No. SC93039

IN THE SUPREME COURT OF MISSOURI

BALLOONS OVER THE RAINBOW, INC.,
Petitioner – Appellant,

v.

MISSOURI DEPARTMENT OF REVENUE,
Respondent.

On Petition for Review from the
Missouri Administrative Hearing Commission

APPELLANT'S BRIEF

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Jurisdictional Statement

This appeal involves the construction of the revenue laws of Missouri and therefore falls within the exclusive jurisdiction of the Supreme Court of Missouri under Article V, Section 3 of the Missouri Constitution.

One of the questions presented on appeal is whether taxes imposed on Appellant by section 144.020 violate the Anti-Head Tax Act ("AHTA"), 49 U.S.C. § 40116. Resolution of this question requires construction of section 144.020 in connection with other revenue laws of Missouri. Additionally, this appeal raises questions requiring construction of sections 144.030, 144.610 and 144.655, which are also revenue laws of Missouri.

Statement of Facts

Balloons Over the Rainbow, Inc. ("Appellant" or "Balloons") filed two complaints with the Administrative Hearing Commission ("Commission"), appealing the Director of Revenue's ("Director") denial of a sales tax refund on Appellant's gross receipts for hot air balloon rides and assessment of unpaid sales and use taxes in connection with providing hot air balloon rides. (Legal File (LF) 75; Appendix (App.) 1). Appellant appeals from the Decision of the Commission that denied Appellant's requested refund and found Appellant liable for sales and use taxes.

Appellant is a Missouri corporation providing individuals untethered hot air balloon rides in Missouri and New Mexico, which are operated by pilots holding a commercial pilot license issued by the Federal Aviation Administration ("FAA"). (Transcript (Tr.) 7:15 – 8:1-12; 27:20). Appellant advertises its hot air balloon rides to the general public by way of its website. (Tr. 34:9-23; 35:4-7; 35:12, Exhibit A; 46:12, Exhibit C; 106:9, Exhibit D). To ride with Appellant, customers purchase flight certificates. Appellant sells flight certificates directly to its customers and third-party contrac-

tors also sell flight certificates to the contractor's customers, which may be used to travel with Appellant. (Tr. 18:2-8; 94:16-22).

All customers purchasing their flight certificates from Appellant pay the same rates, and Appellant has no restrictions on when a certificate can be used. (Tr. 106:9, Exhibit D). If weather permits Appellant to fly on a given day and space is available, any member of the general public can purchase a flight certificate and fly with Appellant. (Tr. 106:9, Exhibit D).

Once a customer has purchased a flight certificate and scheduled a ride with Appellant, the website instructs the customer to meet at the Jefferson County Library in High Ridge, Missouri. (Tr. 34:9-11). From the library, customers are transported to the launch site for the hot air balloon ride. (Tr. 34:24-25; 35:1-3). The launch site changes depending on the weather. (Tr. 33:14-25; 34:1-8; 35:4-7). Indeed, everything done in a hot air balloon is weather dependent, so like the launch site, the route the hot air balloon travels while flying and the landing site change with the weather. (Tr. 33:14-25; 34:1-8; 35:4-24). In other words, no trip is the same.

After launching, the hot air balloon will reach an average altitude between 1,500 and 3,000 feet. (Tr. 36:17-20). The hot air balloon carries passengers approximately one hour downwind (Tr. 34:3-8; 106:9, Exhibit D). The landing spot is always dependent on the weather, so the hot air balloon could land in Missouri or Illinois. (Tr. 47:14:25; 48:8:11). Sometimes it even lands at airports. (Tr. 8:14-16; 9:5-7; 41:13-16). Regardless of where the hot air balloon lands, the passengers are shuttled back to the Jefferson City Library. (Tr. 36:3-5).

Third-party contractors sold flight certificates for hot air balloon rides through contractual arrangements with Appellant. (Tr. 94:15-25; 95:1-5; 100:8-16). The third-party contractors purchased Appellant's hot air balloon rides at a discounted rate and then resold them to their customers. (Tr. 18:2-8; 94:15-25; 95:1-5; 100:8-16). Appellant never collected or remitted sales taxes on hot air balloon rides being resold by its third-party contractors. (Tr. 18:2-3; 18:14-17). Appellant could not collect such taxes because Appellant had no knowledge of the amount charged by the third-party contractors for the flight certificates and did not collect money

from the individuals redeeming the flight certificates. (Tr. 94:13-14; 95:2-5; 99:17-21; 100:17-19).

On January 4, 2011, Appellant requested a refund of sales taxes in the amount of $7,761.51, which Appellant had paid on receipts for the period from October 1, 2007 through March 31, 2010. (Tr. 10:19 – 11:1). The basis for Appellant's refund claim was that the AHTA prohibits a state from levying a sales tax on the gross receipts of sales for hot air balloon rides. (LF 1-5). Prior to January 6, 2011, the Department of Revenue audited Appellant for sales and withholding taxes for the period beginning January 1, 2007, and ending December 31, 2009, and consumer's use taxes for the period beginning January 1, 2005, and ending December 31, 2009. (Tr. 51:20-24).

The Department of Revenue assessed Appellant with unpaid sales taxes of $3,160.36 and consumer's use taxes of $1,984.44. (Tr. 24:10, Exhibit 3). On February 10, 2011, the Director denied the refund requested by Appellant. (LF 5). On April 8, 2011, Appellant filed a complaint with the Commission for the denial of the refund. (LF 1). On May 11, 2011, Appellant filed a complaint with

the Commission regarding the assessment of the sales taxes and consumer's use taxes. After a hearing, the Commission primarily ruled in favor of the Director. (LF 80-98; App. A6-A24). This appeal followed.

Points Relied On

Point I

The Administrative Hearing Commission erred in concluding Appellant owed sales taxes on hot air balloon rides, because the AHTA prohibits levying such taxes, in that those taxes are a tax or charge on an individual traveling in air commerce.

Aloha Airlines, Inc. v. Dir. of Taxation of Hawaii, 464 U.S. 7 (1983)

Gorman v. NTSB, 558 F.3d 580, 591 (D.C. Cir. 2009)

Hill v. Nat'l Transp. Safety Bd., 886 F.2d 1275, 1280 (10th Cir. 1989)

49 U.S.C. § 40116

49 U.S.C. § 40102

Section 144.020.1, RSMo.

Section 305.101.1, RSMo.

FAA Order 7400.9V §§ 6008, 6010 (Sep. 15, 2012)

Question on Taxation of Hot Air Balloon Flights,

U.S. Dept. of Transp. Off. Gen. Counsel Op. (Jun. 29, 2010)

Ariz. Trans. Tax Ruling No. TPR 92-1 (Mar. 10, 1992)

N.M. Rev. Ruling No. 422-98-1 (Apr. 29, 1998)

Kan. Private Letter Ruling No. P-2010-003 (Jun. 30, 2010)

Balloon Flying Handbook, FAA-H-8082-11A (DOT/FAA, 2008)

Point II

The Administrative Hearing Commission erred in concluding Appellant owed sales taxes on flight certificates sold outside Missouri by a third-party contractor, because the sales of hot air balloon rides by the out-of-state contractor were not "sales at retail" in Missouri and qualified for the "resale" exemption, in that the rides were purchased by the out-of-state contractor for the purpose of resale to its customers.

Kirkwood Glass Co. v. Dir. Of Revenue,

166 S.W.3d 583 (Mo. banc 2005)

Becker Electric Company v. Dir. of Revenue,

749 S.W.2d 403 (Mo. banc 1988)

Kansas City Power & Light Co. v. Dir. of Revenue,

83 S.W.3d 548 (Mo. banc 2002)

Music City Ctr. v. Dir. of Revenue,

295 S.W.3d 465 (Mo. banc 2009)

Section 144.010.1, RSMo.

Point III

The Administrative Hearing Commission erred in concluding Appellant owed use taxes on its purchase of certain fixed assets, because Appellant is exempt from such use taxes under section 144.030.2, in that Appellant is a "common carrier."

Cook Tractor Co., Inc. v. Dir. Of Revenue,

187 S.W.3d 870 (Mo. banc 2006)

Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC,

525 F.2d 630 (D.C. Cir. 1976)

State ex rel. Anderson v. Witthaus,

340 Mo. 1004, 102 S.W.2d 99 (1937)

Section 144.030, RSMo.

Argument

Under the AHTA's plain language, the sales taxes imposed on Appellant, and affirmed by the Commission, are prohibited. Indeed, the U.S. Department of Transportation ("DOT"), the agency charged with enforcing the AHTA, agrees that states are prohibited from levying a tax on the gross receipts of the sales of hot air balloon rides. (LF 9-13; App. 64). In addition to ignoring the AHTA's ban on imposing these taxes, the Commission misconstrued Missouri revenue laws concerning a "sale at retail" and consumer's use taxes. Therefore, the Commission's Decision should be reversed and remanded to the Commission for the sole purpose of calculating the refund due Appellant.

Standard of Review

The Commission's interpretation of the AHTA and revenue laws is reviewed de novo, giving no deference to the Commission on its interpretation and application of the law. *Sw. Bell Tel. Co. v. Dir. of Revenue*, 182 S.W.3d 226, 228 (Mo. banc 2005); *Spradling v. SSM Health Care St. Louis*, 313 S.W.3d 683, 686 (Mo. banc 2010); *Gervich v. Condaire, Inc.*, 370 S.W.3d 617, 620 (Mo.

banc 2012). "The [Commission's] factual determinations will be upheld if the law supports them and, after reviewing the whole record, there is substantial evidence that supports them." *Id.*

Point I

The Administrative Hearing Commission erred in concluding Appellant owed sales taxes on hot air balloon rides, because the AHTA prohibits levying such taxes, in that those taxes are a tax or charge on an individual traveling in air commerce.

The revenue laws of Missouri levy a tax on "the amount paid for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events." RSMo Section 144.020.1(2). For purposes of this appeal, the parties and the Commission all agree Appellant's gross receipts from its hot air balloon rides are fees "paid for amusement or entertainment," and therefore are subject to a sales tax if not otherwise prohibited. The AHTA, however, prohibits taxing gross receipts from the sale of untethered hot air balloon rides.

Originally codified as § 1513(a), and now codified as 49 U.S.C. § 40116(b), the AHTA prohibits a state or political subdivision from levying or collecting a "tax, fee, head charge, or other charge on —

(1) an individual traveling in air commerce; (2) the transportation of an individual traveling in air commerce; (3) the sale of air transportation; or (4) the gross receipts from that air commerce or transportation." 49 U.S.C. § 40116(b). Thus, sales taxes imposed by section 144.020 are prohibited to the extent they levy taxes on gross receipts derived from an individual traveling in air commerce. *Aloha Airlines, Inc. v. Dir. of Taxation of Hawaii*, 464 U.S. 7 (1983).[1]

Taxes assessed on gross receipts from the sales of Appellant's hot air balloon rides are precisely the type of taxes prohibited by the AHTA because the sales derive from individuals "traveling" in

[1] "Although the *Aloha Airlines* opinion referenced the fact that the AHTA prohibited levies on gross receipts, whether taxed "directly or indirectly," (language that was eliminated in the AHTA's subsequent re-codification), we are convinced that the change in the statutory language does not affect the continuing validity of the Court's holding because, as the revision notes make clear, the alteration was made only to omit 'surplus.'" *Sw. Air Ambulance, Inc. v. City of Las Cruces*, 268 F.3d 1162, 1168 n.3 (10th Cir. 2001).

"air commerce." *See*, *e.g.,* Question on Taxation of Hot Air Balloon Flights, U.S. Dept. of Transp. Off. Gen. Counsel Op. (Jun. 29, 2010) (LF 9-13; App. A64); Ariz. Trans. Tax Ruling No. TPR 92-1 (Mar. 10, 1992) (App. A57); N.M. Rev. Ruling No. 422-98-1 (Apr. 29, 1998) (App. A60); Kan. Private Letter Ruling No. P-2010-003 (Jun. 30, 2010) (App. A62).[2]

[2] Although these opinions are advisory, informal and not a part of the record on appeal (with the exception of the letter authored by the DOT (LF 9-13; App. 64)), a court may take judicial notice of them as they constitute public records. *See Central Controls Co. v. AT & T Information Sys., Inc.*, 746 S.W.2d 150, 153 (Mo. App. 1988) (taking judicial notice of public records); *see also Union Electric Co. v. Department of Revenue*, 136 Ill.2d 385, 399, 556 N.E.2d 236 (1990) ("Although the private letter ruling in question has not been made part of the record, we take judicial notice of it as it constitutes a public record."). Indeed, the Commission relied upon Illinois revenue ruilings on a different issue in this appeal. *See* App. A15.

A. Hot air balloon rides carry individuals who are "traveling"; the Commission erred in finding otherwise.

A passenger-carrying, piloted and untethered hot air balloon operator, such as Appellant, carries individuals who are "traveling" under the AHTA. The AHTA does not define "traveling." When a word is not defined by statute, it is defined according to its plain and ordinary meaning as derived from the dictionary. *State v. Oliver*, 293 S.W.3d 437, 446 (Mo. banc 2009). "Travel" is defined in the dictionary as "as a verb meaning 'to go or proceed on or as if on a trip or tour: JOURNEY….'" *English Manor Bed & Breakfast v. Great Lakes Co's.*, 716 N.W.2d 531, 544 (Wis. App. 2006) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2432-33 (unabr. 1993)). Appellant's passengers fall within this definition.

It is hard to imagine how an individual on a hot air balloon is not traveling when considering how the FAA describes hot air balloon flights.[3] *See Balloon Flying Handbook,* FAA-H-8082-11A

[3] Even the Director's questioning referred to Appellant's hot air balloon rides as "traveling." *See, e.g.,* Tr. 48:23-25; 49:1 ("Q: And you're not

(DOT/FAA, 2008),www.faa.gov/regulations_policies/handbooks_manuals/aircraft/media/FAA-H-8083-11.pdf.[4] The FAA explains hot air balloons launch, then "travel," then land. "A balloon is distinct from other aircraft in that it ***travels*** by moving with the wind and cannot be propelled through the air in a controlled manner." *Id.* at 2-2 (App. A52) (emphasis added); *see also* LF 8. Outlook briefing "is used to make tentative decisions regarding the flight, such as go/no-go, and potential directions of ***travel***." *Id.* at 3-2 (App. A54) (emphasis added). "The pilot should always face the direction of ***travel***, especially at low altitude." *Id.* at 7-11; App. A56 (emphasis added).

The Commission concluded Appellant's passengers do not "travel" within the meaning of the AHTA because the passengers

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traveling from one airport to another airport, you're *traveling* from a location in open to a location in the open? A: Yes, sir") (emphasis added).

[4] The AHTA is within the regulatory purview of the Department of Transportation ("DOT"). *Nw. Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 366-67 (1994). The FAA is an operating mode of the DOT.

do not move "from one place to another;" instead, they "start and finish at the Jefferson County public library. The purpose of the balloon rides is not travel or transportation; it is amusement." (LF 85; App. A10).[5] Not only has this conclusion been expressly rejected by the DOT (LF 10), it is based on the flawed premise that "travel" should be defined synonymously with "transportation," so that both mean "movement from one place to another." Adopting such a definition would render one of those two words redundant and superfluous, *Wehrenberg, Inc. v. Dir. of Revenue*, 352 S.W.3d 366, 367 (Mo. banc 2011), and is inconsistent with the plain understanding of the term as evidenced by the FAA's use of "travel." Moreover, the AHTA nowhere mentions the purpose of a flight,

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[5] The Commission found that in this respect this case is similar to *Branson Scenic Ry. v. Dir. of Revenue*, 3 S.W.3d 788 (Mo. App. 1999). That case did not address the AHTA and it is unclear how that case has any applicability to the determination of whether the AHTA prohibits sales taxes on Appellant's gross receipts from hot air balloon rides. If the Director chooses to rely on *Branson*, Appellant will further distinguish it in its Reply Brief.

nor does it limit the definition of "travel" by specifying an individual can only "travel" from one specific place to another.

Even if the Commission's definition of "travel" was correct (it was not), there was no substantial evidence to support its determination that Appellant's passengers are not moving from one place to another. The sales tax at issue is the tax assessed on the gross receipts from sales of Appellant's hot air balloon rides. The undisputed facts demonstrate the hot air balloon rides launch at one location and land a substantial distance downwind from the launch site. In that regard, it is error to conclude there is not "movement from one place to another." Therefore, Appellant's balloon rides are carrying individuals who are "traveling" under the AHTA.

B. Hot air balloons operate in "air commerce"; the Commission erred in failing to so conclude.

Untethered hot air balloons also operate in "air commerce." "Air commerce" means:

> foreign air commerce, interstate air commerce, the transportation of mail by aircraft, the operation of aircraft within the limits of a Federal airway, or the operation of aircraft that directly affects, or may endanger safety in, foreign or interstate air commerce.

49 USC § 40102(a)(3) (emphasis added). Thus, "air commerce" not only includes "foreign air commerce" and "interstate air commerce," both defined terms (49 USC §§ 40102(a)(22), (24)), it also includes "the operation of aircraft within the limits of a Federal airway" and "the operation of aircraft that directly affects, or may endanger safety in, foreign or interstate air commerce." 49 U.S.C. § 40102(a)(3).

In other words, if Appellant's hot air balloon rides fall into any one of the four categories above, then Appellant's hot air balloons operate in air commerce. A common requirement for each of the

categories is operation of or transportation by "aircraft." 49 USC §§ 40102(a)(3), (22), (24). Bringing this all together in the context of this case means Appellant's hot air balloons operate in "air commerce" if Appellant's hot air balloons are "aircraft" and the operation of those hot air balloons: (i) is within the "Federal Airway," (ii) "may endanger safety in, foreign or interstate air commerce" ***or*** (iii) furthers a business between a place in Missouri and another place in Missouri through the airspace over a place outside of Missouri in furtherance of a business (*i.e.,* "interstate air commerce").

1. Appellant's balloon is an "aircraft."

A hot air balloon is an "aircraft" under federal aviation statutes: "any contrivance invented, used, or designed to navigate, or fly in, the air." 49 U.S.C. § 40102(a)(6). Indeed, the FAA expressly defines a "balloon" as an aircraft, namely as a "lighter than air aircraft that sustains flight through the use of either gas buoyancy or an airborne heater." 14 C.F.R. § 1.1. Moreover, section 305.101.1 states that under the Uniform Aeronautics Law (sections 305.010 to 305.110), "air-craft" includes a balloon, and section 305.070 requires these sections to be "interpreted and con-

strued as to…harmonize, as far as possible, with federal laws and regulations on the subject of aeronautics." Therefore, a hot air balloon is clearly an "aircraft" within the meaning of 49 U.S.C. § 40102(a)(3).

2. Appellant's aircraft operates within the limits of Federal airways.

Hot air balloons are also being operated "within the limits of Federal airways." "Federal airway" means "a part of the navigable airspace that the Administrator designates as a Federal airway." 49 U.S.C. § 40102(a)(20). The airspace in Missouri extending upward from 1,200 feet and above has been designated as a Federal airway. FAA Order 7400.9V §§ 6008, 6010 (Sep. 15, 2012), http://www.faa. gov/documentLibrary/media/Order/7400.9.pdf.[6] Appellant's flights are generally in the airspace in Missouri between 1,500 to 3,000 feet above the surface and at times in excess

[6] FAA Order 7400.9V is routinely revised. The previously canceled versions are available at http://www.faa.gov/regulations_policies/orders_notices/index.cfm/go/document.information/documentID/1020329. Throughout these revisions, the airspace in Missouri continued to be designated as a Federal airway.

of 10,000 feet. (Tr. 36:17-20) (L.F. 77). Thus, Appellant is operating a hot air balloon or "aircraft" within the limits of a Federal airway, which qualifies as "air commerce."

3. Appellant's aircraft rides may endanger safety in air commerce.

The Court need not inquire further to determine whether Appellant's operations qualify as "air commerce," but Appellant's hot air balloon rides qualify as "air commerce" for another independent reason: the rides are the "operation or navigation of aircraft ... which ***may*** endanger safety in, interstate, overseas, or foreign air commerce." *Gorman v. NTSB*, 558 F.3d 580, 591 (D.C. Cir. 2009) (emphasis added, ellipses in original). Put differently, even if the aircraft is not being operated in interstate or foreign air commerce, the aircraft is being operated in "air commerce" if it may endanger safety in interstate or foreign air commerce. No demonstrable threat is necessary to come within this part of the "air commerce" definition. *Id.* All that is required is that the operation of the aircraft could cause the "potential" to endanger safety in interstate, overseas, or foreign air commerce. *Hill v. Nat'l Transp. Safety Bd.*, 886 F.2d 1275, 1280 (10th Cir. 1989).

Appellant's hot air balloon rides are untethered and are directionally controlled strictly by the wind pattern, leaving the balloonist with minimal directional control over the aircraft. *Balloon Flying Handbook* at 2-2; *see also* (Tr. 33:14-25; 34:1-8; 35:4-24; 47:14:25; 48:8:11). This lack of control, coupled with the balloons flying within the limits of a Federal airway, undoubtedly creates the potential for the balloon to endanger interstate commerce. Indeed, if hot air balloons, and all aircraft for that matter, did not have the potential to endanger safety in interstate air commerce, then the FAA could not regulate them. *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1442 (10th Cir. 1993) (the Federal Aviation Act "directed the Federal Aviation Agency to regulate air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense."). Of course, the FAA does regulate all "aircraft," which includes hot air balloons as discussed above. 14 C.F.R. § 91.1 ("This subpart prescribes flight rules governing the operation of aircraft within the United States"). Because the operation of Appellant's hot air bal-

loons may endanger interstate commerce, its operations qualify as "air commerce."

4. Appellant's aircraft operates in "interstate air commerce."

Although Appellant has established two independent reasons that it qualifies as operating in "air commerce," there is another: Appellant is operating in "interstate air commerce." This term means "the operation of aircraft in furthering a business or vocation … between a place in … (i) a State and a place in … another State[; or] (ii) a State and another place in the same State through the airspace over a place outside the State...." . 49 U.S.C. § 40102(a)(24).

The undisputed facts demonstrate that as part of Appellant's business, its hot air balloons (aircraft) operate between Missouri and Illinois. (Tr. 47:14:25; 48:8:11; 49:9-10). Likewise, it is undisputed that Appellant's business sometimes requires it to operate its hot air balloons between a place in Missouri and another place in Missouri over the airspace of Illinois. *Id.* Therefore, Appellant's operation of aircraft is in "interstate air commerce," which qualifies as "air commerce."

Once the relationship among all the statutory provisions is understood, it becomes clear the sales taxes imposed by section 140.020, when applied to the sale of hot air balloon rides, are a prohibited tax on the gross receipts from "an individual traveling in air commerce" as preempted by the AHTA. 49 U.S.C. § 40116(b). Therefore, the Commission's Decision should be reversed and remanded for the sole purpose of determining the refund due Appellant for the sales taxes improperly levied against its sales of hot air balloon rides.

Point II

The Administrative Hearing Commission erred in concluding Appellant owed sales taxes on flight certificates sold outside Missouri by a third-party contractor, because the sales of hot air balloon rides by the out-of-state contractor were not "sales at retail" in Missouri and qualified for the "resale" exemption, in that the rides were purchased by the out-of-state contractor for the purpose of resale to its customers.

The AHTA preempts sales taxes at issue here, so it is unnecessary to inquire further into sales tax. However, even if the AHTA did not preempt sales taxes at issue here (which it does), the

Commission still erred in concluding Appellant owed sales taxes. The Commission concluded all "the elements of the sale at retail are met at the time Balloons accepts the certificate from the customer and agrees to provide a hot air balloon ride to the customer in exchange for the certificate." (LF 89; App. A15). In so holding, the Commission misconstrued "sale at retail" and misapplied the "resale exemption."

1. Appellant never made a "sale at retail."

The taxable event for sales tax is a retail sale, which is defined as "any transfer made by any person... of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale ... for a valuable consideration...." Section 144.010.1(11). No sales tax can be imposed when "the items were purchased outside of Missouri." *Kirkwood Glass Co. v. Dir. of Revenue*, 166 S.W.3d 583, 585 (Mo. banc 2005).

Here, it is undisputed the flight certificates sold by third-party contractors were purchased outside Missouri. (Tr. 18:2-13). If any *sales tax* should be collected at all, it should be by the third-party contractor, not Appellant. *Becker Electric Company v. Dir. of Revenue*, 749 S.W.2d 403, 405 (Mo. banc 1988) ("Collection and sub-

mission of the sales tax is generally the responsibility of the seller…."). *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 102 S.W.3d 526, 528 (Mo. banc 2003), and *Lynn v. Dir. of Revenue*, 689 S.W.2d 45, 48 (Mo. banc 1985), relied on by the Commission (LF 90-91; App. A16-A17), do not require a different result.

In *Six Flags,* the transaction was "between the customer and an amusement park in Missouri for admission to the amusement park in Missouri." 102 S.W.3d at 528. In *Lynn*, "the collection of a portion of an admission fee while a chartered tour boat is on the Kansas side of the Missouri river does not render the transaction in interstate commerce when the obligation to pay for the tour arose in Missouri, the payments are kept in Missouri, and the boat is moored in Missouri." 689 S.W.2d at 48. In both of these cases, the Missouri entity providing the service directly charged and collected the sales price for the tickets at the time of purchase. *Six Flags*, 102 S.W.3d at 528; *Lynn*, 689 S.W.2d at 48.

Here, however, the transaction was not between a customer and a Missouri entity providing balloon rides; instead, the transaction was between a customer and an *out-of-state* third party con-

tractor. Moreover, the obligation to pay for the flight certificate occurred when the customer purchased the flight certificate from the third-party contractor and the third-party contractor kept those payments outside Missouri. Though it makes sense that the sellers were required to collect sales tax in *Six Flags* and *Lynn*, here Appellant had no knowledge of the amount charged by the out-of-state contractor for the flight certificates and never collected money from the individuals redeeming the flight certificates. (Tr. 94:13-14; 95:2-5; 99:17-21; 100:17-19).

The Commission concluded that not requiring Appellant to collect and remit sales taxes on sales made by an out-of-state third-party contractor would "defeat the general assembly's clear intention that such a sale is subject to Missouri sales tax…." (LF 91; App. A17). The legislature's intent is not defeated by this result. The legislature only sought to impose a sales tax on sales occurring in Missouri, and to levy a use tax on sales occurring outside Missouri, such as happened here. *Kirkwood Glass Co.*, 166 S.W.3d at 585 ("Use taxes are meant to complement, supplement, and protect sales taxes by eliminating the incentive to purchase from

out-of-state sellers in order to avoid local sales taxes."). If customers decide to buy flight certificates from a seller outside Missouri, such as some customers have done here, then those customers would be required to pay use taxes, assuming those taxes are not preempted by the AHTA (they are). *Becker Elec. Co.*, 749 S.W.2d at 405. Therefore, Appellant owes no tax to Missouri for sales occurring outside Missouri.

2. The "resale exemption" applies.

A "sale at retail" includes only transfers made "for use or consumption by the buyer," and not transfers made for resale. *Kansas City Power & Light Co. v. Dir. of Revenue*, 83 S.W.3d 548, 550 (Mo. banc 2002). "In other words, if a person purchases a tangible or intangible product in order to sell it to another, the purchase is not subject to sales tax." *Id.* at 551. This exemption to the imposition of sales tax is known as the "resale exemption." *President Casino, Inc. v. Dir. of Revenue*, 219 S.W.3d 235, 238 (Mo. banc 2007).

The Commission and the parties referred to the "flight certificates" interchangeably as "gift certificates." The semantics are unimportant. Regardless of the name, the certificates allowed customers to ride on Appellant's hot air balloons. To that end, the cer-

tificates are no different than the admission tickets discussed in *Music City Ctr. v. Dir. of Revenue*, 295 S.W.3d 465 (Mo. banc 2009).[7] The certificate permits a customer entry onto the balloon just as a ticket admits entry into a show. "A sale of [a certificate] is taxable if the [certificate] was sold for use or consumption and not, instead, for resale." *Id.* at 468. The reason for the resale exemption is simple: to avoid "multiple taxation of the same property as it passes through the chain of commerce." *Id.*

The key question, then, is whether Appellant's sales of balloon rides to its out-of-state contractor were for the purpose of resale. *Id.* at 469 ("The issue, then, is whether the sales by Music City were for the purpose of a taxable resale by the Branson-based businesses."). The record demonstrates that balloon rides were purchased by the third-party contractor for resale to the third-party contractor's customers. Here, Appellant provided the Balloon rides sold by a third-party contractor. (Tr. 18:2-13). In other

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[7] "The holding in *Music City* was subsequently abrogated by amendments to § 144.018, but … those amendments were not effective during the tax periods at issue here." (LF 91 n. 4)

words, Appellant's services are being resold. "These sales … from [Appellant] to the [contractor] falls clearly within the statutorily established definition of 'resale.'" *Music City*, 295 S.W.3d at 469. Therefore, Appellant owes no tax to Missouri on the balloon rides that occurred by way of redemption of a certificate sold by Appellant's third-party contractors.

Point III

The Administrative Hearing Commission erred in concluding Appellant owed use taxes on its purchase of certain fixed assets, because Appellant is exempt from such use taxes under section 144.030.2, in that Appellant is a "common carrier."

The Commission held Appellant's purchase of certain fixed assets – two balloons and an inflator – were subject to use tax because Appellant was not a "common carrier," and therefore was not eligible to claim the exemptions provided in section 144.030.2. (LF 93; App. A19). Subsections 3 and 20 of section 144.030.2 exempt from state and local use tax:

> Material, replacement parts and equipment purchased for use directly upon, and for the repair and maintenance or

> manufacture of…aircraft engaged as common carriers of persons or property; [and]
>
> ***
>
> All sales of aircraft to common carriers for storage or use in interstate commerce[.]

There is no dispute the purchase of the balloons and an inflator qualify as sales of either "aircraft" or "material, replacement parts and equipment purchased for use directly upon aircraft." The issue is whether Appellant is a "common carrier." The statute does not define the term, but case law supplies the answer.

The "test of whether one is a common carrier is whether he has invited the trade of the public." *Cook Tractor Co., Inc. v. Dir. of Revenue*, 187 S.W.3d 870, 874 (Mo. banc 2006) (internal quotes omitted). The essential characteristic under this test is that the carrier "undertakes to carry for all people indifferently." *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) (collecting cases, including *State ex rel. Anderson v. Witthaus*, 340 Mo. 1004, 102 S.W.2d 99, 102 (1937)) (internal quotes and ellipses removed). Carrying all people indifferently

does not mean business may not "be turned away either because it is not of the type normally accepted or because the carrier's capacity has been exhausted." *Id.* Rather, the concept refers to not making distinctions, based on the person, regarding who may travel. *See id.* (referring to "individualized decisions").

Appellant was in the business of providing carriage for persons traveling in air commerce as discussed above. The key issue that must be resolved here is whether Appellant "invited the trade of the public." The only evidence the Commission cited to suggest Appellant had not "invited the trade of the public" was this testimony:

> Q: A customer walks in your place and presents you with a gift certificate. You're obligated to fly that customer based on the gift certificate?
>
> A; Not at all.
>
> Q: You fly that customer based on the gift certificate?
>
> A: If I choose to fly that customer, yeah.

This excerpt is not substantial evidence of making individualized decisions based on the person. Instead, it merely confirms that

presentment of a "gift certificate," in and of itself, does not obligate Appellant to fly a passenger. For example, the passenger may be turned away because Appellant lacks capacity or the weather does not permit the flight. These valid, non-individualized reasons do not undermine Appellant's ability to qualify as a "common carrier." *Nat'l Ass'n of Regulatory Util. Comm'rs*, 525 F.2d at 641.

The record shows Appellant advertises its business on its website to solicit the general public. (Tr. 34:9-23). The record also shows Appellant holds itself out as ready to engage with anyone who might make a reservation, subject to weather and capacity. (Tr. 34:9-23, 35:4-7). These essential characteristics qualify Appellant as a "common carrier." *Cook Tractor*, 187 S.W.3d at 874. Therefore, Appellant was exempt from the use tax on the balloons and inflator fan under section 144.030.2(3) and (20), and the Commission's decision should be reversed.[8]

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[8] Despite the auditor agreeing to use a sampling method by reviewing the invoices from 2009 to project purchases over the five-year period of the audit, the auditor conveniently added "one time" purchases from other years to raise Appellant's total purchases above the $2,000

Conclusion

The Commission erred in construing the AHTA and the Missouri revenue laws. The AHTA preempts sales taxes on the gross receipts of Appellant's hot air balloon rides; thus, making it unnecessary to decide whether there was even a "sale at retail." Even if the AHTA did not preempt sales taxes on Appellant's gross receipts, Appellant still would not owe sales taxes for balloon rides sold by third-party contractors. Likewise, Appellant would not owe use taxes after removing purchases exempt for common carriers such as Appellant. Therefore, Appellant respectfully requests this Court reverse the Commission and remand this case to the Commission for the sole purpose of determining the refund due Appellant.

Respectfully submitted,

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threshold. *See* LF 15; App. A4, A23-24. After deducting these exempt purchases from Appellant's total purchases subject to use taxes during the audit period, however, the amount is less than $2,000. Consequently, Appellant owed no use taxes. *See* LF 96-97; App. A22-23.

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1. This brief complies with the limitations contained in Rule 84.06(b) because it contains 6,727 words. This word count does not exclude the parts of the brief subject to exemption under said rules.

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/s/ Jesse B. Rochman

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I hereby certify that on May 13, 2013, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system, and pursuant to Rule 84.05(a), two paper copies of the brief were sent by first-class U.S. mail, postage prepaid, to the following counsel of record:

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