1 2 3	BEFORE THE STATE BOARD OF TAX APPEALS STATE OF ARIZONA 101 North First Avenue - Suite 2340 Phoenix, Arizona 85003 602.528.3966
4) ROBERT and CAROL MACE dba MACE) Docket No. 1847-00-S AVIATION,)
6 7	Appellant, vs.) NOTICE OF DECISION:) FINDINGS OF FACT AND) CONCLUSIONS OF LAW
8 9	ARIZONA DEPARTMENT OF REVENUE,
10 11	The State Board of Tax Appeals, having considered all evidence and arguments presented, and
12 13	having taken the matter under advisement, finds and concludes as follows: <u>FINDINGS OF FACT</u>
14	Robert and Carol Mace operate Mace Aviation ("Appellant") in Globe, Arizona on the San Carlos Apache Indian Reservation. Robert and Carol Mace are not members of the Apache Tribe.
15 16	The Arizona Department of Revenue (the "Department") audited Appellant for the period April 1, 1989 through July 31, 1995 (the "Audit Period") and determined that Appellant was liable for transaction
17 18	privilege tax under the retail sales, the tangible personal property rental, and the jet fuel tax classifications. Thereafter, the Department assessed Appellant additional transaction privilege tax,
19 20	penalties for late payment, late filing and negligence, and interest. Appellant protested the assessment to the Office of Administrative Hearings ("OAH"). OAH held that the sales of certain aircraft and parts were exempt out-of-state sales. See A.R.S. § 42-1310.01.B.7.
21	The OAH also allowed Appellant a deduction for separately itemized services but otherwise upheld the
22	remainder of the assessment. Appellant timely appealed the OAH decision to the Director of the Department. The Director vacated the portion of the assessment attributable to the rental of a helicopter

to an out-of-state lessee, but otherwise affirmed the OAH decision. Appellant now timely appeals the remainder of the assessment to this Board.

DISCUSSION

At issue before the Board is whether Appellant sold airplanes or merely provided non-taxable broker services in connection with the sale of airplanes; whether certain specific transactions are nontaxable out-of-state transactions; and, whether Appellants sales on the reservation of jet fuel to the Federal Government are taxable where the jet fuel was used by the Federal Government in planes for fire protection service on the San Carlos Indian Reservation. Appellant bears the burden of proof as to all issues of fact. A.A.C. R16-3-118.

The Department argues that Appellant is in the business of selling aircraft. Thus, all of Appellant's income from this activity is presumed to be included in the tax base. A.R.S. § 42-5023. Appellant contends that it does not sell airplanes but only receives commissions for brokering the sales.

"The retail classification is comprised of the business of selling tangible personal property at retail." A.R.S. § 42-5061(A). "Selling at Retail' means a sale for any purpose other than for resale in the regular course of business in the form of tangible personal property." A.R.S. § 42-5061(U)(3). A.R.S. § 42-5001(13) broadly defines a "sale" as "any transfer of title or possession, or both . . . by any means whatever . . . of tangible personal property or other activities taxable under this chapter, for a consideration"

The evidence submitted to the Board, including documents showing chain of title, letters from some customers, some out-of-state FAA registrations, and sworn testimony by Appellant, supports Appellant's claim that it never held title or had physical possession of the airplanes at issue. Therefore, Appellant is not engaged in the business of selling airplanes at retail and is not liable for the tax assessed on its brokering activities. *See Stillwell Grand Prix Motors v. City of Tucson*, 168 Ariz. 560, 815 P.2d 929 (App.1991).¹

There are a number of specific transactions that Appellant claims were erroneously included in the assessment. The Department conceded some of these transactions at the hearing before the Board.

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Stillwell involved a Tucson car dealership that participated in a program whereby persons who wanted to purchase a European automobile and who were planning to travel to Europe, could order the car through Stillwell then pick it up and use it while in Europe. After the trip, the car would be shipped to the buyer in the United States. Stillwell would receive the purchase price from the customer and record the transaction like any other sale then forward the payment to the seller after deducting its commission. The Arizona Court of Appeals held that, because the activities of Stillwell did not include the transference of title or possession of the cars, they were not sales subject to the retail sales tax at issue. 168 Ariz. at 562, 815 P.2d at 931.

Others were removed from contention by an amended assessment submitted by the Department. The Department argues that Appellant has not met its burden of proof concerning the transactions that remain in dispute.

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The Board has reviewed the evidence submitted and finds that Appellant has met its burden of proving that all but one of these transactions are exempt from taxation. Appellant has failed to substantiate that the sale of helicopter parts to a Grand Canyon tour company is exempt. Therefore, Appellant is liable for tax on this single itemized transaction.

Finally, Appellant argues that its sales of jet fuel to the federal government are exempt because the sales took place on the reservation and the government used the fuel in aircraft that it operated on the reservation.

The United States Supreme Court has clearly established that contracts, like those at issue, between a contractor and the federal government to perform work on an Indian reservation are taxable. *Arizona Dep't of Rev. v. Blaze Construction Co.*, 526 U.S. 32 (1999). Appellant acknowledges the bright line test established by the Court, but argues that the *Blaze* decision is wrong, and that, in any event, it should be applied prospectively only.

This Board is bound by decisions of the U.S. Supreme Court. The Court applied its decision to the taxpayer in *Blaze* retroactively. Further, the Court has specifically held that

"When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review as to all events, regardless of whether such events predate or postdate our announcement of the rule."

Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993). Only the U.S. Supreme Court can decide whether to apply one of its decisions retroactively. It expressly did so in *Blaze*. Therefore, Appellant is liable for the tax assessed on its sales of jet fuel.

CONCLUSIONS OF LAW

1. Appellant is not engaged in the business of selling airplanes at retail. See A.R.S. §§ 42-5061,

5001(13); Stillwell Grand Prix Motors v. City of Tucson, 168 Ariz. 560, 815 P.2d 929 (App.1991).

 Appellant has met its burden of proof concerning all of the disputed itemized transactions, except for the sale of helicopter parts discussed herein.

1	3. Appellant is liable for tax assessed on its sales of jet fuel. See Arizona Dep't of Rev. v. Blaze	
2	Construction Co., 526 U.S. 32 (1999); Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97 (1993).	
3	ORDER	
4	THEREFORE, IT IS HEREBY ORDERED that the appeal is granted in part and denied in part,	
5	and the final order of the Department is modified.	
	This decision becomes final upon the expiration of thirty (30) days from receipt by the taxpayer,	
6	unless either the State or taxpayer brings an action in superior court as provided in A.R.S. § 42-1254.	
7	DATED this 28th day of January, , 2002.	
8	STATE BOARD OF TAX APPEALS	
9	Jamie C. Wash A	
10	Janice C. Washington, Chairperson	
11	SPL:ALW	
12		
13	CERTIFIED	
14	Copies of the foregoing mailed or delivered to:	
15	Robert and Carol Mace dba Mace Aviation	
16	P.O. Box 2775 Globe, Arizona 85502	
17	Sara Bransum	
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