

**No. SC93039**

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IN THE SUPREME COURT OF MISSOURI

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

v.

MISSOURI DEPARTMENT OF REVENUE,  
Respondent.

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**On Petition for Review from the  
Missouri Administrative Hearing Commission**

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**APPELLANT’S REPLY BRIEF**

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## **Reply Argument**

### **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.**

#### ***A. The AHTA bars sales taxes on balloon rides.***

The only subsection relevant to the analysis as to whether the AHTA bars sales taxes on balloon rides is 49 U.S.C. § 40116(b). Despite this, the Director's analysis detours through three other subsections of the AHTA irrelevant to the issues at hand before finally arriving at subsection (b). Appellant will take the same detour as the Director to illustrate how each subsection besides subsection (b) is not germane to this appeal.

#### **I. Subsection (e)**

The Director's analysis starts by asserting 49 U.S.C. § 40116(e) authorizes the taxes at issue on this appeal. *See* Respondent's Brief at p. 6. "The provision on which the [Director] relies, § 40116(e), preserves the right of the states to collect those taxes not otherwise barred by the statute." *United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 335 (1st Cir. 2003). As explained in Appellant's Brief, the taxes at issue here are prohibited by 49

U.S.C. § 40116(b). *See* Appellant’s Brief at pp. 11-24. Thus, the Director’s analysis of subsection (e) adds nothing to the analysis of the points relied on by Appellant.

## **II. Subsection (d)**

The Director continues its analysis by attacking a “straw man” with its argument that 49 U.S.C. § 40116(d) does not otherwise bar the taxes at issue on this appeal, and thus are permitted by 49 U.S.C. § 40116(e). *See* Respondent’s Brief at p. 7. Appellant never argued the taxes at issue were barred by subsection (d). Indeed, the Director recognizes this. *Id.* at 8 (“subsection (e)...excepts out ‘those taxes enumerated in subsection (b),’ *the subsection on which Taxpayer principally relies*”) (emphasis added). Thus, the analysis of subsection (d) is wholly irrelevant.

## **III. Subsections (c) and (b)**

After meandering through the AHTA, the Director finally arrives at its analysis of the only subsection relevant to this appeal: 49 U.S.C. § 40116(b). *See* Respondent’s Brief at p. 8. The Director maintains the taxes at issue on this appeal are not prohibited by 49 U.S.C. § 40116(b) for two reasons: (1) “the prohibitions in (b) do not apply to a state tax that is imposed as provided by subsection (c);” and (2) the taxes at issue do not come within the enumerated

prohibitions of 49 U.S.C. § 40116(b). The Director misinterpreted both of these subsections of the AHTA as discussed below.

1. *Subsection (c) is not a savings clause to the categorical ban imposed by subsection (b).*

The Director argues “under subsection (c), the State is expressly authorized to impose ‘a tax on or relating to’ the flight of Taxpayer’s balloon. And because subsection (c) allows Missouri’s sales tax, the prohibitions in subsection (b) simply do not apply here.” This same argument, however, was already rejected in *Twp. of Tinicum v. U.S. Dep’t of Transp.*, 582 F.3d 482 (3d Cir.2009).

In that case, the Third Circuit was faced with the following fact pattern:

Suppose a municipality enacts a tax that falls within one of the four categories enumerated in subsection (b). Suppose the tax relates to a commercial flight. And suppose that flight arrives in or departs from the taxing municipality. Does subsection (c) save the tax from the categorical ban? That is the question presented by Tinicum’s petition for review, and we answer it in the negative.

*Id.* at 487 (footnotes omitted).

Like *Tinicum*, the Director’s argument requires this Court to suppose the taxes at issue here are banned by subsection (b). See Respondent’s Brief at p. 9. Also similar to *Tinicum*, the Director argues the taxes relate to the flight of commercial aircraft because Appellant “operates its hot air balloon in commerce,” and the flights “always ‘take off’ and generally ‘lands’ in Missouri.” *Id.* Thus, the Director argues subsection (c) saves the taxes at issue on this appeal from the categorical ban in subsection (b).

Contrary to the Director’s interpretation, 49 U.S.C. § 40116(c) does not act as a savings clause. Instead, it “provides that a tax on a subject flight that lacks a ground nexus to the taxing jurisdiction cannot pass AHTA muster (regardless of whether the tax falls within the categorical ban), but it says nothing about the fate of a tax on a subject flight that does have such a nexus.” *Township of Tinicum*, 582 F.3d at 489. Properly interpreted, subsection (b) and (c) provide that:

a tax falling within an enumerated category is prohibited, and a tax not falling within an enumerated category is not necessarily prohibited, except that a tax on a subject flight

lacking a ground nexus is prohibited even if such tax does not belong to an enumerated category.

*Id.* at 489-90.

In other words, 49 U.S.C. § 40116(b) categorically bans certain enumerated taxes and 49 U.S.C. § 40116(c) bans taxes not otherwise barred by subsection (b) if the flight does not take off or land in the jurisdiction of the taxing municipality. Because Appellant's balloon rides have a ground nexus to Missouri, Appellant never argued that subsection (c) banned the taxes at issue. Instead, Appellant asserted in Appellant's Brief that 49 U.S.C. § 40116(b) bans the taxes at issue. Thus, 49 U.S.C. § 40116(b) is where Appellant focused its analysis, and is the only subsection of the AHTA that this Court needs to address. As discussed below and contrary to the Director's analysis, subsection (b) does bar the taxes at issue on this appeal.

## *2. Subsection (b) bars taxes on hot air balloon rides.*

The Director frames the key issues as being "whether the tax is imposed on 'air commerce' or 'air transportation.'" See Respondent's Brief at p. 10. The Director contends taxes on balloon rides are permissible under the AHTA because the "balloon rides at is-

sue here are neither ‘air commerce’ or [sic] ‘air transportation.’” *Id.* Initially, Appellant never argued in Appellant’s Brief that it engaged in “air transportation,” so it is no wonder the Director found it the “simpler of the two questions to answer....” *Id.* at 11. Instead, Appellant argued “[t]axes 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 ‘air commerce.’*” See Appellant’s Brief at p. 12 (emphasis added).

The Director tacitly concedes hot air balloon rides carry individuals who are “traveling” by making no contention otherwise in its response. See, e.g., *Carney Funeral Chapel, Inc. v. Sav. of Am., Inc.*, 978 S.W.2d 820, 826 (Mo. App. 1998). Instead, the Director argues Appellant’s balloon rides do not come within the definition of “air commerce.” See Respondent’s Brief at pp. 12-15. “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). The Director concedes appellant's balloons are "aircraft." See Respondent's Brief at p. 9 ("A hot air balloon is an aircraft."). This concession is important because the Federal Aviation Act "directed the Federal Aviation Agency to regulate *air commerce* in such a manner as to best promote its development and safety and fulfill the requirements of national defense." *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438, 1442 (10th Cir. 1993) (emphasis added). The FAA regulates *all* aircraft, which logically means all aircraft, including balloons traveling in air commerce. See, e.g., 14 C.F.R. § 91.1 ("This subpart prescribes flight rules governing the operation of aircraft within the United States"). Regardless, balloon rides also fall within at least one of the three other subparts of the "air commerce" definition: (a) "interstate air commerce" (defined at 49 USC §§ 40102(a)(24)); (b) "the operation of aircraft within the limits of a Federal airway"; and (c) "the operation of aircraft that directly affects, or may endanger safety in, foreign or interstate air commerce." 49 U.S.C. § 40102(a)(3). Each will be addressed in turn.

*a. Interstate air commerce*

Interstate air commerce 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 Director only contends that Appellant’s balloon rides do not come within this definition because “[a]lthough the balloon may occasionally be carried by the wind into Illinois, the trips always begin and end in Missouri....” *See* Respondent’s Brief at p. 12.

Although the “trips” might always begin and end in Missouri, the balloon rides (*i.e.*, the operation of the aircraft) do not. Rather, the balloons sometimes land in Illinois or travel over the air space in Illinois. (Tr. 47:14:25; 48:8:11; 49:9-10). So although Appellant’s balloon rides might not frequently operate between Missouri and Illinois or between one place in Missouri and another place in Missouri over the air space in Illinois, it does not follow that Appellant is not operating in interstate air commerce because “frequency is not the key[.]” *See* Respondent’s Brief at p. 11. There-

fore, Appellant's operation of aircraft is in "interstate air commerce," which qualifies as "air commerce."

*b. Appellant's balloons may endanger safety in air commerce.*

"Air commerce" includes the operation of aircraft that "**may** endanger safety in, interstate, overseas, or foreign air commerce." *Gorman v. NTSB*, 558 F.3d 580, 591 (D.C. Cir. 2009) (emphasis added). The language "may endanger" makes clear that to come within the definition of "air commerce," it is not necessary that the hot air balloon "*actually* pose a demonstrable threat, as [the Director] suggests." *Id.* (emphasis added). Instead, all that is necessary is that the operation of the aircraft *may* "endanger safety in, foreign or interstate air commerce." *Hill v. Nat'l Transp. Safety Bd.*, 886 F.2d 1275, 1280 (10th Cir. 1989). Respondent concedes this danger *may* exist. *See* Respondent's Brief at p. 14. ("There are *certainly* some circumstances in which a hot air balloon being used for recreational or entertainment purposes could 'endanger safety in, foreign or interstate air commerce.'"). Because the operation of Appellant's hot air balloons *may* endanger interstate commerce, its operations qualify as "air commerce."

*c. Federal Airways*

Hot air balloons are also being operated “within the limits of Federal airways.” The Director initially contends Appellant failed to present or argue FAA Order 7400.9W §§ 6008, 6010 (Sep. 15, 2012), but this is not true. The Commission’s Decision provides that Appellant cited 14 C.F.R. § 71.71, which “states that class E airspace consists of, among other things, ‘the federal airways described in subpart E of FAA Order 7400.9W (*incorporated by reference, see § 71.1*)[.]” (App. A13) (emphasis added). Accordingly, FAA Order 7400.9W is part of 14 CFR § 71.71, which was raised by Appellant below.

FAA Order 7400.9W includes many areas within or across Missouri, specifically including many routes to and around St. Louis. *See, e.g.*, FAA Order 7400.9W at pp. E-340, 436, 998, 999, 1007, 1088. Again, there is no frequency requirement for balloon rides to be considered to operate within federal airways. So long as the balloons ever operate in a federal airway, they meet the definition of “air commerce.” The record reveals that Appellant’s balloon rides travels in the federal airways identified in FAA Order 7400.9W (Tr. 38-43).

After dispensing with the Director's detour through inapplicable subsections of the AHTA, it becomes clear the 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). Indeed, the DOT and the other states that have looked at the issue have concluded that such taxes are preempted by the AHTA. *See, e.g.*, Question on Taxation of Hot Air Balloon Flights, U.S. Dep't of Transp. Off. Gen. Counsel Op. (Jun. 29, 2010) (LF 9-13; App. A64); Ariz. Transaction Tax Ruling No. TPR 92-1 (Mar. 10, 1992) (App. A57); N.M. Revenue Ruling No. 422-98-1 (Apr. 29, 1998) (App. A60); Kan. Private Letter Ruling No. P-2010-003 (Jun. 30, 2010) (App. A62); *see also* Sales Tax on Admissions Related to Air Commerce, Fla. Dep't Rev. TIP #12A01-10 (June 4, 2012), available at [dor.myflorida.com/dor/tips/tip12a01-10.html](http://dor.myflorida.com/dor/tips/tip12a01-10.html); Hot Air Balloon Rides and Other Aircraft-Related Admissions, Wis. Dept. of Revenue (Dec. 14, 2010), available at [www.revenue.wi.gov/taxpro/news/101213a.html](http://www.revenue.wi.gov/taxpro/news/101213a.html) ("Wisconsin sales and use tax does not apply to admissions charged for un-tethered hot air balloon rides....The department revised its longstanding

position set forth in sec. Tax 11.84(2)(c), Wis. Adm. Code (May 2010 Register), as the result of a recent advisory opinion by the U.S. Department of Transportation General Counsel.”). It is telling Respondent chose to not even address these persuasive findings from the DOT and other states. 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 Appellant made two additional arguments in the Appellant’s Brief that the Commission still erred in concluding Appellant owed sales taxes on flight certificates sold by its third-party contractors. The first was that the Commission misconstrued “sale at retail,” and the second was that the Commission misapplied the “resale exemption.”

### ***A. Appellant never made a “sale at retail.”***

The Director asserts Appellant “sold nothing to the [third-party contractor].” See Respondent’s Brief at p. 22. This is not supported by the record. Appellant agreed to provide its services to the third-

party contractors at a discounted rate through a contractual arrangement (the sale), and the Third-Party contractors resold this service to its customers outside of Missouri. (Tr. 18:2-8; 94:15-25; 95:1-5; 100:8-16). Thus, no sales tax can be imposed because “the items were purchased outside of Missouri.” *Kirkwood Glass Co. v. Dir. of Revenue*, 166 S.W.3d 583, 585 (Mo. banc 2005).

Recognizing this is the law, the Director maintains the sale still took place in Missouri with no law or citation to the record to support such a bald assertion. *See* Respondent’s Brief at p. 19. Instead, the Director argues the sales of flight certificates by third-party contractor cannot change the location of a sale any “more than accepting payment by credit card moves the point of sale from the store to the state from which the payment is ultimately made.” *Id.* Although it is true that payment by credit card does not move the point of sale to the state from which payment was ultimately made, the analogy bears no resemblance to the situation here.

A summary explanation of the credit card transaction process is helpful.

A customer will initiate the process when he or she purchases a product from the merchant with a credit card. Once the credit card information is “swiped” on a terminal, or entered on a website, the merchant terminal transmits an authorization request to the merchant’s “acquiring bank” .... The acquiring bank sends the credit card request through an electronic network to the cardholder’s issuing bank. Based on the cardholder’s credit limit or other factors, the issuing bank will send a message back through the network to the acquiring bank, who forwards it back to the merchant, which states that the merchant should either approve or decline the transaction. If approved, the merchant will complete the transaction and the acquiring bank will credit the merchant’s account with the appropriate amount of funds. This entire process typically takes a matter of seconds. Some days to months after the sale is completed, the acquiring bank will submit the transaction information to the issuing bank, which will seek payment from the cardholder and settle with the acquiring bank.

*Gucci Am., Inc. v. Frontline Processing Corp.*, 721 F.Supp.2d 228, 238 (S.D.N.Y. June 23, 2010).

With the summary of the process detailed, it becomes evident why the Director's analogy bears no resemblance to the situation here: under the analogy, the Missouri entity providing the service directly charged (by credit card) and ultimately collected the sales price for the tickets at the time of purchase (or within a few seconds thereof). This situation, then, would be akin to the situations in *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). See Appellant's Brief at p. 26. Thus, it would make sense that Appellant be required to collect sales taxes for flight certificates he sold to out-state-customers using a credit card because Appellant would have knowledge of the amount charged for the flight certificates and actually collected money directly from the individuals obtaining the flight certificates.

Here, however, the transaction was not between a customer and Appellant; instead, the transaction was between a customer and an *out-of-state* third party contractor. 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. So although it would make sense for a Missouri merchant accepting a credit card payment from an out-of-state purchaser, 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 Director seemingly agrees that these facts distinguish the case from *Six Flags*. See Respondent's Brief at p. 18 ("Six Flags, unlike Taxpayer, received and kept the money regardless of whether or when the purchaser ever used to [sic] ticket."). Therefore, Appellant owes no tax to Missouri for sales occurring outside Missouri.

***B. The "resale exemption" applies.***

The Director argues the "resale exemption" does not apply because Appellant "made no 'sales of balloon rides to its out-of-state-contractor.'" To reach this conclusion, the Director uses sleight of hand to shift the taxable event from the purchase made with the

third-party contractor back to Appellant by the use of a “gift certificate” analogy.<sup>1</sup>

It is true that if Appellant’s third-party contractors were selling Appellant’s gift certificates, the sale at retail would not actually occur until the gift certificate was redeemed. It is also true under this analogy that Appellant would have received payment at the time the “gift certificate” was sold (regardless of whether it was redeemed), and when they were redeemed with Appellant, it would be possible for Appellant to collect sales taxes because Ap-

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<sup>1</sup> A “gift certificate” is a voucher given to the purchaser that is exchangeable for a specified cash value of goods or services from a particular place of business. *See* Merriam-Webster Online Dictionary, [merriamwebster.com/dictionary/gift%20certificate](http://merriamwebster.com/dictionary/gift%20certificate) (last visited June 23, 2013) (defining “gift certificate” as “a certificate entitling the recipient to receive goods or services of a specified value from the issuer”); Dictionary.com, [dictionary.reference.com/browse/gift+certificate](http://dictionary.reference.com/browse/gift+certificate) (last visited June 23, 2013) (defining “gift certificate” as “a certificate entitling the bearer to select merchandise of a specified cash value from a store, usually presented as a gift”).

pellant would have knowledge of the amount charged by the out-of-state contractor (i.e., the face value of the gift certificate). Of course, the record shows this is not the case. Appellant had no knowledge of the amount charged by the out-of-state contractor for the flight certificates and never collected money until after it performed the contracted services for its third-party contractor. (Tr. 94:13-14; 95:2-5; 99:17-21; 100:17-19).

The taxable event, however, actually occurs when the flight certificate is sold by the third-party contractor to its customers. At that point, there has been a sale of “of admission tickets, cash admissions, charges and fees to or in places of amusement, entertainment and recreation....” Section 144.020. But Appellant is not the one making the sale, and therefore, cannot be responsible for sales taxes on the sale.

The only connection Appellant has to the sale is that it was contracted by the third-party contractors to offer a service to the third-party contractor’s customers: balloon rides (Tr. 18:2-13). In other words, Appellant is merely a subcontractor whose services are being resold. If any taxes should be collected on these sales – they should not because of the AHTA – the reselling party (the

third-party contractor) should be charged with paying the sales taxes because these sales fall squarely “within the statutorily established definition of ‘resale.’” *Music City Ctr. v. Dir. of Revenue*, 295 S.W.3d 465, 469 (Mo. banc 2009). 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 Director agrees the dispositive issue under this point is whether Appellant is a “common carrier.” *See* Respondent’s Brief at p. 20. The Director answers that in the negative by focusing on the definition of “carrier,” which according to the Director means “one who transports, or provides transportation to or of, goods or passengers.” *Id.* at 21. Using this definition, the Director then relies heavily on *Branson Scenic Ry. v. Dir. of Revenue*, 3 S.W.3d 788 (Mo. App. 1999) for the proposition that Appellant cannot be a carrier, and thus, not a “common carrier,” if it offers rides for amusement. *See* Respondent’s Brief at 23 (“Taxpayer, like the railroad in *Branson* ... is not a ‘carrier,’ common or otherwise). The Director’s reliance on *Branson* is misplaced for at least two reasons.

First, *Branson* is distinguishable. The issue before the *Branson* court was whether the determination that the railway’s excursion

train rides into Arkansas were amusement rides which were not exempt from sales tax as interstate commerce. *Branson*, 3 S.W.3d at 789. That is not even remotely close to the issue here, which is whether certain equipment purchased by Appellant was exempt from use tax because it is a “common carrier.” Indeed, *Branson* never once mentioned the term “common carrier.”

Second, the proposition the Director cites *Branson* for (“Taxpayer, like the railroad in *Branson* ... is not a ‘carrier’”) is not supported by the opinion in *Branson*. Actually, to the contrary, *Branson* described the railway and other entities that carry persons for amusement as a “carrier,” despite the fact it found the purpose of the rides was for amusement. *Branson*, 3 S.W.3d at 792. (“When a **carrier** offers rides for fun, as opposed to offering them for the purpose of actually getting the rider to a particular place, then the **carrier** is providing amusement rides”) (emphasis added). In other words, the Director’s argument that a “common carrier” cannot provide transportation for amusement is refuted by *Branson*. This is why the Commission presumed Appellant was a carrier, as the Director even recognizes. See Respondent’s Brief at p. 23.

The only evidence the Director relies upon for its assertion that Appellant is not a common carrier, is the same evidence the Commission cited:

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. The Director tacitly concedes that these would be valid examples for "choosing" not to provide carriage that would not deprive Appellant of "common carrier" status, but asserts Appellant did not cite anything in the record to support such a claim. This assertion, however, ignores Appellant's statement of facts, which provides that 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).” See Appellant’s Brief at p. 3.

Thus, 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; 106:9, Exhibit D). These essential characteristics qualify Appellant as a “common carrier.” *Cook Tractor Co., Inc. v. Dir. Of Revenue*, 187 S.W.3d 870 (Mo. banc 2006). 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.

### **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 like 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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### **Certificate of Compliance**

1. This brief complies with the limitations contained in Rule 84.06(b) because it contains 5,118 words. This word count does not exclude the parts of the brief subject to exemption under said rules.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in at least 13-point font.

3. Pursuant to Local Court Rule No. 1 for this Court, this brief was electronically filed. The document was scanned for viruses and is virus-free.

*/s/ Jesse B. Rochman*

**Certificate of Service**

I hereby certify that on June 27, 2013, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system to counsel of record.

/s/ Jesse B. Rochman