

Summary of SC93039, *Balloons Over the Rainbow Inc. v. Director of Revenue*

On review from the administrative hearing commission, Commissioner Karen A. Winn
Argued and submitted September 4, 2013; opinion issued April 15, 2014

Attorneys: Balloons was represented by Aaron French, Jesse B. Rochman and Apollo D. Carey of Sandberg Phoenix & von Gontard PC in St. Louis, (314) 231-3332; and the director was represented by Solicitor General James R. Layton and Deputy Solicitor General Jeremiah J. Morgan of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A company that provides hot air balloon rides in the St. Louis area seeks review of the administrative hearing commission's decision partly in favor of the director of revenue regarding certain sales and use tax claims the company made. In a unanimous decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri affirms the decision in part, reverses it in part and remands (sends back) the case. The commission erred in denying the sales tax refunds and in assessing future sales tax for the balloon rides sold by out-of-state third-party vendors. Because hot air balloons have a potential to endanger safety in interstate air commerce, they fall within the federal definition of "air commerce." As such, the federal law prohibiting state taxation on the gross receipts from individuals traveling in air commerce preempts the state law on which the sales tax is based. The commission properly assessed the use tax, however, because the company failed to show that it operated as a "common carrier" and, therefore, that it is entitled to the exemption for the purchases at issue.

Facts: Balloons Over the Rainbow Inc. sells rides on untethered hot air balloons in the St. Louis area. Riders meet Balloons in High Ridge and then are transported to a launch point that varies depending on prevailing wind directions. Each ride lasts about an hour and is piloted by a commercial pilot licensed by the federal aviation administration. Flights typically are confined to Missouri, but the flight path – which ultimately is dictated by prevailing wind patterns – enter Illinois' airspace about 10 percent of the time. At the end of each flight, pilots attempt to land the balloons in Missouri as close to the launch site as possible. Regardless of the exact landing location, all passengers are shuttled back to High Ridge. Rides can be purchased either in Missouri directly from Balloons or over the Internet through out-of-state third-party vendors with a contractual relationship with Balloons. Customers buying directly from Balloons pay the same rate, and Balloons collects sales tax for those rides purchased in Missouri. Customers buying flight certificates from third-party vendors pay a price set by the vendors, which pay Balloons a flat fee for the redeemed flight certificates based on their contracts with Balloons. No payment is exchanged between Balloons and the vendors prior to the customers presenting Balloons with the flight certificates, and Balloons never has collected or remitted sales tax on the payments it receives for those flights.

In January 2011, Balloons requested from the director of revenue a refund of about \$7,800 for sales taxes it remitted from October 2007 through March 2010, claiming the federal anti-head tax act prohibits Missouri from assessing sales taxes on the sale of hot air balloon rides and, therefore, preempts the Missouri statute under which Balloons paid the Missouri sales tax. The director denied Balloons' refund request. Balloons sought review of this decision in an April 2011 complaint filed with the administrative hearing commission. Following an audit, the

director of revenue assessed Balloons for about \$2,700 in unpaid sales taxes, plus additions and interest, for gross receipts from rides sold through the Internet by out-of-state third-party vendors. The director also assessed Balloons for nearly \$1,200 in use taxes for certain purchases, including two from Texas – a \$1,000 inflator fan and an \$18,000 hot air balloon. Balloons sought review of this decision in a June 2011 complaint filed with the administrative hearing commission. Following a hearing regarding both complaints, the commission ruled partly in favor of the director on both complaints. Balloons seeks this Court's review.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Court en banc holds: (1) Because section 144.020(2) is preempted by the federal anti-head tax act, the commission erred in denying Balloons' claims for a refund on sales taxes and in assessing future sales tax for the balloon rides sold by out-of-state third-party vendors. Pursuant to the supremacy clause of the United States Constitution, the imposition of sales tax under section 144.020 is preempted by the federal act when the tax imposed is in conflict with the federal act. The federal act prohibits, in relevant part, a state from imposing a tax on the gross receipts from an individual traveling in air commerce or the transportation of an individual traveling in air commerce. It is a matter of first impression whether this federal act prohibits states from taxing the sale of untethered hot air balloon rides.

Because hot air balloons have a potential to endanger safety in interstate air commerce, hot air balloons fall within the federal definition of "air commerce." "Air commerce," in relevant part, is defined as "the operation of aircraft that directly affects, or may endanger safety in, foreign or interstate air commerce." The director concedes that hot air balloons fall within the federal definition of "aircraft." A federal appeals court has held that the definition of "air commerce" should be construed broadly to effectuate Congress' valid purpose of protecting air safety. Consistent with this purpose, that court determined there must be only the potential for the aircraft to endanger safety in interstate air commerce. This broad interpretation of "air commerce" was based on the federal aviation administration's broad authority to regulate air safety. The federal aviation administration's regulations governing hot air balloons demonstrate that hot air balloons do have the potential to endanger safety in air commerce and that preventive measures are needed to curb that potential, recognizing the inherent handicap of hot air balloons, whose direction is controlled strictly by wind pattern.

(2) The commission's decision as to the assessment of use tax is authorized by law and is supported by competent and substantial evidence on the whole record. Tax exemptions are to be construed strictly, and the taxpayer claiming the exemption bears the burden of showing that it falls within the statutory language. The two exemptions in section 144.030.2 under which Balloons makes its claims – subdivisions (3) and (20) – both pertain to "common carriers." The dispute is whether Balloons meets the criteria for "common carrier," which does not have a statutory definition. Absent a statutory definition, words used in statutes are given their plain and ordinary meaning. This Court previously has ascertained the plain and ordinary meaning of "common carrier" under each section 144.030.2 exemption claimed by Balloons. A common carrier cannot pick and choose whom it serves but rather must hold itself out to carry for everyone who asks it. The commission found, based on testimony from Balloons' president, that Balloons "chooses" whether to accept particular passengers for hot air balloon rides. This discretion contradicts Missouri case law. Accordingly, the commission properly could believe this evidence and conclude that Balloons failed to show it operated as a "common carrier" and, therefore, was not entitled to an exemption for the purchases at issue.