MEMORANDUM

TO: COMPTROLLER OF MARYLAND, COMPLIANCE DIVISION

FROM: GLENN P. THOMAS, ATTORNEY FOR FRIENDSHIP HOT AIR BALLOON CO., INC.

DATE: JUNE 5, 2008

ISSUE: WHETHER THE ADMISSIONS AND AMUSEMENT TAX ON FLIGHTS OF A HOT AIR BALLOON IN INTERSTATE COMMERCE WAS PREEMPTED BY FEDERAL STATUTE UNDER THE COMMERCE CLAUSE

FACTS

Friendship Hot Air Balloon Co., Inc., a Maryland corporation ("Friendship"), has been operating since 1992 providing hot air balloon excursions for individuals within federal air space. Friendship's balloon is registered with the Federal Aviation Administration ("FAA"), Friendship's pilot is licensed with the FAA and Friendship's flight plans must be called into to the local FAA representative before the balloon may take off. During the prior four years, most of Friendship's excursions have left from the State of Maryland, however, a few of the trips were provided in other states. Friendship has also provided tethered balloon rides on occasions when perfect weather conditions existed to make such accommodations to its clientele. In addition, for the last three years, Friendship has served as organizer of a balloon rally for the Preakness Races in May of each year.

ANALYSIS

The Admissions and Amusement tax (the "AA Tax") is a tax on gross receipts authorized, under Tax-Gen § 4-102, to be implemented by counties, municipal corporations, and the Maryland Stadium Authority. Pursuant to Resolution No. 69-2006, effective July 1, 2006, the County Council of Howard County imposed the AA Tax on 7.5% of gross receipts from any admission and amusement, including the use of recreational or sports equipment. The Maryland Tax Court has held that use of recreational equipment includes helicopter sightseeing rides. *See Dover Int'l Limited vs. Comptroller*, 1988 Md. Tax LEXIS 2 (February 17, 1988).

While, under *Dover,* it appears that hot air balloon excursions would also be subject to the AA Tax as the use of recreational equipment, the imposition of the AA Tax on the gross receipts from the excursions has been preempted by federal law. *See* Arizona Department of Revenue Tax Ruling TPR 93-13, attached. Section 40116 of Title 49 of the United States Code (formerly codified as 49 U.S.C. § 1513) provides that:

> a State, a 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 (*emphasis added*).

A few exceptions apply under subsection (c) of 49 U.S.C. § 40116 and 49 U.S.C. § 40117, but those exceptions apply to taxes and fees on carriage of persons in air commerce other than a tax on gross receipts. *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 11 n.6 (1983). Section 40102(a)(3) of Title 49 of the United States Code defines "air commerce" as including "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." "Aircraft" is "any contrivance invented, used, or designed to navigate, or fly in the air." 49 U.S.C. § 40102(a)(20).

The federal preemption on a gross receipts tax applies to airlines only making intrastate flights. *See Aloha Airlines* (holding that a property tax determined on the gross receipts of an airline flying only within the state was preempted by federal statute). Further, 49 U.S.C. § 40116 also preempts aircraft flights even if they are purely for amusement, such as in the case of hot air balloon excursions. *See* Arizona Tax Ruling TPR 93-13.

CONCLUSION

While *Dover* may apply to Friendship, the Tax Court never decided the issue on federal preemption of a gross receipts tax imposed by the state. Except for tethered balloon rides, Friendship operates its aircraft within the limits of federal airspace or the operation of its aircraft affects or may endanger safety in interstate commerce. Friendship's balloon is registered with the FAA, its pilot is licensed with the FAA and Friendship must call-in its flight plans to the FAA. In *Aloha Airlines*, the United States Supreme Court spoke on the issue of preemption and has determined that any gross receipts tax on intrastate flights in or affecting interstate commerce is preempted by federal law. The AA Tax on Friendship's un-tethered hot air balloon excursions is preempted by federal law.

Aloha Airlines, Inc. v. Director of Taxation of Hawaii
U.S.Hawaii,1983.

Supreme Court of the United States
ALOHA AIRLINES, INC., Appellant
v.
DIRECTOR OF TAXATION OF HAWAII.
HAWAIIAN AIRLINES, INC., Appellant
v.
DIRECTOR OF TAXATION OF HAWAII.
Nos. 82-585, 82-586.

Argued Oct. 4, 1983.
Decided Nov. 1, 1983.

Hawaiian airlines brought action challenging state's imposition of public service company tax on their gross incomes. The Tax Appeal Court, City and County of Honolulu, Yasutaka Fukushima, J., ruled against the airlines, and they appealed. The Supreme Court of Hawaii, Nakamura, J., 647 P.2d 263, affirmed, and certiorari was granted. The Supreme Court, Justice Marshall, held that Hawaii statute which imposed a tax on the annual gross income of airlines operating within state and which declared that the tax was a means of taxing airline's personal property was preempted by section of Airport Development Acceleration Act which prohibited state from levying a tax on the gross receipts derived from sale of air transportation but which provided that property taxes were not included in the prohibition, because nothing in federal statute's legislative history suggested that Congress intended to limit its preemptive effect to taxes on airline passengers or to save gross receipts taxes such as the one imposed by Hawaii, and fact that Hawaii tax was styled as a property tax measured by gross receipts rather than a straight-forward gross receipts tax did not entitle the tax to escape preemption.

Reversed and remanded.

West Headnotes

[1] Commerce 83 ⚿63.10

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(E) Licenses and Taxes
83k63 Licenses and Privilege Taxes
83k63.10 k. Particular Subjects and Taxes. Most Cited Cases
When a federal statute unambiguously forbids the states to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look behind the plain language of the federal statute to determine whether a state statute that imposes such a tax is pre-empted.

[2] Commerce 83 ⚿74.20

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(E) Licenses and Taxes
83k74.20 k. Gross Receipts Taxes. Most Cited Cases

Taxation 371 ⚿3626

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(B) Regulations
371k3625 Validity of Acts and Ordinances
371k3626 k. In General. Most Cited Cases
(Formerly 371k1212.1, 371k1212)
Hawaii statute which imposed a tax on annual gross income of airlines operating within state and which declared that the tax was a means of taxing an airline's personal property was pre-empted by section of Airport Development Acceleration Act which prohibited a state from levying tax on gross receipts derived from sale of air transportation but which provided that property taxes were not included in the prohibition, because nothing in federal statute's legislative history suggested that Congress intended to limit its pre-emptive effect to taxes on airline passengers or to save gross receipts taxes such as the one imposed by Hawaii, and fact that Hawaii tax was

styled as a property tax measured by gross receipts rather than a straight-forward gross receipts tax did not entitle the tax to escape pre-emption. Federal Aviation Act of 1958, § 1113(a), as amended, 49 U.S.C.A. § 1513(a); HRS § 239-6.

**291*Syllabus*[FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*7 A Hawaii statute imposes a tax on the annual gross income of airlines operating within the State, and declares that such tax is a means of taxing an airline's personal property. Section 7(a) of the Airport Development Acceleration Act of 1973 (ADAA) prohibits a State from levying a tax, "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 therefrom," but provides **292 that property taxes are not included in this prohibition. Appellant airlines each brought an action for refund of taxes assessed under the Hawaii statute, claiming that the statute was pre-empted by § 7(a). The Hawaii Tax Appeal Court rejected this pre-emption argument, and the Hawaii Supreme Court affirmed.

Held: Section 7(a) pre-empts the Hawaii statute. Pp. 294 - 295.

(a) When a federal statute unambiguously forbids a State to impose a particular kind of tax on an industry affecting interstate commerce, as § 7(a) does here by its plain language, courts need not look beyond the federal statute's plain language to determine whether a state statute that imposes such a tax is pre-empted. P. 294.

(b) Moreover, nothing in the ADAA's legislative history suggests that Congress intended to limit § 7(a)'s pre-emptive effect to taxes on airlines passengers or to save gross receipts taxes such as the one Hawaii imposes. Although § 7(a) was enacted to deal primarily with local head taxes on airline passengers, the legislative history contains many references to the fact that § 7(a) pre-empts state taxes on gross receipts of airlines. Pp. 294 - 295.

(c) The fact that the Hawaii tax is styled as a property tax measured by gross receipts rather than as a straightforward gross receipts tax does not entitle the tax to escape pre-emption under § 7(a)'s property tax exemption. Such styling of the tax does not mask the fact that the purpose and effect of the tax are to impose a levy upon the gross receipts *8 of airlines, thus making it at least an "indirect" tax on such receipts. P. 295.

65 Haw. 1, 647 P.2d 263, reversed and remanded.

Richard L. Griffith argued the cause for appellants in both cases. With him on the briefs were *Michael A. Shea, Richard R. Clifton, Hugh Shearer,* and *H. Mitchell D'Olier.*

William D. Dexter argued the cause for appellee. With him on the brief was *Kevin T. Wakayama.*†

† Briefs of *amici curiae* urging affirmance were filed for the State of Alaska et al. by *Kenneth O. Eikenberry,* Attorney General of Washington, and *Jeffrey D. Goltz,* Assistant Attorney General, *Norman C. Gorsuch,* Attorney General of Alaska, and *Diane T. Colvin,* Assistant Attorney General, *Robert K. Corbin,* Attorney General of Arizona, *Michael C. Turpen,* Attorney General of Oklahoma, *Chauncey H. Browning,* Attorney General of West Virginia, and *Jack C. McClung,* Deputy Attorney General; and for the Multistate Tax Commission et al. by *Eugene F. Corrigan.*

Briefs of *amici curiae* were filed for the State of New York by *Robert Abrams,* Attorney General, *Peter H. Schiff,* and *Francis V. Dow,* Assistant Attorney General; and for the Air Transport Association of America by *Andrew C. Hartzell, Jr.*

Justice MARSHALL delivered the opinion of the Court.

These appeals present the question whether 49 U.S.C. § 1513(a) preempts a Hawaii statute that imposes a tax on the gross income of airlines operating within the State. We conclude that the Hawaii tax is preempted.

I

In 1970, Congress committed the federal government to assisting States and localities in expanding and improving the nation's air transportation system. See Airport and Airway Development Act of 1970,

Pub.L. 91-258, 84 Stat. 219. In the same session, Congress established the Airport and Airway Trust Fund to funnel federal resources to local airport expansion and improvement projects. See Airport and Airway*9 Revenue Act of 1970, Pub.L. 91-258, § 208, 84 Stat. 236, 250-252. As originally devised, the Trust Fund received its revenues from several federal aviation taxes, including an 8% tax on domestic airline tickets, a $3 head tax on international flights out of the United States, and a 5% tax on air freight. See §§ 203, 204, 84 Stat. 238-240 (codified as amended, at 26 U.S.C. §§ 4261, 4271 (1976 ed. and Supp.1981)). See generally *Massachusetts v. United States*, 435 U.S. 444, 98 S.Ct. 1153, 55 L.Ed.2d 403 (1978).

Once the Airport and Airway Development Act was passed and the Trust Fund established, the question arose whether States and municipalities were still free to impose additional taxes on airlines and air travelers. In *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972), this Court ruled that neither the Commerce Clause nor the Airport and Airway Development Act precluded state or local authorities from assessing head taxes on passengers boarding flights at state or local airports. In particular the Court noted, "No federal statute or specific congressional action or declaration evidences a congressional purpose to deny or pre-empt state and local power to levy charges designed**293 to help defray the costs of airport construction and maintenance." *Id.*, at 721, 92 S.Ct., at 1357.

Following the *Evansville-Vanderburgh Airport* decision, Committees in both Houses of Congress held hearings on local taxation of air transportation.[FN1] Both Committees concluded that the proliferation of local taxes burdened interstate air transportation, and, when coupled with the federal Trust Fund levies, imposed double taxation on air travelers.[FN2] To deal with these problems, Congress passed § 7(a) of the *10 Airport Development Acceleration Act of 1973 (ADAA), the provision at issue in these appeals. See Pub.L. 93-44, § 7(a), 87 Stat. 88, 90. That section, which is currently codified at 49 U.S.C. § 1513,[FN3] reads:

> FN1. See Hearings on S. 2397 et al. before the Subcommittee on Aviation of the Senate Committee on Commerce, 92d Cong., 2d Sess., 129-198 (1972); Hearings on H.R. 2337 et al. before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 92d Cong., 2d Sess. (1972).
>
> FN2. See S.Rep. No. 93-12, pp. 17, 20-21 (1973)U.S.Code Cong. & Admin.News 1973, p. 1434; H.R.Rep. No. 93-157, pp. 4-5 (1973).
>
> FN3. In 1982, Congress amended 49 U.S.C. § 1513 to prohibit discriminatory property taxes imposed on air carriers. See Airport and Airway Improvement Act of 1982, Pub.L. 97-248, § 532, 96 Stat. 701 (codified at 49 U.S.C. § 1513(d)). Being enacted after the relevant periods, this amendment has no bearing on these appeals.

> "(a) No State ... shall levy or collect a tax, fee, head charge, or other charge, 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 therefrom....
>
> "(b) Nothing in this section shall prohibit a State ... from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services."

For States with taxes that were in effect prior to May 21, 1970, and would be preempted by § 1513(a), Congress postponed the effective date of the section until December 31, 1973. *Ibid.*

II

Appellants Aloha Airlines, Inc., and Hawaiian Airlines, Inc., are both commercial airlines that carry passengers, freight, and mail among the islands of Hawaii. Throughout the periods relevant to these appeals, Appellants have been Hawaii public service companies, see Haw.Rev.Stat. §§ 239-2, 269-1 (1976 ed. and Supp.1982), and subject to the State's public service company tax, which provides:

> "There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business.... The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including ***11** going concern value, and is in lieu of the [general excise] tax imposed by chapter 237 but is not in lieu of any other tax." § 239-6 (1976).

In 1978, Appellant Aloha Airlines sought refunds for taxes assessed under this provision for the carriage of passengers between 1974 and 1977 on the ground that 49 U.S.C. § 1513(a) had preempted Haw.Rev.Stat. § 239-6 as of December 31, 1973. In 1979, Appellant Hawaiian Airlines filed a similar action seeking a refund for taxes paid between 1974 and 1978. In separate decisions, the Tax Appeal Court of the State of Hawaii rejected Appellants' preemption arguments, *In re Aloha Airlines, Inc.*, No. 1772 (Haw.Ct.Tax App.1978); *In re Hawaiian Airlines, Inc.*, Nos. 1853, 1868 (Haw.Ct.Tax App.1980). On consolidated appeal, the Hawaii Supreme Court affirmed, one Justice dissenting, *In re Aloha Airlines, Inc.*, 65 Haw. 1, 647 P.2d 263 (1982). Appellants then filed timely notices of appeal, this Court noted probable jurisdiction, ****294**459 U.S. 1101, 103 S.Ct. 721, 74 L.Ed.2d 948 (1983), and we now reverse.

III

The plain language of 49 U.S.C. § 1513(a) would appear to invalidate Haw.Rev.Stat. § 239-6. § 1513(a) expressly preempts gross receipts taxes on the sale of air transportation or the carriage of persons traveling in air commerce, and Haw.Rev.Stat. § 239-6 is a state tax on the gross receipts [FN4] of airlines selling air transportation and carrying persons traveling in air commerce. The Hawaii Supreme Court sought to avoid this direct conflict by looking beyond the language of § 1513(a) to Congress's purpose in enacting the statute. The Court concluded that Congress passed the ADAA to deal with the proliferation of local and state head taxes on airline passengers in the early 1970's. Since Haw.Rev.Stat. § 239-6 is imposed upon air carriers ***12** as opposed to air travelers, the Hawaii Court reasoned that the provision did not come within the ambit of § 1513(a)'s prohibitions.

FN4. Appellee concedes that the phrase "gross income," under Haw.Rev.Stat. § 239-6, is synonymous the phrase "gross receipts," used in 49 U.S.C. § 1513(a). See Brief for Appellee 7, n. 2.

[1] We cannot agree with the Hawaii Supreme Court's analysis. First, when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is preempted.[FN5] Thus, the Hawaii Supreme Court erred in failing to give effect to the plain meaning of § 1513(a).[FN6]

FN5. The Hawaii Supreme Court apparently considered itself obliged by *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), and its progeny to examine thoroughly Congress's intentions before declaring Haw.Rev.Stat. § 239-6 preempted. *In re Aloha Airlines, Inc.*, 65 Haw. 1, 13-16, 647 P.2d 263, 272-273 (1982). *Rice* and its progeny, however, involved the implicit preemption of state statutes. Rules developed in these cases apply when a court must decide whether a state law should be preempted even though Congress has not expressly legislated preemption. These rules, therefore, have little application when a court confronts a federal statute like § 1513(a) that explicitly preempts state laws.

FN6. The Hawaii Supreme Court professed confusion over the "paradox" between § 1513(a)'s prohibition on certain state taxes on air transportation and § 1513(b)'s reservation of the States' primary sources of revenue, such as property taxes, net income taxes, franchise taxes, and sale or use taxes. *In re Aloha Airlines, Inc., supra*, at 16, 647 P.2d, at 273. We find no paradox between § 1513(a) and 1513(b). § 1513(a) preempts a limited number of state taxes, including gross receipts taxes imposed on the sale of air transportation or the carriage of persons traveling in air commerce. § 1513(b) clarifies Congress's view that the States are

> still free to impose on airlines and air carriers "taxes other than those enumerated in subsection (a)," such as property taxes, net income taxes, and franchise taxes. While neither the statute nor its legislative history explains exactly why Congress chose to distinguish between gross receipts taxes imposed on airlines and the taxes reserved in § 1513(b), the statute is quite clear that Congress chose to make the distinction, and the courts are obliged to honor this congressional choice.

[2] Second, even if the absence of an express proscription made it necessary to go beyond the plain language of § 1513(a), ***13** nothing in the legislative history of the ADAA suggests that Congress intended to limit § 1513(a)'s preemptive effect to taxes on airline passengers or to save gross receipts taxes like § 239-6.[FN7] Although Congress****295** passed § 1513(a) to deal primarily with local head taxes on airline passengers, the legislative history abounds with references to the fact that § 1513(a) also preempts state taxes on the gross receipts of airlines.[FN8] For example, Senator Cannon, one of the ADAA's sponsors, clearly stated in floor debate: "The bill prohibits the levying of State or local head taxes, fees, gross receipts taxes or other such charges either on passengers or on the carriage of such passengers in interstate commerce." 119 Cong.Rec. 3349 (1973).

> FN7. Indeed, Congress was presented an opportunity to exempt gross receipts taxes from § 1513(a), and declined to grant the exemption. During House hearings on the ADAA, a representative of the Ohio Tax Commission asked the Subcommittee responsible for the bill to expand section 1513(b) to permit state "gross receipts taxes fairly apportioned to a State," so that Ohio could maintain a gross receipts tax similar to Hawaii's § 239-6. See Hearings on H.R. 4082 before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 93d Cong., 1st Sess., 246-253 (1973). When Congress enacted the ADAA without Ohio's proposed amendment, the State Attorney General issued an opinion concluding that Ohio's gross receipts tax was preempted. See Ohio Op.Atty.Gen. 73-117 (Nov. 20, 1973).
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> FN8. See, *e.g.*, S.Rep. No. 93-12, p. 6 (1973); H.R.Conf.Rep. No. 93-225, p. 5 (1973)U.S.Code Cong. & Admin.News 1973, p. 1434; 119 Cong.Rec. 18,045 (1973) (statement of Sen. Cannon); 119 Cong.Rec. 17,345 (1973) (statement of Rep. Devine).

Finally, we are unpersuaded by Appellee's contention that, because the Hawaii legislature styled § 239-6 as a property tax measured by gross receipts rather than a straight-forward gross receipts tax, the provision should escape preemption under § 1513(b)'s exemption for property taxes. The manner in which the state legislature has described and categorized § 239-6[FN9] cannot mask the fact that the purpose***14** and effect of the provision is to impose a levy upon the gross receipts of airlines. § 1513(a) expressly prohibits States from taxing "directly or indirectly" gross receipts derived from air transportation. Beyond question, a property tax that is measured by gross receipts constitutes at least an "indirect" tax on the gross receipts of airlines. A state statute that imposes such a tax is therefore preempted.[FN10]

> FN9. The most likely explanation for the seemingly curious way in which the legislature characterized § 239-6 is that, at one time, this Court distinguished between the manner in which a state statute was measured and the subject matter of the tax when assessing the validity of the tax under the Commerce Clause. Compare *Railway Express Agency v. Virginia*, 358 U.S. 434, 73 S.Ct. 411, 3 L.Ed.2d 450 (1959) (upholding a property tax measured by gross receipts), with *Railway Express Agency v. Virginia*, 347 U.S. 359, 74 S.Ct. 558, 98 L.Ed. 337 (1954) (striking down a functionally equivalent business privilege tax). But cf. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). The constitutionality of § 239-6 is of course not at issue in these appeals.
>
> FN10. The unambiguous proscription contained in § 1513(a) compels us to conclude that it preempts Haw.Rev.Stat. § 239-6 as well as other state taxes imposed

on or measured by the gross receipts of airlines. Amici point out that several states have taxation statutes similar to § 239-6 and that the ability of those states to retain revenues collected from airlines during the past decade will be affected by our decision today. We acknowledge that our interpretation of § 1513(a) may result in the disruption of state systems of taxation; we are, however, bound by the plain language of the statute. Congress clearly has the authority to regulate state taxation of air transportation in interstate commerce, see *Arizona Public Service Co. v. Snead,* 441 U.S. 141, 150, 99 S.Ct. 1629, 1634, 60 L.Ed.2d 106 (1979), and we trust that Congress will amend § 1513(a) if it concludes, upon reconsideration, that the preemptive sweep of the current version is too great.

IV

In conclusion, we join with state courts of Alaska and New York [FN11] in the view that § 1513(a) proscribes the imposition of ***15** state and local taxes on gross receipts derived from air transportation or the carriage of persons in air commerce. The judgment of the Supreme Court of the State of Hawaii is reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

FN11. *Wein Air Alaska, Inc. v. State,* No. 3AN 81-8582 Civil (Alaska Sup.Ct.1983), appeal docketed, No. --- (Alaska S.Ct.); *Air Transport Association of America v. New York State Department of Taxation and Finance,* 91 A.D.2d 169, 458 N.Y.S.2d 709 (App.Div.), aff'd, 59 N.Y.2d 917, 466 N.Y.S.2d 319, 453 N.E.2d 548 (1983), cert. pending, No. 83-162; cf. *State ex rel. Arizona Dept. of Revenue v. Cochise Airlines,* 128 Ariz. 432, 626 P.2d 596 (App.1980) (§ 1513(a) preempts state gross receipts taxes on the carriage of passengers, but not freight, in air commerce); see also *Allegheny Airlines, Inc. v. City of Philadelphia,* 453 Pa. 181, 309 A.2d 157 (1973) (finding a Philadelphia head tax on air passengers preempted).

It is so ordered.

U.S.Hawaii,1983.
Aloha Airlines, Inc. v. Director of Taxation of Hawaii
464 U.S. 7, 104 S.Ct. 291, 78 L.Ed.2d 10

END OF DOCUMENT

ARIZONA DEPARTMENT OF REVENUE

ARIZONA TRANSACTION PRIVILEGE TAX RULING

TPR 92-1

This substantive policy statement is advisory only. A substantive policy statement does not include internal procedural documents that only affect the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules made in accordance with the Arizona administrative procedure act. If you believe that this substantive policy statement does impose additional requirements or penalties on regulated parties you may petition the agency under Arizona Revised Statutes § 41-1033 for a review of the statement.

ISSUE:

Application of the Arizona transaction privilege tax on income derived from hot air balloon activities.

APPLICABLE LAW:

A.R.S. § 42-1310.13.A (former A.R.S. § 42-1309) levies the Arizona transaction privilege tax under the amusement classification as follows:

> The amusement classification is comprised of the business of operating or conducting theaters, movies, operas, shows of any type or nature, exhibitions, concerts, carnivals, circuses, amusement parks, menageries, fairs, races, contests, games, billiard or pool parlors, bowling alleys, public dances, dance halls, boxing and wrestling matches, skating rinks, tennis courts, video games, pinball machines, sports events or any other business charging admission or user fees for exhibition, amusement, entertainment or instruction, other than activities or projects of bona fide religious or educational institutions....

49 U.S.C.S. § 1301.29 defines "navigable airspace" as follows:

> "Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations and shall include airspace needed to insure safety in take-off and landing of aircraft.

49 U.S.C.S. § 1513 provides for federal preemption in the taxing of persons traveling in air commerce.

DISCUSSION:

The federal preemption set forth in 49 U.S.C.S. § 1513 prohibits taxation, directly or indirectly, on persons traveling in air commerce or the carriage of persons traveling in air commerce or on the sale of air transportation.

Pursuant to 49 U.S.C.S. § 1301.4 and .5 "air commerce" and "aircraft" are defined as follows:

> "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.
>
> "Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air.

This definition of "aircraft" is sufficiently broad to include hot air balloons.

Webster's Third New International Dictionary defines "commerce", in pertinent part, as "... involving transportation from place to place."

In the matter of State of Arizona v. Cochise Airlines, 128 Ariz. 432, 626 P.2d 596 (1980), the court held as follows: "... that when Congress prohibited a tax upon the carriage of persons in air commerce, it preempted the Arizona transaction privilege tax insofar as it relates to the transportation of persons."

CONCLUSION AND RULING:

A hot air balloon, which transports people, is a federally registered aircraft which travels in air commerce with access into federal airways. Gross receipts from the business of hot air ballooning when it includes the transporting of people in an untethered hot air balloon are not subject to transaction privilege tax.

A tethered hot air balloon does not travel in air commerce regardless of whether or not it "transports people". As such, gross receipts from a tethered balloon "ride" are subject to transaction privilege tax under the amusement classification.

Normally, the gross receipts from the rental of a hot air balloon would be subject to transaction privilege tax under the personal property rental classification.

Paul Waddell, Director
Signed March 10, 1992

Return to Home Page