⁴⁵ Doc. 32-2 at pp. 8-9, 13, 14 (Berto Depo at pp. 81-82, 88, 98).

⁴⁶ Doc. Doc. 32-3 (2005 IRS letter, assessing taxes from 2001 - 2004). During oral argument on October 31, 2008, however, the Government conceded that, if liability were established, it would revisit these issues.

⁴⁷ Doc. 43-9 at p. 7 (Day Depo at p. 54); Doc. 43-10 at pp. 5-6 (Burzynski Depo at pp. 32-33); Doc. 43-11 at pp. 7-8 (Blythman Depo at pp. 34-35); Doc. 43-12 at p. 3 (Huston Depo at p. 30); Doc. 45-17 at p. 11 (Day Depo at p.54)

IV. DISCUSSION

A. Jurisdiction – The Variance Doctrine

The Government argues that filing a timely and sufficient claim for a refund is a jurisdictional prerequisite to maintaining a tax refund suit in federal court.⁴⁸ However, the decision issued by the IRS indicates that it was given “adequate notice of the claim so that it can be investigated and resolved.”⁴⁹ Temsco’s claim for refund and abatement of assessment specifically addresses the issues currently before this court.⁵⁰ And, in fact, the IRS states that the issue involved in that case is “[w]hether the scenic air flights provided by Temsco Helicopters, Inc. are considered taxable flights under 26 U.S.C. § 4261 as being operated on established lines or whether the flights are not operated on established lines and are therefore exempt from tax as provided for under 26 U.S.C. § 4281.”⁵¹ The conclusion reached by the IRS is the same conclusion the Government asks this court to reach in the current case: “that the Court enter judgment in its favor for the full amount of the tax liabilities owed by plaintiff, for the second and third quarters of 2002, 2003 and 2004, because plaintiff’s helicopter flight-seeing tours operated, during the relevant time period, on an established line.”⁵²

The Government’s argument that “[t]he Commissioner should not be left to his own devices in order to discover the precise nature of a taxpayer’s claim and thus be placed in a position of having to hazard a guess,”⁵³ is a far cry from the current situation. As demonstrated by the facts, the documentation submitted by the parties shows that the IRS had notice of the nature of Temsco’s claims.

⁴⁸ Doc. 40 at p. 13.

⁴⁹ *Synergy Staffing, Inc. v. U.S. I.R.S.*, 323 F.3d 1157, 1161 (9th Cir. 2003).

⁵⁰ Doc. 32-6 at pp. 10-14.

⁵¹ Doc. 32-3 at p. 8.

⁵² Doc. 40 at p. 2. At oral argument the Government modified this request to seek only a ruling on liability leaving the amount owed for later determination.

⁵³ Doc. 40 at p. 14, citing *Stoller v. United States*, 444 F.2d 1391, 1393 (5th Cir. 1971).

Moreover, even if the variance doctrine were applied to this case, “[t]he IRS may be found to have waived its specificity requirements if (1) it has sufficient knowledge of the taxpayer's claim, and (2) it either makes a determination on the merits or leads the taxpayer to believe that it treated the claim as formally sufficient.”⁵⁴ Thus, even if Temsco’s claim “substantially varied” from that it brings here,⁵⁵ the IRS appears to have waived its specificity requirements.⁵⁶

B. Exemption from Air Transportation Excise Tax

Both sides agree that the helicopters used to conduct the flight-seeing charters had certified take-off weights of 6,000 pounds or less. The question is whether Temsco’s flights were operated on an “established line” under 26 U.S.C. § 4281. If so, Temsco was subject to the Air Transportation Excise Tax. Otherwise, it was exempt.

Section 49.4263-5 of the Treasury Regulations provides:

The term “operated on an established line” means operated with some degree of regularity between definite points. It does not necessarily mean that strict regularity of schedule is maintained; that the full run is always made; that a particular route is followed; or that intermediate stops are restricted. The term implies that the person rendering the service

⁵⁴ *Nick’s Cigarette City, Incorporated v. U.S.*, 531 F.3d 516, 521 (7th Cir. 2008), citing *Angelus Mining Co. v. Comm’r*, 325 U.S. 293, 296 (1945); see also *Martinez v. United States*, 595 F.2d 1147, 1148 (9th Cir. 1979) (“We find it unnecessary to address the government’s arguments that the claim was not sufficiently specific, or that lack of specificity (if any) would entitle the district court to find that it lacked jurisdiction. Instead, we conclude that the District Director effectively waived the requirement of specificity by reviewing the appellant’s files and considering his claim on the merits. His letter states that the taxpayer’s files were reviewed. The ‘proposed’ disallowance was solidly based on that review.”); *King v. United States*, 152 F.3d 1200, 1201 (9th Cir. 1998) (following *Martinez*, the Ninth Circuit found that the IRS had “expressly reached the merits” of the case, so that the district court properly exercised jurisdiction).

⁵⁵ The court does not, however, find that Temsco’s claim substantially varies from that it has brought in this court.

⁵⁶ See *Angelus Mining Co. v. Comm’r*, 325 U.S. at 297 (“Congress has given the Treasury this rule-making power for self-protection and not for self-imprisonment. If the Commissioner chooses not to stand on his own formal or detailed requirements, it would be making an empty abstraction, and not a practical safeguard, of a regulation to allow the Commissioner to invoke technical objections after he has investigated the merits of a claim and taken action upon it. Even tax administration does not as a matter of principle preclude considerations of fairness.”).

maintains and exercises control over the direction, route, time, number or passengers carried, etc.

1. Regularity

In a case cited by both parties, *Lake Mead Air, Inc. v. United States*, 991 F.Supp. 1209, 1212 (D.Nev. 1997), the court states that “the crux of the phrase ‘on an established line’ seems to be that the public can rely on the transportation because of a regularity determined by the provider, not the customer, i.e., the whims of customers do not dictate a particular route.” In this case, ninety-eight percent of the customers – the cruise ship passengers – primarily dictate the regularity and routes of the flights. To paraphrase from *Lake Mead Air*: “But for the [cruise lines] and any customers [they] happened to produce, the operator would not have flown [those] route[s].”⁵⁷

The same reasoning applies to the walk-in customers on days in which no cruise ship is in port. Only when and if someone requested a flight would any particular flight-seeing charter take place.⁵⁸ To the extent there is a “degree of regularity,” it is not due to a regular schedule. Instead, “any perceivable pattern is due to customer demand.”⁵⁹

2. Control

Although the individual pilots have physical control over the helicopters being flown, the customers have control over the tours' destinations, times, routes to see certain sites, etc. Thus, the facts show that the customers, rather than Temsco, have "control" over the charters.⁶⁰

⁵⁷ *Lake Mead Air.*, 991 F.Supp at 1212.

⁵⁸ Doc. 43-14 at pp. 3, 7-8 (Schultz Depo) (“Walk-ins” must call in to confirm that they will be able to take the flight they have booked, because the cruise ship passengers are given priority).

⁵⁹ Although not relying on this Private Letter Ruling as a basis for the court’s decision, the language is credited to IRS PLR 200747003, 2007 WL 4141461 (Nov. 23, 2007).

⁶⁰ See 26 C.F.R. § 49.4263-5; see also Rev. Rul. 62-617, 1972-2 C.B. 580 (“the aircraft making the flights is not operated on an established line because the carrier has not retained control over the direction, route, time, or cargo carried. The arrangement between the Postal Service and the operator of the aircraft is, in effect, a charter of the aircraft.”).

As stated in Revenue Ruling 62-617, 1972-2 C.B. 580 at p. 1:

An air taxi operator of an aircraft having a maximum certificated takeoff weight of less than 6,000 pounds entered into a contract with the United States Postal Service to provide overnight air mail service between two cities. The aircraft did not operate between these two cities before this contract was entered into. The contract provides for a mail service rate based on six regularly scheduled round trips weekly between the hours of 11:00 p.m. and 3:30 a.m. In addition to maintaining control over the flight schedule, the Postal Service has exclusive use of the aircraft with respect to the six round trips.

. . .
. . . the aircraft making the flights is not operated on an established line because the carrier has not retained control over the direction, route, time, or cargo carried. The arrangement between the Postal Service and the operator of the aircraft is, in effect, a charter of the aircraft, a so-called "wet lease."

Other than the issue of exclusivity of use, the situation addressed in the Revenue Ruling is not materially different from the situation here.

The Government argues, citing *Lake Mead Air*, that because Temsco refused to add a new tour, and refused to take a nudist group to a glacier for a nude Christmas photo shoot, it had such control over the tours that it was operating an established line.⁶¹ This court disagrees with the *Lake Mead Air* case on this point. Temsco could refuse to take anyone on its tours, and was free to contract with the cruise lines, and with other customers, as it saw fit. However, once there was a contractual arrangement, Temsco was required to abide by that agreement. It was not allowed to take the cruise ship passengers wherever it wished. Even the "Pilot's Choice" trip was agreed upon by the cruise lines in advance, and customers knew they were purchasing that particular tour. Temsco flew only if, when, and where its services were contracted. Thus, control was in the hands of its customers.

⁶¹ Doc. 40 at pp. 22-23; *Lake Mead Air*, 991 F. Supp. at 1213.

3. Between Definite Points

It is undisputed that the flight-seeing charters included landings on various glaciers, and that the locations of glacier landings varied depending upon weather conditions, changing surfaces, Forest Service restrictions, the current snow line, etc. The Government argues that taking off, and ultimately returning to, the same airport satisfies the "between definite points" requirement, regardless of whether the flight's destination varied.⁶² But, as stated in *Lake Mead Air*, "a payment for **continuous transportation** beginning and ending at the same point is taxable."⁶³ Where Temsco's charters land specifically for the purpose of sightseeing and/or activities before again taking off to return to the point of origination, those landings are contrary to the plain meaning⁶⁴ of "continuous transportation."

So although "intermediate stops" are permitted on an "established line," in this case, the stops **were** the destinations. The passengers were paying specifically to see the glaciers upon which the helicopters landed, and sometimes to engage in activities at those destinations. The places upon which the helicopters landed constituted a purpose for the flights, rather than "intermediate stops" made by the helicopters.

The Government also argues that Temsco's construction is too narrow, and that because there were only a limited number of glaciers upon which Temsco landed, the flights were operated "between definite points."⁶⁵ The Government, however, does not

⁶² Doc. 40 at p. 24, n.23.

⁶³ *Lake Mead Air*, 991 F.Supp. at 1213.

⁶⁴ See, e.g., *Steven N.S. Chung v. United States*, ___ F.3d ___, 2008 WL 4307449 at *4 (9th Cir. Sept. 23, 2008) ("the plain meaning of the statute controls.").

⁶⁵ Doc. 40 at p. 24.

cite any support for this argument,⁶⁶ and may be ignoring, or unaware of, the size of the glaciers.⁶⁷

C. 1994 IRS Audit

In 1994, the IRS wrote to Temsco, stating: "Temsco Helicopters, Inc. is no longer in the business of providing transportation that is subject to the transportation taxes. **All flights** are subject to the fuel taxes under Internal Revenue Code Sections 4091, 4081, and 4041."⁶⁸ The Government has pointed to nothing that has occurred, since 1994, to change its position since that time. Although the letter once mentions Temsco Airlines,⁶⁹ it is directed at Temsco Helicopters, and in fact, the closure of the airline business in approximately 1990 is stated as the reason for the change in the tax structure.⁷⁰ Temsco had every right to rely to this position until notified otherwise, and even if liability were found, Temsco would incur no penalty.

V. CONCLUSION

Under 26 U.S.C. § 4281, Temsco's charter business is exempt from the Air Transportation Excise Tax. The charters at issue are controlled by Temsco's customers, and any perceivable schedule pattern is due to the demands of its

⁶⁶ *Id.* The Court disagrees with the decision in *Lake Mead Air* to the effect that, in order to be exempt, a carrier must act as a taxi does on the ground. Most taxis do not even have a point of origin; they just travel the streets searching for fares. Conceivably, an air taxi would start at a specific landing field and land where the customer directed; thus, it would have, at most, one definite point. On the other hand, Lake Mead's tours started and ended at the same point without fail, so its flights were between definite points." *Lake Mead Air*, 991 F.Supp. at 1213. In addition, there is no indication in *Lake Mead Air* that the flights were to specific destinations at which the aircraft landed within or on the rim of the Grand Canyon.

⁶⁷ Doc. 32-15 at p. 6 (Schultz Depo at p. 32).

⁶⁸ Doc. 32-2 at 2 (emphasis added);

⁶⁹ Doc. 43 at 13-14 (discussion of Government's position that the letter was directed at only airplane flights).

⁷⁰ Doc. 43-8 at p. 7 (Berto Depo at p. 81) & Doc. 41-36 at pp. 8-15 (Berto Depo at pp. 82-89), describing Temsco's closure of the airline portion of its business in approximately 1990, resulting in the 1994 letter from the IRS stating that Temsco was no longer required to pay transportation excise taxes).

customers, rather than to a regular schedule dictated by Temsco. Further, the flights which are destined for various places on which to sightsee and engage in activities are not conducted "between definite points."

Therefore, it is HEREBY ORDERED that:

1. Temsco's motion for summary judgment, at docket number 32, is GRANTED.
2. The United States of America's cross motion for summary judgment, at docket number 40, is DENIED.

DATED this 13th day of November 2008 at Anchorage, Alaska.

/s/ JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE