MARYLAND TAX COURT

Friendship Hot Air Balloon Company, Inc.	*	
Petitioner,	*	**M.T.C. No. 09-AA-OO-0849**
v.	*	
Comptroller of the Treasury	*	

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PETITIONER'S PRETRIAL BRIEF

TABLE OF AUTHORITIES

STATUES

ANTI-HEAD TAX ACT ("AHTA"), 49 U.S.C. § 40116

TAX-GENERAL ARTICLE § 4-101(b)(iv) and § 4-102(a)(1)

CASES

Aloha Airlines, Inc. v. Director of Taxation of Hawaii, 464 U.S. 7, 104 S.Ct. 291 (1983)

Comptroller of the Treasury v. J/Port, Inc., 184 Md. App. 608 (2009)

Dover Int'l Limited vs. Comptroller, 1988 Md. Tax Lexis 2 (February 17, 1988)

Twp. of Tinicum v. United States DOT, 582 F.3d 482 (3d Cir. 2009)

OTHER

March 19, 2008. *DOT Declaratory Order OST-2007-29341*.

January 29, 2010. *Guidance Letter* from the U.S. Department of Transportation General Counsel *Re: Question on Taxation of Hot Air Balloon Flights*

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Supremacy Clause of the United States Constitution provides in relevant part:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The relevant portions of the ANTI-HEAD TAX ACT ("AHTA"), 49 U.S.C. § 40116 and the MARYLAND TAX-GENERAL ARTICLE §§ 4-101 and 4-102 are set forth in Appendix A.

QUESTIONS PRESENTED

1. Is the transport of passengers for a fee in a free balloon subject to admissions and amusement taxes pursuant to TAX-GENERAL ARTICLE § 4-101(b)(iv) and § 4-102(a)(1)?

2. If the provisions of TAX-GENERAL ARTICLE § 4-101(b)(iv) and § 4-102(a)(1) levy an admissions or amusement tax on the transport of passengers for a fee in a free balloon a tax on "the gross receipts from ... air commerce or transportation" are they categorically preempted by the AHTA, 49 U.S.C. § 40116?

INTRODUCTION & BACKGROUND

The Petitioner, Friendship Hot Air Balloon Company, Inc. ("Friendship Hot Air Balloon") provides air transportation in federally registered aircraft. *See Affidavit of Ronald C. Broderick,* April 14, 2010. The aircraft used in Petitioner's business is a free balloon piloted by a federally certificated commercial pilot operation pursuant to federal aviation regulations in airspace defined and controlled by federal aviation regulations. *See Affidavit*

of Ronald C. Broderick Re: Pilot Briefing for a Typical Balloon Flight, July 14, 2010.

The Comptroller of the Treasury ("Comptroller") seeks to impose a gross receipts tax on the aerial transport of fare paying passengers via free balloon by the Petitioner, Friendship Hot Air Balloon Company, Inc. ("Friendship Hot Air Balloon").

ARGUMENT

I. THE TRANSPORT OF FARE PAYING PASSENGERS VIA FREE BALLOON, IS NOT "USE OR RENTAL OF RECREATIONAL OR SPORTS EQUIPMENT" AS USED IN TAX-GENERAL ARTICLE § 4-101(B)(IV).

In the July 23, 2009, *Notice of Final Determination,* Hearing Officer Maschas stated "charges for the hot air balloon rides unequivocally fall within the purview of Tax-General Article § 4-101(b)(iv) as charges for the use of recreational equipment" and reference was made to *Dover Int'l Limited vs. Comptroller,* 1988 Md. Tax Lexis 2 (February 17, 1988). Unfortunately, because the hearing in this matter was held in February of 2009, the Petitioner and Mr. Machas didn't have the benefit of reference to the Court of Special Appeals analysis in *Comptroller of the Treasury v. J/Port, Inc*., 184 Md. App. 608 (2009).

In *J/Port* the Court applied the concept of demise to the determination of whether the legal creation of a rental exists:

> ... The demise, in practical effect and in important legal consequence, shifts the possession and control of the vessel from one person to another, just as the shoreside lease of real property shifts many of the incidents of ownership from lessor to lessee. 262 Md. at 137. BLACK'S LAW DICTIONARY 250 (8th Ed. 2004) refers to a "demise charter" as a "bareboat charter," defining both as a "charter under which the shipowner surrenders possession and control of the vessel to the charterer, who then succeeds to many of the shipowner's rights and obligations."

184 Md. App. at 629. The Court also noted that:

> ... The sales and use tax statute does not expressly define the term "rent." "Where a word is used in a statute and not specifically defined, it should be construed as having its ordinary and commonly accepted meaning."

184 Md. App. at 631.

With the benefit of the *J/Port* analysis of the possession necessary to establish a rental, and given the level of federal preemptive control established over the operation of aircraft in controlled airspace, it is difficult to conceive of how a fare paying, non-certificated passenger could ever achieve the level of aircraft control necessary to "rent" a hot air balloon. *See Affidavit of Ronald C. Broderick* (April 14, 2010) and *Affidavit of Ronald C. Broderick Re: Pilot Briefing for a Typical Balloon Flight, July 14, 2010.*

II. THE AHTA § 40116(B) CATEGORICALLY PROHIBITS GROSS RECEIPTS TAXES SUCH AS THE ADMISSIONS AND AMUSEMENT TAX AUTHORIZED BY TAX-GENERAL ARTICLE § 4-102(A)(1).

"Congress clearly has the authority to regulate state taxation of air transportation in interstate commerce." *Aloha Airlines v. Dir. of Taxation*, 464 U.S. 7, 14 (U.S. 1983). Earlier, the Civil Aeronautics Board (CAB), as created under the CAA, was given responsibility for the economic regulation of the commercial aviation industry. Congress, in 1973, prohibited a state or political subdivision tax, fee, head charge, or other charge levied or collected, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived from such a sale. Then Congress created the Airline Deregulation Act of 1978 to promote "an air

transportation system which relies on competitive market forces to determine the quality, variety and price of air services." Currently, the pertinent portion of 49 U.S.C. § 40116 reads:

> § 40116. State taxation
>
> ....
>
> (b) Prohibitions. Except as provided in subsection (c) of this section and section 40117 of this title [49 USCS § 40117], a State, a political subdivision of a State, and any person that has purchased or leased an airport under section 47134 of this title [49 USCS § 47134] may not levy or collect 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.

Thus, even if hot air balloon transportation was within the Maryland statutory definition of "use or rental of recreational or sports equipment," U.S.C. § 40116 prohibits the State of Maryland from "levy[ing] or collect[ing] a tax, fee, head charge, or other charge" on Petitioner Friendship Hot Air Balloon's hot air balloon transportation services.

III. THE "SAVINGS CLAUSE" CONTAINED IN AHTA § 40116(C) DOES NOT APPLY TO FLIGHT-RELATED TAXES.

In 1994 Congress recodified the AHTA and relocated it to § 40116 via Public Law 103-272. Section 1 of that law set forth the new text:

> (b) Prohibitions. Except as provided in subsection (c) of this section and section 40117 of this title, a State [or] political subdivision of a State . . . may not levy or collect 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.
>
> (c) Aircraft taking off or landing in 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.

Hearing officer Andrew Maschas relied on the wording of § 40116(c) to serve as a saving provision in the July 23, 2009 *Final Determination* in this matter as justification for upholding the gross receipts tax on free balloon flights in Maryland. In 2007, the town of Tinicum, Pennsylvania also relied on the wording of § 40116(c) to enact a head tax on air commerce at the Philadelphia International Airport. The air lines operating at the Philadelphia International Airport, however, appealed to the DOT and the DOT held § 40116(c) did not serve as a way to avoid the categorical ban on gross receipts taxes on air commerce contained in § 40116(b). *DOT Declaratory Order OST-2007-29341*, March 19, 2008. On page 25 of the Order, the DOT explained:

> ...Congress added the subject provision [§ 40116(c)] in 1990, to limit the reach of a state or political subdivision's taxes on aircraft overflights. The provision does not serve as independent authority for a political subdivision to impose a tax on an aircraft. Moreover, the taxes contemplated by this subsection are limited to those permitted by the AHTA. The only taxes so permitted are in the category of the "usual" and "unobjectionable" property taxes, net income taxes, franchise taxes, and sales taxes encompassed in the "savings" clause of subsection (e)(1) of § 40116. [Citations omitted.]

The town of Tinicum appealed to federal court and the U.S. Third Circuit, after reviewing the legislative history, decisively ruled:

> We hold that the AHTA's text unambiguously demonstrates that subsection (c) is not a savings clause for flight-related taxes. Under the applicable Chevron framework, we need not go further.

Twp. of Tinicum v. United States DOT, 582 F.3d 482, 490 (3d Cir. 2009).

In addition to the ruling in *Tinicum*, the categorical prohibition of a gross receipts tax on free balloon operations is further explained by the January 29, 2010 *Guidance Letter* from the U.S. Department of Transportation General Counsel *Re: Question on Taxation of Hot Air Balloon Flights* in which the General Counsel states:

> Without addressing the specifics of the Maryland A&A tax, we can say generally that an amusement tax imposed by a locality pursuant, to state law on the gross receipts of a hot air balloon operator carrying passengers in air commerce would be preempted by the AHTA.

With respect to concerns about whether passengers in free balloons “travel”, the DOT *Guidance Letter* explains:

> It may be contended that hot air balloon passengers in untethered, piloted balloons do not "travel" within the meaning of the AHTA, based on an argument that the dominant purpose of a hot air balloon ride is not to go from one specific place to another specific place, but rather to provide entertainment, such as that provided by sightseeing companies. However, the AHTA nowhere mentions the purpose of a flight. Nor does it limit the definition of "travel" by specifying that one can only "travel" from one specific place to another. We decline to interpret the word "travel" as including any such limitations not found in the statute.

Finally, the DOT General Counsel identified the close relationship between aviation safety and the term “air commerce”:

> Untethered hot air balloons also operate in "air commerce." 49 U.S.C. § 40l02(a)(3). "Air commerce" includes not only "foreign or interstate air commerce," but also "the operation of aircraft that directly affects, or may endanger safety in, foreign or interstate air commerce." 49 U.S.C, § 40102(a)(3); 14 CFR § 1.1. A hot air balloon is an "aircraft" under the definition in the federal aviation statutes: "any contrivance invented, used, or designed to navigate, or fly in, the air." 49 U.S.C. § 40102(a)(6). Additionally, 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 CFR § 1.1. Further, a hot air balloon can have an FAA-issued

> standard airworthiness certificate, and a hot air balloon pilot can be certified under the lighter-than-air category rating with a balloon class rating, under 14 CFR part 61. Moreover, there is no dispute that hot air balloons *may* "directly affect [or] endanger safety in" interstate commerce,, and the courts have made it clear that the FAA may regulate flight activities that have the "potential" to endanger safety in interstate or overseas air commerce. *See Hill v. National Transp, Safety Bd,*, 886 F,2d 1275, 1279-1280 (10th Cir. 1989). An aircraft operator need not be a commercial operator, or operate in interstate air transportation, in order to be regulated under the FAA's "air commerce" jurisdiction. *See Gorman* v, *NTSB and FAA,* 558 F.3d 580, 591 (D.C. Cir. 2009).

It may well be that free balloons, especially festively colored hot air balloons, give a carefree appearance to passers-by. The operation of a free balloon, however, entails the exercise of carefully learned skills and the exercise of judgment in an environment where distraction can result in the serious injury or death of people in other aircraft or on the ground. Ballooning is part of a carefully controlled aviation environment and the federal government has preempted the action of individual states in order to provide for the maximum good.

CONCLUSION

For all of the foregoing reasons, Petitioner Friendship Hot Air Balloon requests that this Court rule that the Comptroller's *Final Determination* of assessment of any admissions and amusement tax in this matter is improper and illegal and any monies paid by Petitioner be promptly refunded and returned and that the Court grant such further relief as appropriate.

Respectfully submitted,

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Counsel for Petitioner

Certificate of Service

I hereby certify that on this 19th day of April, 2010, a copy of the foregoing paper was mailed first class to: Cristina A. Milnor, Esq., Office of the Attorney General, Comptroller of the Treasury, 301 W Preston St., Room 401, Baltimore, MD 21201-2383, Counsel to the Comptroller and emailed to: Cmilnor@comp.state.md.us; and mailed first class to: Robert Schulte, Esq., Schulte Booth, P.C., 3001 Elliott Street, Baltimore, Maryland 21224 and emailed to: rschulte@schultebooth.com.

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Allen R. Dyer, Esq.

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Appendix A — Relevant Statutes

U.S.C. TITLE 49 FEDERAL TRANSPORTATION § 40116

§ 40116. State taxation

(a) Definition. In this section, "State" includes the District of Columbia, a territory or possession of the United States, and a political authority of at least 2 States.

(b) Prohibitions. Except as provided in subsection (c) of this section and section 40117 of this title [49 USCS § 40117], a State, a political subdivision of a State, and any person that has purchased or leased an airport under section 47134 of this title [49 USCS § 47134] may not levy or collect 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.

(c) Aircraft taking off or landing in 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.

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Md. TAX-GENERAL Code Ann. § 4-101

§ 4-101. Definitions

(a) In general. -- In this title the following words have the meanings indicated.

(b) Admissions and amusement charge. --

(1) "Admissions and amusement charge", unless expressly provided otherwise, means a charge for:

(I) admission to a place, including any additional separate charge for admission within an enclosure;

(ii) use of a game of entertainment;

(iii) use of a recreational or sports facility;

(iv) use or rental of recreational or sports equipment; and

(v) merchandise, refreshments, or a service sold or served in connection with entertainment at a nightclub or room in a hotel, restaurant, hall, or other place where dancing privileges, music, or other entertainment is provided.

(2) "Admissions and amusement charge" does not include a charge for admission to a political fundraising event.

....

Md. TAX-GENERAL Code Ann. § 4-102

§ 4-102. Authorization to impose admissions and amusement tax

(a) Counties. -- A county may impose, by resolution, a tax on:

(1) the gross receipts derived from any admissions and amusement charge in that county; and

(2) an admission in that county for a reduced charge or at no charge to a place if there is a charge for other admissions to the place.

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Appendix B — Orders & Letters

Exhibit 1.

March 19, 2008. *DOT Declaratory Order OST-2007-29341*.

Exhibit 2.

January 29, 2010. *Guidance Letter* from the U.S. Department of Transportation General Counsel *Re: Question on Taxation of Hot Air Balloon Flights*

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Appendix C — Affidavits

Exhibit 3.

Affidavit of Ronald C. Broderick,
April 14, 2010

Exhibit 4.

Affidavit of Ronald C. Broderick Re: Pilot Briefing for a Typical Balloon Flight,
July 14, 2010 with Attachments