SC93039

IN THE SUPREME COURT OF MISSOURI

BALLOONS OVER THE RAINBOW, INC.,

Appellant,

vs.

DIRECTOR OF REVENUE,

Respondent.

Appeal from the Administrative Hearing Commission
The Honorable Karen A. Winn, Commissioner

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF FACTS

This case involves sales taxes on amounts paid to Balloons Over the Rainbow Inc. ("Taxpayer"), for a service: giving rides for amusement on hot air balloons. And it involves use taxes paid or owing by Taxpayer for items purchased for use in the business.

The Business.

Taxpayer offers "free flight" (*i.e.*, untethered) hot air balloon rides in the St. Louis area. Administrative Record (AR) 76; Appellant's Appendix (App.) A2. Passengers ride for "entertainment, not transportation from one location to another." AR 77; App. A3. Passengers meet Taxpayer's staff at the Jefferson County Library, and are returned there when the flight is completed. AR 76; App. A2. The location of the launch and landing depend on the wind. AR 76; App. A2. But generally the flights are within Missouri. AR 77; App. A3.

Pilots operating the balloons are licensed by the Federal Aviation Administration. AR 76; App. A2. Generally, they fly the balloons at 1,500 to 3,000 feet, attempting to stay out of airport flight patterns. AR 76-77; App. A2-A3. When the balloons do pass over airports, the balloons ascend to higher altitudes. AR 77; App. A3.

Sales Tax Collections.

Some passengers "purchase balloon rides directly from" Taxpayer. AR 77; App. A3. One item at issue here is Taxpayer's request for the refund of $7,761.51 in sales tax that Taxpayer remitted to the Director for such purchases. AR 77; App. A3. But Taxpayer did not collect nor remit sales tax on other purchases, those made by passengers using "flight certificates"—sometimes characterized in this case as "gift certificates" (*see* App. Br. at 28)—purchased from out-of-state vendors. AR 77; App. A3. In those instances, after the balloon ride Taxpayer requested and obtained payment from the vendor. AR 77; App. A3. The amount paid after-the-fact to Taxpayer was a flat fee set by contract with the vendor; it apparently was not the amount paid by the customer to the vendor. AR 77; App. A3. Taxpayer neither collected nor remitted sales tax on the amounts paid by the vendor for the balloon rides for which Taxpayer accepted flight certificates.

The Director audited Taxpayer, determined that Taxpayer had failed to collect and remit sales taxes, and agreed with Taxpayer on a sampling method for determining the amount of sales and thus of sales tax. AR 78; App. A4. Based on that calculation, the Director assessed Taxpayer $2,729.76, plus additions and interest. AR 78; App. A4.

Use Tax Payments.

The other part of the case arises from Taxpayer's purchase of two items: an inflator fan, purchased in Texas; and a balloon, also purchased in Texas. AR 79; App. A5.[1] After a use tax audit, the Director found that Taxpayer was liable for nearly $1,700 in use taxes—a total that included not just the balloon and inflator purchased in Texas, but other items. AR 79; App. A5. After Taxpayer made partial payment "under protest" (AR 79; App. A5), the Director "assessed $1,184.65 in consumer's use tax on out-of-state purchases" (AR 80; App. A6)—including, again, items other than the balloon and inflator fan purchased in Texas.

Proceedings at the Administrative Hearing Commission

Taxpayer filed two complaints at the Administrative Hearing Commission ("AHC"). In the first, filed in April 2011, Taxpayer appealed the

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[1] In its brief, Taxpayer refers to "*two* balloons and an inflator." App. Br. at 30 (emphasis added). Though Taxpayer purchased the other balloon in Missouri, the seller did not collect sales tax. AR 79; App. A5. The AHC held that responsibility for collecting and remitting the sales tax on the Missouri transaction was the responsibility of the seller, not of Taxpayer. AR 95; App. A20. The Director has not cross-appealed; sales tax on the balloon purchased in Missouri is not at issue.

denial of a request for refund of sales tax Taxpayer collected from the passengers who paid Taxpayer directly. AR 75; App. A1. In June 2011, Taxpayer filed a second complaint with the AHC, challenging the assessment of unpaid use and sales taxes, including (though not limited to) the assessment of sales tax on amounts paid to Taxpayer by third-party sellers of "flight certificates," and use tax on the balloon and inflator fan purchased in Texas. AR 75; App. A2.

After a hearing, the AHC determined, *e.g.*, that Taxpayer was not exempt from collecting and remitting sales taxes, regardless of whether it sold tickets for cash or was paid after the fact by a third party who had sold the customer a "flight certificate." AR 88, 91: App. A15, A17. And that Taxpayer was liable for use tax on the balloon and inflator fan purchased in Texas and used in Missouri. AR 93; App. A19. Taxpayer filed a timely petition for review and now challenges those aspects of the AHC decision.

ARGUMENT

Taxpayer does not dispute that what it operates—a hot air balloon ride business—is a "place of amusement" within the scope of § 144.010.1(11)(a). That section includes among "sales at retail" "Sales of admission tickets, cash admissions, charges and fees to or in places of amusement, entertainment and recreation, games and athletic events." Taxpayer asserts, however, that it is exempt from collecting and remitting sales tax by federal law. As discussed in point I below, the federal law, rather than barring sales tax on such a service, specifically allows it.

Taxpayer also asserts that some of its sales—those paid for by third parties who had sold "flight" or "gift certificates"—are "sales for resale" or that they took place out of state, and are thus not subject to Missouri sales tax. But in fact, Taxpayer made no such sales; it simply sold flights, and was sometimes paid by the passenger and sometimes, after the fact, by someone else.

Finally, Taxpayer asserts that it is not required to pay use tax on equipment and aircraft because it is a "common carrier." But Taxpayer is not a "carrier," much less a "common" one.

I. The Missouri sales tax on Taxpayer's balloon ride sales is not barred by 49 U.S.C. § 40116.

Taxpayer argues that the State is unable to impose sales tax on balloon rides by federal law, specifically by 49 U.S.C. § 40116. That section is a mix of authority and restrictions, giving (or confirming) state taxation authority in respects, but taking it away in others. We begin with the places where the statute gives or confirms state authority to tax. We then turn to the language that takes that authority away—language that does not bar Missouri's tax on Taxpayer's sale of balloon rides.

A. In subsection (e), Congress authorized state taxes on the sale of services—which includes balloon rides.

Congress authorized (or confirmed the authority for) State taxes in subsection (e). There, Congress expressly stated that "a State … may levy or collect … taxes … including … sales or use taxes on the sale of … services." § 40116(e)(1). None of the terms used in subpart (1) are defined in the statute.

We are not aware of—and Taxpayer does not make—any argument that recreational balloon rides are not a "service," and thus that the tax at issue here is a "sales … tax[] on the sale of … services." Plainly read, subsection (e) authorizes the tax at issue.

Subsection (e) makes two exceptions to the rule that states may impose sales taxes. As discussed below, neither applies here. We take the exceptions up in the order in which they are referenced in (e).

B. The exception in subsection (d) applies to property tax, not to sales or use tax.

The first exception to the broad authority in subsection (e) is found in the opening clause of (e). There, Congress limited that authority by excluding any tax that violates subsection (d). Subsection (d), in turn, bars discriminatory taxes—those that burden interstate, as opposed to intrastate, commerce. But as the U.S. Supreme Court recognized, subsection (d) applies to property taxes and related assessments. *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 10 n.3 (1983) (Congress amended prior law to "prohibit discriminatory property taxes imposed on air carriers."). Its first three subparts specifically address (i) "assess[ing] property"; (ii) "levy[ing a] tax on an assessment"; and (iii) "levy[ing] an ad valorem property tax." Subpart (iv) is at least impliedly limited to "ad valorem property tax" as well—but if read more broadly, would still not apply here because it addresses taxes imposed "exclusively" on airport businesses, which would exclude a generally-applicable sales or use tax.

Because the exceptions provided in subsection (d) do not exclude sales tax from (e), subsection (e) generally applies to Missouri sales tax on Taxpayer—absent an exception found in one of the subparts of (e).

C. The prohibition in subsection (b) does not apply to the taxes allowed by subsection (c).

There is an exception in subpart (1) of subsection (e), the subpart that specifically addresses—and allows—sales taxes. It excepts out "those taxes enumerated in subsection (b)," the subsection on which Taxpayer principally relies. We turn, then, to that subsection.

Subsection (b) is expressed as a prohibition. But before we address what the prohibition consists of, we must look at what taxes are even subject to the prohibition.

Subsection (b) begins with this limitation: "Except as provided in subsection (c) of this section and section 40117 of this title." In other words, the prohibitions in (b) do ***not*** apply to a state tax that is imposed as "provided by subsection (c)." So to determine what taxes must be analyzed under (b), we first return to subsection (c).

In subsection (c), Congress gave the states authority to impose taxes on "commercial aircraft" or activities on such aircraft only if the aircraft touches the state:

> A State or political subdivision of a State may levy or collect a tax on or related to a flight of a commercial aircraft or an activity or service on the aircraft only if the aircraft takes off or lands in the State or political subdivision as part of the flight.

49 U.S.C. § 40116(c). Section 40116 is designed, in part, to bar states from taxing aircraft that merely fly over the state en route to or from airports in other states.

The statute defines just one of the terms used in subsection (c). An "aircraft" is "any contrivance invented, used, or designed to navigate, or fly in, the air." 49 U.S.C. § 40102(a)(6). A hot air balloon is an aircraft. "Commercial" means "in, or relating to commerce," or "from the point of view of profit." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) at 456. Taxpayer operates its hot air balloon in commerce, making it a "commercial aircraft." And Taxpayer's balloon always "takes off" and generally "lands" in Missouri. Thus 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.

D. If the sales tax was not allowed by subsection (c), it would still be allowed by subsection (e) because the specific prohibitions of subsection (b) do not cover that service.

Assume for the moment that the sales tax fell outside the scope of subsection (c)—*i.e.*, that the tax was on something other than the sale of a service where "the aircraft takes off or lands in the State or political subdivision as part of the flight." Then the question would be whether the sales tax was "a tax, fee, head charge, or other charge" on one of four enumerated things. Otherwise, the tax would be authorized despite subsection (e)(1).

The four enumerated things are:

(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(e)(1).

The key questions, then, would be whether the tax is imposed on "air commerce" or imposed on "air transportation." Those are defined terms—and the recreational balloon rides at issue here are neither "air commerce" or "air transportation."

1. Recreational balloon rides are not "air transportation."

The simpler of the two questions to answer is whether a recreational balloon ride is "air transportation." "Air transportation" is defined as "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft." 49 U.S.C. § 40102(a)(5). "Foreign air transportation" is not defined, but certainly it requires leaving the United States—and Taxpayer's balloon rides seldom leave Missouri. The balloon does not carry mail.

And the balloon rides are not "interstate air transportation." That term is defined by statute: "'interstate air transportation' means the transportation of passengers or property by aircraft for compensation, the transportation of mail by aircraft, or the operation of aircraft in furthering a business or vocation—between a place in (i) a State … and a place in … another State …." 49 U.S.C. § 40102(a)(25).

Again, for Taxpayer's balloon rides, even crossing the Missouri state line is apparently rare. But that frequency is not the key: the statute contemplates that the "transportation" must be between a point in one state and a point in another, and Taxpayer picks up and returns its passengers to the same location: the Jefferson County Library. AR at 76; App. at A2. That is not "interstate air transportation." So item (3) on the prohibition list and

item (4), as to "transportation," do not apply to Missouri's sales tax on balloon rides for amusement.

2. The sales tax on recreational balloon rides is not a tax on "an individual traveling in air commerce."

Items (1) and (2) and the other side of item (4) on the exclusion list are limited to travel "in air commerce." "Air commerce" is defined to include only certain things: "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 U.S.C. § 40102(a)(3). Certain Taxpayer's balloon rides do not involve "foreign air commerce." And although the balloon may occasionally be carried by the wind into Illinois (Tr. 77; AR 3), the trips always begin and end in Missouri (Tr. 76; AR 2), belying the possibility of a credible claim that they travel in "interstate commerce." That leaves two possibilities. But on this record, at least, those are mere possibilities

a. *"Federal airways."*

The first is that the balloon operates "within the limits of a Federal airway." Again, the phrase uses a defined term: a "'Federal airway' means a part of the navigable airspace that the Administrator designates as a Federal

airway." 49 U.S.C. § 40102(a)(20). But the record here does not show that the Taxpayer's balloon ever—much less always, as the breadth of the refund request would require—operates with such an Airway.

In its brief, Taxpayer makes a broad assertion: "The airspace in Missouri extending upward from 1,200 feet and above has been designated as a Federal airway." App. Br. at 20. Taxpayer cites as authority "FAA Order 7400.9V §§ 6008, 6010 (Sept. 15, 2012)." App. Br. 20.[2] Taxpayer did not present or argue the Order to the AHC. *See* AR 87. But regardless of whether Taxpayer can do so for the first time on appeal, that lengthy Order simply does not do what Taxpayer says.

Rather than designate as "Federal airways" all airspace 1,200 feet and above, § 6008 designates just "listed" areas as "Federal airways," above 1,200 feet:

> The Class EE airspace areas *listed in Sections 6009-6011* are designated as Federal Airways and, unless

[2] Currently, the FAA website shows not version "V" but version "W" of the order. *See* http://www.faa.gov/documentLibrary/media/Order/7400.9W.pdf (last viewed June 12, 2013). Order 7400.9W shows the Sept. 2012 date that Taxpayer cites. It appears that "W" replaced "V," which was issued in 2011.

otherwise specified, extend upward from 1,200 feet

to, but not including, 18,000 feet MSL.

(Emphasis added). So not all airspace in Missouri over 1,200 feet is "designated as a Federal airway," but only those portions listed in subsequent sections of the FAA order.

Various of those listings include areas within or across Missouri. But Taxpayer made no effort to show that any of the balloon rides ever enter any designated airway. Thus the record is insufficient to show that the "airways" portion of the prohibition applied to any flight for which Taxpayer collected sales tax and seeks a refund.

b. *Safety in interstate or foreign commerce.*

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." § 40102(a)(3). The question here is whether that is enough, *i.e.*, whether that possibility brings all hot air balloon use within the scope of § 40116(b).

We speak of the mere possibility because here, Taxpayer assured the Administrative Law Judge that its operations do not endanger air safety. The balloon is kept out of airport approach patterns where possible (AR 76; App. A2), and the pilot coordinates with air traffic control when the balloon does have to enter problematic air space: "I'll let [air traffic controllers] know I'm

coming so I don't surprise them. And they'll probably request that I stay somewhere at 1,000 feet or 1,500 feet until I clear the pattern. And then they'll say, do whatever you want to do." (Tr. 39.) This testimony reflects 14 CFR § 91.113(d)(1), which dictates priorities among converging aircraft and provides that "[a] balloon has the right-of-way over any other category of aircraft."

As described by Taxpayer, the possibility that balloons may endanger safety in foreign or interstate commerce is remote, at best, because balloons have priority over all other aircraft. Because balloons have priority, it is other aircraft that may endanger safety in foreign or interstate commerce because they are required to yield to balloons. The last of the exclusions should not apply.

* * *

The purpose of the pertinent portions of 49 U.S.C. § 40116 is to prevent "double taxation on air travelers." *Aloha*, 464 U.S. at 9. Taxpayer does not seek relief from double taxation; it does not pay the airport-related taxes that led to the double-tax problem and the enactment of the federal law. Rather, Taxpayer seeks relief from any taxation. Federal law does not give that to Taxpayer. And to do so would be beyond the scope of the federal law's stated goals. *See* 49 U.S.C. § 40101.

II. Regardless of whether it was paid in advance by a passenger directly or paid after the fact by a third-party because the passenger presented a "flight certificate," the sales of balloon rides were "sales at retail" in Missouri.

Some of Taxpayer's rides were provided when a person arrived with a prepaid coupon—a gift certificate. AR 77; App. A3. Taxpayer claims that it is not responsible for collecting and remitting sales taxes for those rides because the certificates or coupons, like some of the admission tickets in *Music City Ctr. Management, LLC v. Director of Revenue*, 295 S.W.3d 465 (Mo. banc 2009), the certificates were sold for resale. But in fact, Taxpayer did not sell the certificates at all, for resale or otherwise. It simply sold rides—sometimes for payment by the passenger in advance, and sometimes by accepting a coupon promising payment by a third party. The involvement of a third party does not make the receipt of the admission price a sale for resale.

Section 144.210.1 provides the resale exemption, imposes the burden of proof on the seller, and requires that the seller keep certain records to substantiate use of the exemption:

> [t]he burden of proving that a sale of tangible personal property, services, substances or things was not a sale at retail shall be upon the person who made the sale . . . . The seller shall obtain and

> maintain exemption certificates signed by the purchaser or his agent as evidence for any exempt sales claimed; provided, however, that before any administrative tribunal of this state, a seller may prove that sale is exempt from tax under this chapter in accordance with proof admissible under the applicable rules of evidence.

Here the record includes no "exemption certificates." But that makes sense because there were no sales for resale.

The contrast with the *Music City* facts demonstrates the problem. Music City sold tickets, at a discount, to various businesses. Some of those businesses resold the tickets and some did not. *See* 295 S.W.3d at 466. But each business actually purchased the tickets, paying Music City for the ticket. Here, there was no comparable transaction. What potential passengers purchased was, in essence a gift certificate—and they bought it from a third party who had not purchased that certificate, coupon, or voucher from Taxpayer. AR 77; app. A3. *If* the purchaser presented the certificate, coupon, or voucher to Taxpayer, and if Taxpayer gave the person a balloon ride, Taxpayer then asked for and obtained payment from the third-party certificate vendor. AR 77; App.A3. It seems apparent that if the purchaser did not schedule and appear to ride the balloon, the third party, not Taxpayer,

retained the funds. Despite its claim here, the record shows that Taxpayer, unlike Music City, made no "sales of balloon rides to its out-of-state contractor." App. Br. at 29.

Taxpayer in that respect is unlike not just Music City, but Six Flags, whose out-of-state sales of its own tickets was at issue in *Six Flags Theme Parks, Inc. v. Director of Revenue,* 102 S.W.3d 526 (Mo. banc 2003). Six Flags, unlike Taxpayer, received and kept the money regardless of whether or when the purchaser ever used to ticket.

Taxpayer makes a good point when it says that what it calls "flight certificates" can just as well be called "gift certificates." (App. Br. at 28.) Such certificates are used to make a taxable purchase of goods or services. The tax is calculated at the time of the purchase of the merchandise or service, though it may actually be collected later—for example, when the purchaser uses a Visa charge or prepaid card, and the seller then collects from Visa. To charge the tax at the time the gift card is purchased is not logical—and, as here, where the amount that will later actually be paid for the good or service is unknown, not even practical.

That Taxpayer is really selling rides to passengers for different forms and timing of payment also defeats Taxpayer's claim that the sales occurred out of state. There is no dispute that the vendor of the flight or gift certificate operated outside of Missouri. But Taxpayer sold nothing to the vendor.

Taxpayer sold the ride in Missouri. That Taxpayer accepted an arrangement under which the payment came after rather than before the ride does not change the place or time of the sale—again, no 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.

III. Taxpayer is a "place of amusement," not a "common carrier," and its purchases were not exempt from use tax.

This Court and the Court of Appeals have heard sales tax exclusion claims from businesses comparable to that of Taxpayer. In each instance, the court found that the business was a "place of amusement," subject to sales tax. Thus "[h]elicopter flight tours come under a description of a place of amusement, and fees paid for such a tour are subject to sales tax" under Section 144.020.1(2). *Fostaire Harbor, Inc. v. Missouri Director of Revenue*, 679 S.W.2d 272, 273 (Mo. banc 1984). The same is true for riverboat excursion rides on the Missouri River. *Lynn v. Director of Revenue*, 689 S.W.2d 45 (Mo. banc 1985). And "giving them rides on [a] railroad" that "was not in the business of transporting people to particular destinations although its trips most often went the same route. It was in the entertainment business, not in the railroad business." *Branson Scenic Railway. v. Director of Revenue*, 3 S.W.3d 788, 790 (Mo. App. W.D. 1999).

Here, Taxpayer does not dispute that it is operating a "place of amusement" subject to § 144.020.1(2)—hence its reliance on federal law to provide a tax exemption, discussed in point I. But Taxpayer also seeks an exemption from paying use tax for some purchases. According to Taxpayer, it qualifies for an exemption because it is a "common carrier." Taxpayer thus presents this Court with a novel question: Is this "place of amusement" a "common carrier"? The answer is no.

The statutory bases for Taxpayer's exemption claim are found in two items on the list of sales tax exemptions in § 144.030.2: "2. There are also specifically exempted … (3) … 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] … (21) All sales of aircraft to common carriers for storage or for use in interstate commerce …." Those exemptions apply to use tax pursuant to § 144.615(3).

The issue here is not whether the particular items at issue qualify as "equipment" (the inflator) and "aircraft" (the balloon), but whether they were purchased by Taxpayer as a "common carrier … for use in interstate commerce." But Taxpayer's business is not simultaneously a "place of amusement" and a "common carrier."

At the AHC, Taxpayer cited the definition of "common carrier" found in § 390.020:

> (6) "Common carrier", any person which holds itself out to the general public to engage in the transportation by motor vehicle of passengers or property for hire or compensation upon the public highways and airlines engaged in intrastate commerce; ….

See AR at 92. Here, Taxpayer abandons that argument—as it should, given that balloons are not motor vehicles and Taxpayer's balloon is not an "airline."

Taxpayer instead looks to the common law. But its argument fails there in two respects.

First, a "carrier" is one who transports, or provides transportation to or of, goods or passengers. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) ("carrier" is one "engaged in transporting passengers or goods for hire"). In *Branson*, the Court of Appeals relied in part on this Court's decision in *Lynn* to explain what "transporting" or transportation contemplates:

> Transportation necessarily involves moving people and things from one port to a different port. *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 457, 14 S.Ct. 1125, 38 L.Ed. 1047 (1894), overruled

> on other grounds as recognized by *United States v. Gaudin*, 515 U.S. 506, 520, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). Indeed, the *Lynn* court made this distinction when it equated transportation to carrying persons "to another port by the end of the voyage." 689 S.W.2d at 48. "Transportation," in its everyday usage, is a "means of conveyance or travel from one place to another." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1971) … 2430 ….

Branson, 3 S.W.3d at 791. The Court of Appeals gave numerous examples of "amusement" that involved riding some sort of vehicle, but did not provide "transportation" as that term is properly used: "Carousels, pony rides, riverboat rides, trail rides, miniature train rides, and the antique car ride at Worlds of Fun in Kansas City." *Id.* at 792. The Court even cited an example that uses an aircraft: rides on the "old Constellation airliner," obtained by "pay[ing] a fee to Save–a–Connie, Inc."—rides that begin and end at the Kansas City Downtown Airport. *Id.* In each instance, "the carrier is providing amusement rides. It is not in the transportation business, even though its mode of amusement is mobile." *Id.* This Court described the circumstances in

Lynn in similar terms, expressly rejecting the idea that what the excursion boat provided was "transportation":

> Passengers do not board the vessel with the expectation that they will be carried to another port by the end of the voyage. The sole objective of boarding the vessel is for personal recreation and diversion. The use of the taxpayer's vessel and barge is not "transportation."

Lynn at 48. Taxpayer, like the railroad in *Branson* and the boat in *Lynn,* is not providing transportation, and thus is not a "carrier," common or otherwise.

The AHC presumed that Taxpayer was a carrier, and addressed the question of whether it was a common carrier—concluding that it was not. That conclusion is supported by the record that Taxpayer[3] created. As quoted by the AHC, Taxpayer claimed the ability to "choose" whether to accept a particular passenger. AR 93, quoting Tr. 98-99. That choice is anathema to the "common carrier" concept, which requires, as Taxpayer properly states, that to be a "common carrier" a business "undertake[] to carry for all people

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[3] Taxpayer bore the burden of proving eligibility for an exemption. *801 Skinker Blvd. Corp. v. Director of Revenue*, 395 S.W.3d 1, 4 (Mo. banc 2013).

indifferently." *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976); *see* App. Br. at 31.

On appeal, Taxpayer tries to give that testimony a different and more limited meaning than the one divined by the AHC. Taxpayer suggests that its witness didn't really mean that he could "choose," but only that there are circumstances in which carriage is impermissible. Taxpayer says that, "for example," there might be capacity or weather constraints. App. Br. at 33. But in making its "for example" statement, Taxpayer cites nothing in the record to support the claim that when its witness said he could "choose" whether to carry a passenger, he did not mean what he said.

Instead, Taxpayer turns to evidence that it holds itself out to carry anyone who pays the fee. App. Br. at 33. This Court has used the concept of "holding itself out" in *Cook Tractor Co., Inc. v. Director of Revenue*, 187 S.W.3d 870, 873-74 (Mo. banc 2006) (citing *State ex rel. Anderson v. Witthaus*, 102 S.W.2d 99 (Mo. banc 1937)). But in *Cook Tractor*, there was no suggestion that a business that held itself out to carry anyone could simultaneously choose not to actually carry someone. All the advertising in the world cannot disprove the fact that on this record, the AHC was justified in finding that in the end Taxpayer chose whether to board a particular passenger. Thus even if Taxpayer were a "carrier," it would not be a "common carrier" entitled to invoke the use tax exemption it claims.

CONCLUSION

For the reasons stated above, the decision of the Administrative Hearing Commission should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri CaseNet on June 12, 2013, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 5,547 words.

/s/ *James R. Layton*
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