IN THE MARYLAND TAX COURT

UP UP AWAY HOT AIR BALLOON COMPANY, Petitioner, v. **COMPTROLLER OF THE TREASURY OF MARYLAND,** Respondent.	MTC. No. 09-AA-OO-0993

PETITIONER UP UP AWAY HOT AIR BALLOON COMPANY, INC.'S OPPOSITION TO THE RESPONDENT COMPTROLLER OF MARYLAND'S ASSESSMENT OF AMUSEMENT AND ADMISSIONS TAX

The Petitioner, Up Up Away Hot Air Balloon Company, Inc., by and through its attorneys, Robert Schulte and Schulte Booth, P.C., and pursuant to COMAR 14.12.01.01, hereby files this appeal to this Honorable Court and opposes the Respondent, Comptroller of the Treasury of Maryland's, assessment of admissions and amusement taxes upon its gross business receipts, and for cause respectfully represents that, as fully set forth below, said taxes are illegal and not in accord with Federal and State law.

FACTS AND BACKGROUND

1. Petitioner, Up Up Away Hot Air Balloon Company, Inc. (herein "UUAHB") is a Maryland Corporation that owns and operates hot air balloons.

2. UUAHB currently provides, and has provided since 2002, flights in a federally licensed (registration N9015Y) hot air balloon, piloted by a Federal Aviation Administration (FAA) certificated pilot, Matthew Frank Lidinsky.

3. A true and accurate copy of the balloon's federal registration and airworthiness certificates are attached hereto as, respectively, **Exhibit 1** and **Exhibit 2.**

4. A true and accurate copy of Matthew Frank Lidinsky's Federal balloon pilot certification is attached hereto as **Exhibit 3**.

5. According to the Federal Aviation Regulations, a hot air balloon is an "aircraft" in that a "[b]alloon means a lighter-than-air *aircraft* that is not engine driven, and that sustains flight through the use of either gas buoyancy or an airborne heater." 14 C.F.R § 1.1 (emphasis added).

6. Relevant portions of the Federal Aviation Regulations are attached hereto as **Exhibit 4**.

7. A hot air balloon operates in "air commerce" in that it involves the operation or navigation of an aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce. **Ex. 4**, 14 C.F.R. § 1.1.

8. UUAHB is in the business of transporting persons for compensation via untethered hot air balloon aircraft in federally controlled airspace.

9. All airspace within the jurisdictional boundaries of Maryland is federally controlled airspace.

10. A true and accurate copy of an area aerial navigation chart is attached hereto as **Exhibit 5**.

11. In March of 2008, the Maryland Comptroller's Office, Compliance Division, contacted, among others, Petitioner to inform him that it was proceeding to conduct an audit of UUAHB's books to assess unpaid amusement and admissions taxes for the period of October 1, 2004 to April 30, 2008.

12. On or about April 25, 2008, agents of the Maryland Comptroller's Office, Compliance Division, met with Mr. Lidinsky to conduct the audit whereupon he permitted those agents full access to his books and financial records.

13. On or about June 10, 2008, Mr. Lidinsky received the final audit work papers, which detailed the State's claim that UUAHB owed $2,397.10 in amusement taxes, which were calculated as 10% of gross receipts for flights that had taken off and landed within the State of Maryland.

14. On August 17, 2009, the Comptroller of Maryland issued its Notice of Final Determination, finding UUAHB liable for $2,989.76 in unpaid admissions and amusement tax, plus interest and penalties.

15. A true and accurate copy of Notice of Final Determination is attached hereto as **Exhibit 6.**

16. Mr. Lidinsky filed his petition for appeal in this matter on April 14, 2010 and a hearing was scheduled by this Court for September 1, 2010.

17. Attached to this paper as **Exhibit 7** is the Affidavit of Matthew Frank Lidinsky, incorporated herein by reference.

ARGUMENT

The Admissions and Amusement Tax is Preempted by Federal Law Because it is a Tax on the Gross Receipts from Air Commerce

18. The previous paragraphs are incorporated herein by reference.

19. By assessing the admissions and amusement tax on UUAHB, the State of Maryland attempts to tax gross receipts from air commerce.

20. The state is expressly prohibited from doing so by Federal law.

21. The Anti-Head Tax Act (herein "AHTA") prohibits a state or local taxing

authority from collecting a "tax, fee, head charge, or other charge on — (1) an individual travelling 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(b).

22. In *Aloha Airlines v. Director of Taxation,* 464 U.S. 7, 13-14 (1983), the United States Supreme Court held that a tax measured by the gross receipts of airline companies operating within the state of Hawaii was preempted by the precursor statute to 49 U.S.C. § 40116(b) in that it was a tax on air commerce specifically prohibited by the plain language of the statute.

23. AHTA's plain language preempts gross receipts taxes on the sale of air transportation or the carriage of persons in air commerce. *Aloha Airlines,* 464 U.S. at 11.

24. For its part, the Comptroller of Maryland concluded that the State's tax on the hot air balloon flights was permissible under the AHTA because 49 U.S.C. § 40116(c) "provid[es] an exception for a tax on the flight of a commercial aircraft 'only if the aircraft takes off or lands in the State or political subdivision as part of the flight.'" **Ex. 6**, pg. 5.

25. This determination is incorrect.

26. While facially appearing to provide a safe harbor for taxes on flights which "take[] off or land[] within the state," 49 U.S.C. § 40116(c) does **not** provide an exception for a tax on the flight of aircraft in air commerce.

27. It is not a "savings clause" for taxes prohibited under the AHTA in that it only creates a geographical requirement for an otherwise permissible tax on those

providing flight services. *See Township of Tinicum v. U.S. Dep't of Transportation*, 582 F. 3d 482, 488-89 (3d Cir. 2009).

28. "[T]axes (except those enumerated in subsection (b) of this section) including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services" are otherwise permissible taxes. 49 U.S.C. § 40116(e)(1).

29. 49 U.S.C. § 40116(c) simply sets out the geographical requirement that a permissible tax is one with a geographical nexus to the State only if the flights take off or land within the State. *Township of Tinicum*, 582 F. 3d at 489-90.

30. The amusement tax in question is not an otherwise permissible tax because it is a direct tax on the gross receipts from air commerce, a tax expressly prohibited by subsection (b) of AHTA.

31. The fact that the hot air balloon flights take off or land within Maryland is irrelevant to the question of whether or not a State can tax gross receipts derived from a flight in air commerce under 49 U.S.C. § 40116(b).

32. Clearly, under Federal law, it cannot.

33. Thus, the State of Maryland Comptroller's Office is without authority to tax the gross receipts of aircraft operating in air commerce including, but by no means limited to, receipts derived by Petitioner's operation of a hot air ballon. 49 U.S.C. § 40116(b).

Additional Authority

34. With that said, Petitioner respectfully directs the Court's attention to New Mexico Rev. Ruling 422-98-1 (1998), and Arizona Dept. of Revenue, TPR 92-1 (1992),

courtesy copies of which are submitted herewith, as **Exhibit 8** and **Exhibit 9**.

35. Both the State of New Mexico and the State of Arizona have concluded that taxes on gross receipts of balloon operations in air commerce, such as those conducted Petitioner, are impermissible under 49 U.S.C. § 40116(b).

36. Finally, Petitioner too directs the Court's attention to a July 29, 2010 correspondence from the United States Department of Transportation ("USDOT") to Mr. Lidinsky, wherein the Secretary opined, *inter alia*, that "an amusement tax imposed by a locality pursuant to [S]tate law on the gross receipts of a hot air balloon operator carrying passengers in air commerce would be preempted by [49 U.S.C. § 40116(b)]."

37. A courtesy copy of the July 29, 2010 from the Office of the Secretary of the Department of Transportation to Matthew Frank Lidinsky is provided herewith as **Exhibit 10**.

A Hot Air Balloon is not an Amusement and Should Not be Subject to the Admissions and Amusement Tax

38. The previous paragraphs are incorporated herein by reference.

39. The admissions and amusement tax in question was assessed under Baltimore County Code § 11-4-601(a), which provides:

> "*Amusements.* There is a tax levied and imposed at a rate of 10% of the gross receipts of any person obtained from any admissions or amusement charge within the county, derived from the amounts charged for: (1) Admission to a place, including any separate charge for admission within an enclosure; (2) Use of a game of entertainment; (3) Use of a recreational or sports facility; (4) Use or rental of recreational or sports equipment; and (5) 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.

See also Maryland Tax-General Article §4-101(b).

40. Flights in an hot air balloon simply do not constitute an "amusement"

under any of the above listed categories of the Baltimore County Code or the Tax-General Articles.

41. The Comptroller, citing *Dover Int'l Limited v. Comptroller*, 1988 Md. Tax LEXIS 2 (February 17, 1988) determined that a ride in a hot air balloon constitutes the "use of recreational equipment," and is therefore an "amusement" subject to the admissions and amusement tax. **Ex. 6**, pg. 4.

42. Maryland Business Regulation defines "amusement ride" as "a device that is intended to give amusement, excitement, pleasure, or thrills to passengers whom the device carries: 1) along or around a fixed or restricted course; or 2) within a defined area." See Md. Code. (2008), § 3-101(e) of the Business Regulation Article.

43. A hot air balloon ride is not an "amusement ride."

44. A hot air balloon flies with the wind and achieves altitude through the use of either gas buoyancy or an airborne heater. *See* 14 C.F.R. §1.1.

45. Further, a hot air balloon does not go "along or around a fixed or restricted course" or "within a defined area," necessary conditions for "amusement rides" under Maryland business regulations. See Md. Code. (2008), § 3-101(e) of the Business Regulation Article.

46. Accordingly, a hot air balloon ride is not an "amusement ride" and cannot be taxed as such.

WHEREFORE, Petitioner, Up Up Away Hot Air Balloon Company, Inc. respectfully requests that this Honorable Court issue an Order declaring that:

A. the Comptroller's admissions and amusement tax cannot be applied to the gross receipts from UUAHB's hot air balloon rides because the gross receipts are

derived from aircraft operating in air commerce and the State of Maryland is prohibited from assessing such a tax pursuant to 49 U.S.C. § 40116(b); and/or

B. the Comptroller's admissions and amusement tax cannot be applied to the gross receipts from UUAHB's hot air balloon rides because such rides do not constitute an "amusement" under the Maryland Tax-General Articles for admissions and amusement taxes, nor do they constitute an "amusement ride" as defined by Md. Code. (2008), § 3-101(e) of the Business Regulation Article.

Respectfully submitted:

SCHULTE BOOTH, P.C.

By: _____

Robert Schulte
3001 Elliott Street
Baltimore, Maryland 21224
(410) 732-1315
rschulte@schultebooth.com

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of July 19, 2010, the foregoing Memorandum was hand delivered to Cristina A. Milnor-Dunbar, Esq., Assistant Attorney General Office of the Comptroller of Maryland Compliance Division 301 W. Preston Street, Suite 401, Baltimore, Maryland 21201, counsel for Respondent.

_____

Robert Schulte

REGISTRATION NOT TRANSFERAE

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION - FEDERAL AVIATION AD
CERTIFICATE OF AIRCRAFT REGISTRATION

NATIONALITY AND REGISTRATION MARKS	AIRCRAF
N 9015Y	RX8-32

MANUFACTURER AND MANUFACTURER'S DESIGNATION

AEROSTAR INTERNATIONAL INC RX 8
ICAO Aircraft Address Code: 53073001

ISSUED TO

UP UP AWAY HOT AIR BALLOON CO
10 MANOR KNOLL CT
BALDWIN MD 21013-9582

CORPORATION

It is certified that the above described aircraft has been entered on the re
Aviation Administration, United States of America, in accordance with the Cc
International Civil Aviation dated December 7, 1944, and with the Federal A
of 1958, and regulations issued thereunder.

DATE OF ISSUE	
January 16, 2003	ADMIN

Form 8050-3(8/97) Supersedes previous editions

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION—FEDERAL AVIATION ADMINISTRATION

STANDARD AIRWORTHINESS CERTIFICATE

1 NATIONALITY AND REGISTRATION MARKS	2 MANUFACTURER AND MODEL	3 AIRCRAFT SERIAL NUMBER	4 CATEGORY
N9015Y	Aerostar RX-8	RX8-3293	Balloon

5 AUTHORITY AND BASIS FOR ISSUANCE

This airworthiness certificate is issued pursuant to the Federal Aviation Act of 1958 and certifies that, as of the date of issuance, the aircraft to which issued has been inspected and found to conform to the type certificate therefor, to be in condition for safe operation, and has been shown to meet the requirements of the applicable comprehensive and detailed airworthiness code as provided by Annex 8 to the Convention on International Civil Aviation, except as noted herein.

Exceptions

None

6 TERMS AND CONDITIONS

Unless sooner surrendered, suspended, revoked, or a termination date is otherwise established by the Administrator, this airworthiness certificate is effective as long as the maintenance, preventative maintenance, and alterations are performed in accordance with Parts 21, 43, and 91 of the Federal Aviation Regulations, as appropriate, and the aircraft is registered in the United States.

DATE OF ISSUANCE	FAA REPRESENTATIVE	DESIGNATION NUMBER
4-8-97	Kevin E. Gunderson	EMIRCE501065

Any alteration, reproduction, or misuse of this certificate may be punishable by a fine not exceeding $1,000, or imprisonment not exceeding 3 years, or both. THIS CERTIFICATE MUST BE DISPLAYED IN THE AIRCRAFT IN ACCORDANCE WITH APPLICABLE FEDERAL AVIATION REGULATIONS.

FAA Form 8100-2 (8-82)

* U.S. GOVERNMENT PRINTING OFFICE: 1992 - 769-206

Airmen Certification

Name Inquiry
Contact Airmen Inquiry
Airport

FAA Registry
Name Inquiry Results

MATTHEW FRANK LIDINSKY

Address

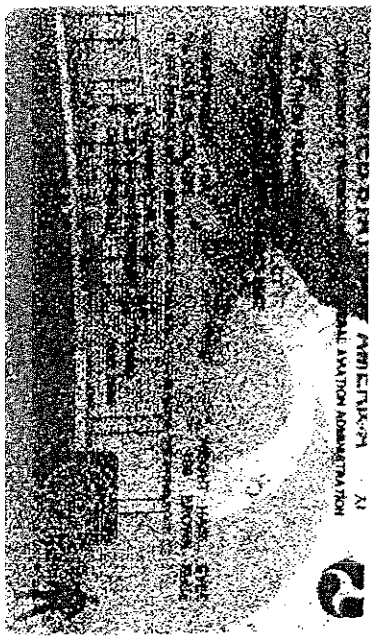
Street 10 MANOR KNOLL CT
City BALDWIN State MD
County BALTIMORE Zip Code 21013-9582
Country USA

Medical

No Medical Available

Certificates

1 of 1



DOI: 8/3/2004
Certificate: COMMERCIAL PILOT
Rating(s):
COMMERCIAL PILOT
LIGHTER-THAN-AIR FREE BALLOON

Limits

LIMITED TO HOT AIR BALLOONS WITH AIRBORNE HEATER.

Electronic Code of Federal Regulations
e-CFR™

e-CFR Data is current as of July 15, 2010

Title 14: Aeronautics and Space

PART 1—DEFINITIONS AND ABBREVIATIONS

Browse Next

§ 1.1 General definitions.

As used in Subchapters A through K of this chapter, unless the context requires otherwise:

Administrator means the Federal Aviation Administrator or any person to whom he has delegated his authority in the matter concerned.

Aerodynamic coefficients means non-dimensional coefficients for aerodynamic forces and moments.

Air carrier means a person who undertakes directly by lease, or other arrangement, to engage in air transportation.

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 a device that is used or intended to be used for flight in the air.

Aircraft engine means an engine that is used or intended to be used for propelling aircraft. It includes turbosuperchargers, appurtenances, and accessories necessary for its functioning, but does not include propellers.

Airframe means the fuselage, booms, nacelles, cowlings, fairings, airfoil surfaces (including rotors but excluding propellers and rotating airfoils of engines), and landing gear of an aircraft and their accessories and controls.

Airplane means an engine-driven fixed-wing aircraft heavier than air, that is supported in flight by the dynamic reaction of the air against its wings.

Airport means an area of land or water that is used or intended to be used for the landing and takeoff of aircraft, and includes its buildings and facilities, if any.

Airship means an engine-driven lighter-than-air aircraft that can be steered.

Air traffic means aircraft operating in the air or on an airport surface, exclusive of loading ramps and parking areas.

Air traffic clearance means an authorization by air traffic control, for the purpose of preventing collision between known aircraft, for an aircraft to proceed under specified traffic conditions within controlled airspace.

Air traffic control means a service operated by appropriate authority to promote the safe, orderly, and expeditious flow of air traffic.

Air Traffic Service (ATS) route is a specified route designated for channeling the flow of traffic as necessary for the provision of air traffic services. The term "ATS route" refers to a variety of airways, including jet routes, area navigation (RNAV) routes, and arrival and departure routes. An ATS route is defined by route specifications, which may include:

(1) An ATS route designator;

(2) The path to or from significant points;

(3) Distance between significant points;

(4) Reporting requirements; and

(5) The lowest safe altitude determined by the appropriate authority.

Air transportation means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

Alert Area. An alert area is established to inform pilots of a specific area wherein a high volume of pilot training or an unusual type of aeronautical activity is conducted.

Alternate airport means an airport at which an aircraft may land if a landing at the intended airport becomes inadvisable.

Altitude engine means a reciprocating aircraft engine having a rated takeoff power that is producible from sea level to an established higher altitude.

Amateur rocket means an unmanned rocket that:

(1) Is propelled by a motor or motors having a combined total impulse of 889,600 Newton-seconds (200,000 pound-seconds) or less; and

(2) Cannot reach an altitude greater than 150 kilometers (93.2 statute miles) above the earth's surface.

Appliance means any instrument, mechanism, equipment, part, apparatus, appurtenance, or accessory, including communications equipment, that is used or intended to be used in operating or controlling an aircraft in flight, is installed in or attached to the aircraft, and is not part of an airframe, engine, or propeller.

Approved , unless used with reference to another person, means approved by the FAA or any person to whom the FAA has delegated its authority in the matter concerned, or approved under the provisions of a bilateral agreement between the United States and a foreign country or jurisdiction.

Area navigation (RNAV) is a method of navigation that permits aircraft operations on any desired flight path.

Area navigation (RNAV) route is an ATS route based on RNAV that can be used by suitably equipped aircraft.

Armed Forces means the Army, Navy, Air Force, Marine Corps, and Coast Guard, including their regular and reserve components and members serving without component status.

Autorotation means a rotorcraft flight condition in which the lifting rotor is driven entirely by action of the air when the rotorcraft is in motion.

Auxiliary rotor means a rotor that serves either to counteract the effect of the main rotor torque on a rotorcraft or to maneuver the rotorcraft about one or more of its three principal axes.

Balloon means a lighter-than-air aircraft that is not engine driven, and that sustains flight through the use of either gas buoyancy or an airborne heater.

Brake horsepower means the power delivered at the propeller shaft (main drive or main output) of an aircraft engine.

Calibrated airspeed means the indicated airspeed of an aircraft, corrected for position and instrument error. Calibrated airspeed is equal to true airspeed in standard atmosphere at sea level.

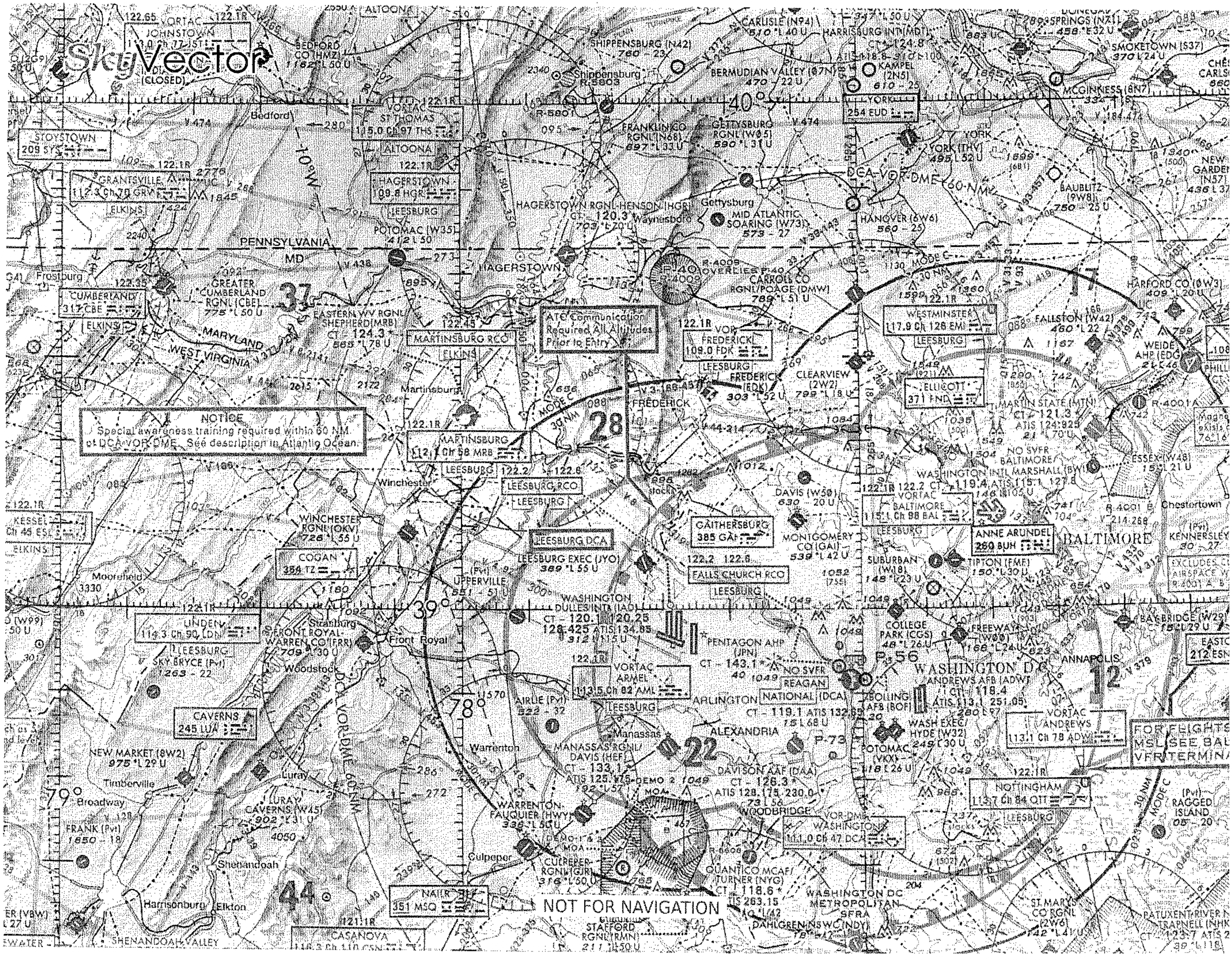
Canard means the forward wing of a canard configuration and may be a fixed, movable, or variable geometry surface, with or without control surfaces.

Canard configuration means a configuration in which the span of the forward wing is substantially less than that of the main wing.

Category:

(1) As used with respect to the certification, ratings, privileges, and limitations of airmen, means a broad classification of aircraft. Examples include: airplane; rotorcraft; glider; and lighter-than-air; and

(2) As used with respect to the certification of aircraft, means a grouping of aircraft based upon intended use or operating limitations. Examples include: transport, normal, utility, acrobatic, limited, restricted, and provisional.



SkyVector
NOTICE
Special awareness training required within 60 NM of DCA VOR-DME. See description in Atlantic Ocean.
ATC Communication Required All Altitudes Prior to Entry
NOT FOR NAVIGATION
PENNSYLVANIA
MD
MARYLAND
WEST VIRGINIA
BALTIMORE
WASHINGTON D.C.
DCA VOR-DME 60 NM
HAGERSTOWN
FREDERICK
MARTINSBURG
WINCHESTER
LEESBURG
ALEXANDRIA
ARLINGTON
ANNAPOLIS

COMPTROLLER of MARYLAND
Serving the People

Peter Franchot
Comptroller

James T. Loftus
Director
Compliance Division

NOTICE OF FINAL DETERMINATION

READ THIS NOTICE WITH CARE:
YOU MUST ACT WITHIN 30 DAYS OF THIS NOTICE DATE TO PRESERVE FURTHER APPEAL RIGHTS.

Up Up Away Hot Air Balloon Company
10 Manor Knoll Court
Baldwin, MD 21013

TIN:	22-3881413
CR #:	10939495
Tax Period:	10/01/04-04/30/08
Tracking #:	61115
Date:	August 17, 2009

Assessment Amounts	
Tax:	$2,136.82
Interest:	634.64
Penalty:	213.68
Total:	$2,985.14

Final Amounts Due	
Tax:	$2,127.94
Interest:	861.82
Penalty:	Abated
Total:	$2,989.76

This is the Comptroller's final determination on your request for revision of the admissions and amusement tax assessment for the above referenced tax period, pursuant to Tax-General Article, § 13-508(c).

A hearing was held on January 28, 2009.

William Cole, on behalf of the Comptroller, testified to the following. The taxpayer provides customers with hot air balloon rides for a fee. Mr. Cole stated that the auditor determined that the gross receipts derived from the hot air balloon rides were subject to the admissions and amusement taxes.

Matthew Lidinsky and Michael Lidinsky, the owners and operators of Up Up Away Hot Air Balloon Co. Company appeared on behalf of the taxpayer, and testified to the following. In order to provide a bit of background on hot air balloon rides, Matthew Lidinsky explained that a launch location, which is an open field, is selected in advance and that the foremost

consideration is the safety of the flight. Mr. Lidinsky stated that hot air balloons simply go with the wind and that the pilot does not have a fixed course or defined areas, as they can only travel in the direction of and at the speed that the wind pushes them along during any given flight. According to Mr. Lidinsky, this is quite different from the definition of an amusement ride provided in Business Regulation, § 3-101 (e) of the Maryland Code, which states that an amusement ride "means a device that is intended to give amusement, excitement, pleasure, or thrills to passengers whom the device carries along or around a fixed or restricted course; or within a defined area." Mr. Lidinsky further stated that they have a "chase crew" following a hot air balloon that is in flight in a truck, and the "chase crew" then picks up the balloon and all associated equipment, the balloon's crew members and any riders from the ultimate landing spot.

Matthew Lidinsky stated the hot air balloons used in their business and his flights are regulated by Federal Aviation Administration (FAA) and that only a pilot licensed by the FAA can fly the balloons. According to Mr. Lidinsky, the Comptroller of Maryland, on the behalf of the Maryland counties where hot air balloon flights take place, is preempted by federal law to levy and collect an admissions and amusement tax on the gross receipts of the taxpayer. Specifically, Mr. Lidinsky pointed to 49 U.S.C.§ 40116 which states that a state or subdivision thereof is prohibited from levying or collecting a tax 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) or the gross receipts from that air commerce or transportation.

To further support of his preemption argument, Mr. Lidinsky referred to rulings made in several other states barring the taxation of hot air balloons rides. Specifically he referred to a decision of the Arizona Department of Revenue stating that federal law preempted the State of Arizona from levying a gross receipts tax on hot air balloon activities. Moreover, Mr. Lidinsky stated that he was not aware of any state that levied a gross receipts tax on hot air balloon activities.

The taxpayer's second argument was that even if hot air balloon rides were in fact subject to admissions and amusement tax, they should not be assessed for this tax because of failure of this office to notify them whether their business's activities were subject to any state taxes. Both Michael and Matthew Lidinsky made is clear that they firmly believed that federal law preempted the State from levying and collecting a tax on the gross receipts from their hot air balloon rides; however, they made an alternative argument that if the State were *not* preempted from taxing their gross receipts, it would be unfair for them to have to pay the assessment, as they had tried on many occasions to get an answer from this office on whether their activities were subject to any State taxes, but never received a clear answer.

Both Matthew and Michael Lidinsky noted that they had called and sent letters to the Comptroller's office in 2004 and 2005 in an effort to determine whether providing hot air balloon rides was subject to sales and use tax, or any other taxes. Michael Lidinsky produced a

signed copy of a letter that he sent to the Comptroller's office on July 25, 2005, inquiring as to whether a flight in a hot air balloon ride was taxable under Maryland's sales and use tax laws. In the final paragraph of that letter, Michael Lidinsky requested that he be provided a written response to his query in writing, and he noted at the hearing that he asked for it in writing so that he would have clear advice that he could rely on, and produce should the business be audited in the future. Michael Lidinsky also provided a copy of a letter that he sent to Jim Dawson, then an employee of the Comptroller, on October 11, 2005, to follow up on a conversation that the two men had on August 1, 2005, where Mr. Dawson had told Michael Lidinsky that he was not certain whether fees charged for hot air balloon rides were subject to Maryland's sales and use tax or admissions and amusement tax, but that Mr. Dawson would research the matter and provide his findings to Michael Lidinsky.. According to Michael Lidinsky, Mr. Dawson never gave him a clear answer on the phone, and failed to contact Michael Lidinsky at a later date to provide an answer on the matter.

According to both Michael and Matthew Lidinsky, this incident was just one in a series of attempts on their parts, by writing letters and making phone calls, over the course of several years to determine whether their business was subject to either sales and use tax or admissions and amusement tax for hot air balloon rides that took off or landed in Maryland. Both Matthew and Michael Lidinsky testified unequivocally that they never received any clarification on this matter from this office, and the documentation that they provided tends to support their testimony. They both felt that because they were never told by the Comptroller's office, when they had asked on many occasions, whether their business was subject to any taxes, it would be a gross miscarriage of justice for them to have to pay this assessment for activities that took place *prior* to when they were notified of the taxability of their activities. While they both felt that their activities were not taxable by the State, they stated that if admissions and amusement tax could legally be levied on their gross receipts that they should not have to pay the assessed amount, but start collecting and remitting from this point forward, as the assessment was the first notice in writing that they received regarding the applicability of admissions and amusement tax on their business's activities.

Matthew Lidinsky also noted that three flights picked up on the audit had the wrong counties listed for the takeoff locations. Because the rate of admissions and amusement tax is based on the county where the activity took place,[1] the tax rates charged were not correct.

At the conclusion of the hearing, the hearing officer stated that, at the request of the taxpayers, she would provide the taxpayer with a copy of a booklet containing all the Maryland laws on admissions and amusement tax by February 25, 2009, which was sent to the taxpayer on

[1] The auditor used had used Baltimore County's admission and amusement tax rate of 10%, as the taxpayer's business is located there and most flights take off from Baltimore County. The taxpayer noted that two of the flights actually took off from Carroll County, which has an admission and amusement tax rate of 10%, and one flight had taken off from Howard County, which has a 7.5% admission and amusement tax rate.

February 25, 2009. Also, the hearing officer requested that the taxpayer provide documentation supporting adjustments to the three flights that the specified as having the wrong county of origin by March 11, 2009. The taxpayer timely provided documentation showing that two of the flights had taken off from Carroll County and one flight had taken off from Howard County. After review of the documentation provided by the taxpayer, the audit work papers were adjusted to change the counties for these three flights, which resulted in the assessed tax amount being reduced from $2,136.82 to $2,127.94. Please find enclosed with this correspondence a copy of the revised audit work papers showing these adjustments.

"'Admissions and amusement charge', unless expressly provided otherwise, means a charge for...use of a recreational or sports equipment." Tax-General Article § 4-101(b) (iv). A county may impose, by resolution, a tax on the gross receipts derived from any admissions and amusement charge in that county. Tax-General Article § 4-102(a) (1).

Except as provided in 49 U.S.C. § 40116 (c) and 49 U.S.C. § 40117 of this title, a State, a political subdivision of a State, and any person that has purchased or leased an airport under 49 U.S.C. § 47134 of this title, 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. 49 U.S.C. § 40116 (b). 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). A State or political subdivision of a State may levy or collect taxes (except those enumerated in subsection (b) of this section), including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services. 49 U.S.C. § 40116 (e) (1).

Turning to the legal arguments presented at the hearing, 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. While the hot air balloon rides contain a transportation component, because the customers start in one place and end in another, the dominant purpose of the taxpayer's business is to provide its customers with an entertainment experience, as the purpose of a hot air balloon flight is to *ride* in a hot air balloon, not to transport people from one place to another place. In fact, if the ride started and began in the same place, the purpose of the activity would still be fulfilled for the customers, as they got to ride in a hot air balloon: the mere fact that the hot air balloon itself ends up in a different place than it began is completely irrelevant to the experience of the hot air balloon ride. Moreover, the Maryland Tax Court has held that charges for a similar activity, helicopter sightseeing rides, constitute the use of recreational equipment. *See Dover Int'l Limited vs. Comptroller,* 1988 Md. Tax LEXIS 2 (February 17, 1988).

During the hearing, the taxpayer argued that, notwithstanding the aforementioned analysis, the application of Tax-General Article § 4-101(b) (iv) to the gross receipts of the taxpayer is preempted by 49 U.S.C. § 40116 (b). To buttress this argument, the taxpayer noted that to the best of its knowledge, no other state levies a gross receipts tax on hot air balloon activities, more specifically, that the Arizona Department of Revenue held that federal law preempted the State of Arizona from levying a gross receipts tax on hot air balloon activities. Simply because other states have chosen not to tax, or, as in the case of the Arizona Department of Revenue held that they are preempted from taxing, the gross receipts of hot air balloon activities, has no bearing on whether gross receipts of hot air balloons are subject to tax in Maryland, as this State is not compelled to follow the legal holdings or positions of any other state. The important question in this case is not what other states do, but whether federal law preempts *any* state or municipality from levying a gross receipts tax on hot air balloon activities.

The taxpayer reads 49 U.S.C. § 40116 (b) (1)-(4) to preempt Maryland from levying an admissions and amusement tax on gross receipts derived from air commerce or transportation. However, 49 U.S.C. § 40116 (c) contradicts the taxpayer's argument by providing an exception for a tax on the flight of a commercial aircraft "only if the aircraft takes off or lands in the State or political subdivision as part of the flight." Thus, subsection (c) indicates that Maryland may levy a tax on the gross receipts of the taxpayer because the taxpayer's hot air balloon took off and landed in Maryland.

Maryland's admissions and amusement tax is a gross receipts tax. However, the admissions and amusement tax assessment against the taxpayer is only attributable to the gross receipts derived from flights that take off or land in Maryland. Thus, the admissions and amusement tax on the taxpayer's gross receipts is not subject to federal preemption under 49 U.S.C. § 40116(b)-(c).

The taxpayer also argued in the alternative that if its gross receipts were in fact subject to admissions and amusement tax that fairness dictated that it should only have to collect and remit the tax prospectively and should not compelled to pay the admissions and amusement tax due for the assessment period of October 1, 2004 through April 30, 2008. The taxpayer's basis for this argument was that it had contacted this office repeatedly in 2004 and 2005 and had inquired whether its business was subject to any taxes, it frequently received no response to its queries and when its questions were addresses, it never received a clear answer one way or another.

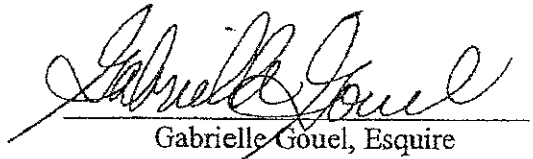
While the situation that the taxpayer had to deal with is unfortunate, it does not nullify the taxpayer's responsibility for the admissions and amusement tax due for the assessment period. In fact, even if the taxpayer had spoken to a Comptroller employee in 2004 and that employee had provided the taxpayer with erroneous advice on the matter, and the taxpayer relied on this erroneous advice to its detriment, Maryland's Court of Appeals has ruled that the Comptroller is not estopped by acts of its agents from the performance of collecting taxes legally

due. *Comptroller of the Treasury, Retail Sales Tax Division v. Atlas General Industries*, 234 Md. 77, 198 A.2d 86 (1964). So while the taxpayer is not arguing that it received erroneous advice, merely that it never received any clear advice, even if a Comptroller employee had given the taxpayer erroneous advice, the Comptroller is not bound by its employees' statements. The Court of Appeals of Maryland has ruled that statements made by an employee of the Comptroller did not estop the State from assessing and collecting sales tax contrary to statements made by employee, who was not authorized to give legal opinions. *C. E. Weaver Stone Co. v. Comptroller of Treasury*, 235 Md. 15, 200 A.2d 53 (1964).

While this Office's lack of response to the taxpayer's queries does not have any effect on the fact that the taxpayer's gross receipts from Maryland flights are subject to admissions and amusement tax, it does provide a good argument for mitigation of the ten-percent late payment penalty assessed against the taxpayer. Pursuant to Tax-General Article §13-606, a tax collector may waive penalty for reasonable cause. Because the taxpayer repeatedly tried in good faith, over several years, to find out whether its gross receipts were subject to admissions and amusement tax, the revised penalty in the amount of $212.79 is abated.

Accordingly, the assessment is affirmed as revised, in the final amounts due listed above.

If you are dissatisfied with this final determination, AN APPEAL MUST BE TIMELY FILED IN THE MARYLAND TAX COURT within 30 days of the date shown above. DO NOT FILE AN APPEAL WITH THE COMPTROLLER OF MARYLAND. If you do not appeal in accordance with the procedures of the MARYLAND TAX COURT within 30 days, this final determination will become an absolute liability, which must be promptly paid, and the payment may not be refunded for any reason. Appropriate forms for use in filing appeals may be obtained from the MARYLAND TAX COURT at 301 West Preston Street, Suite 1513, Baltimore, Maryland 21201, telephone number (410) 767-4830.



Gabrielle Gouel, Esquire
Hearing Officer
(410) 767-1597
ggouel@comp.state.md.us

IN THE MARYLAND TAX COURT

UP UP AWAY HOT AIR BALLOON COMPANY, Petitioner, v. **COMPTROLLER OF THE TREASURY OF MARYLAND,** Respondent.	MTC. No. 09-AA-OO-0993

AFFIDAVIT OF
MATTHEW FRANK LIDINSKY

I, Matthew Frank Lidinsky, being over 18 years of age and otherwise competent to testify do hereby state that:

1. I have personal knowledge of the facts stated herein as well as in Petitioner's Opposition To The Respondent Comptroller's Office For Maryland's Assessment Of Amusement And Admissions Tax.

2. Petitioner Up, Up and Away Hot Air Balloon Company, Inc. ("UUAHB") is a corporation duly organized and existing under the laws of the State of Maryland and in good standing with the State Department of Assessments and Taxation.

3. I am a Federal Aviation Administration ("FAA") certificated pilot with a "Commercial Pilot – Lighter Than Air Free Balloon" rating issued by the FAA and an employee and principal of UUAHB.

4. UUAHB operates hot air balloons in various states, including the State of Maryland.

5. All airspace overlaying the State of Maryland is "federally controlled

airspace."

6. All balloons operated by UUAHB are registered with, and undergo recurrent inspections mandated by, the Federal Aviation Administration.

7. All balloons operated by UUAHB are operated in strict accordance with the Federal Aviation Regulations.

8. All balloon flights by UUAHB involve flights using a lighter-than-air *aircraft* that is not engine driven and that sustains flight through the use of either gas buoyancy or an airborne heater.

9. All such flights directly affect, or which may endanger safety in, interstate, overseas, or foreign air commerce as each takes places within federally controlled airspace.

10. No flights conducted by UUAHB are conducted within a defined area of along or around a fixed or restricted course, as such flights are subject to the vagaries of wind and other factors which make their travel along a fixed or restricted course or in a defined area impossible.

I HEREBY AFFIRM under the penalties of perjury that the foregoing is based upon my personal knowledge and that the contents of the foregoing paper are true.

Matthew Frank Lidinsky

Ruling 422-98-1

Issued: April 29, 1998
Effective: April 29, 1998

A ruling has been requested concerning application of certain provisions of the Gross Receipts and Compensating Tax Act to the following facts:

> X operates a hot air balloon ride business in which it sells balloon rides to individuals. These flights travel in excess of 100 feet above the ground in federal airspace.

X contends that these flights are in federal airspace and that X is engaged in "air commerce", as that term is defined in 49 U.S.C. §40102. Because X's receipts are from air commerce, X asserts that the state is prohibited by 49 U.S.C. §40116(b) from imposing its gross receipts on X's receipts from providing hot air balloon rides.

X's receipts are receipts from providing a service in New Mexico and ordinarily would be subject to gross receipts tax. 49 U.S.C. § 40116, however, provides in pertinent part:

> (b) Except as provided in subsection (c) of this section and section 40117 of this title, 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 air transportation.

49 U.S.C. § 40102(a) defines several key terms, excerpted below:

> (3) "air commerce" means ... interstate air commerce, ...[or] the operation of aircraft within the limits of a Federal airway ...;
> (6) "aircraft" means any contrivance invented, used, or designed to navigate, or fly in, the air;
> (20) "Federal airway" means a part of navigable airspace that the [Federal Aviation Administration] Administrator designates as a Federal airway;
> (24) "interstate air commerce" means the transportation of passengers or property by aircraft for compensation ... or the operation of aircraft in furthering a business or vocation—
>
> (A) between a place in—
>
> (i) a State, territory, or possession of the United States and a place in the District of Columbia or another state, territory or possession of the United States;
>
> (ii) a State and another place in the same State through the airspace over a place outside the State; ....

Hot air balloons are aircraft, as defined in 49 U.S.C. §40102(a)(6). X clearly is in the business of transporting persons for compensation via aircraft.

When X engages in transporting persons in air commerce as defined by federal law, New Mexico is preempted from taxing X's gross receipts. X engages in transporting persons in air commerce when X operates a balloon within the limits of a designated Federal airway or when X transports passengers for compensation between a point in New Mexico and a point elsewhere in the United States or between a point in New Mexico and another point in New Mexico if X travels through the airspace of a place outside this state.

When X's balloon rides are not air commerce, X's receipts are gross receipts subject to the gross receipts tax unless an exemption or deduction applies.

Ruling 422-98-1

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Effective: April 29, 1998

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X's receipts are receipts from providing a service in New Mexico and ordinarily would be subject to gross receipts tax. 49 U.S.C. § 40116, however, provides in pertinent part:

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> (6) "aircraft" means any contrivance invented, used, or designed to navigate, or fly in, the air;
> (20) "Federal airway" means a part of navigable airspace that the [Federal Aviation Administration] Administrator designates as a Federal airway;
> (24) "interstate air commerce" means the transportation of passengers or property by aircraft for compensation ... or the operation of aircraft in furthering a business or vocation—
>
> (A) between a place in—
>
> (i) a State, territory, or possession of the United States and a place in the District of Columbia or another state, territory or possession of the United States;
>
> (ii) a State and another place in the same State through the airspace over a place outside the State; ....

Hot air balloons are aircraft, as defined in 49 U.S.C. §40102(a)(6). X clearly is in the business of transporting persons for compensation via aircraft.

When X engages in transporting persons in air commerce as defined by federal law, New Mexico is preempted from taxing X's gross receipts. X engages in transporting persons in air commerce when X operates a balloon within the limits of a designated Federal airway or when X transports passengers for compensation between a point in New Mexico and a point elsewhere in the United States or between a point in New Mexico and another point in New Mexico if X travels through the airspace of a place outside this state.

When X's balloon rides are not air commerce, X's receipts are gross receipts subject to the gross receipts tax unless an exemption or deduction applies.

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

U.S. Department
of Transportation

Office of the Secretary
of Transportation

GENERAL COUNSEL

1200 New Jersey Avenue, SE
Washington, DC 20590

JAN 29 2010

Mr. Matthew Frank Lidinsky
Up Up Away Hot Air Balloon Co.
10 Manor Knoll Court
Baldwin, MD 21013-9582

Re: Question on Taxation of Hot Air Balloon Flights

Dear Mr. Lidinsky:

The General Counsel has asked me to respond to your request for an opinion from the U.S. Department of Transportation (Department or DOT) on whether a federal aviation statute on state taxation (49 U.S.C. Section 40116, also known as the Anti-Head Tax Act (AHTA)) preempts a State of Maryland admission and amusement (A&A) tax assessed on the gross receipts from sales of your company's hot air balloon rides. You believe that under the AHTA, the A&A tax, which is levied by the counties of Baltimore and Howard, cannot apply to Up Up Away because your hot air balloons are licensed by the Federal Aviation Administration (FAA), piloted by a certificated airman, operated in air commerce, and engaged in the carriage of passengers.

We take this opportunity to provide you with general guidance that the AHTA would preempt a state tax on the gross receipts received for hot air balloon operations. However, we do not feel it appropriate to issue an opinion on the merits of your particular administrative proceeding before the State of Maryland. We are not privy to all the facts in the proceeding, and so offer this guidance, with a copy to the state's Comptroller.

The Department is charged with administering the AHTA. *Northwest Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 366-67 (1994) ("The Secretary of Transportation is charged with administering the federal aviation laws, including the AHTA."). The AHTA prohibits a state or political subdivision (such as a county) from levying or collecting a:

> tax, fee, head charge, or other charge [directly or indirectly] on -- an individual traveling in air commerce; . . . or the gross receipts derived from that air commerce or transportation. 49 U.S.C. § 40116(b)(1), (4).

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.

The Supreme Court has stated that the classification of the tax is not determinative under the AHTA; rather, if the tax -- even if classified as other than a "gross receipts" tax -- is measured by gross receipts, the purpose and effect of the tax would be to impose a levy on the gross receipts. Accordingly, it would be preempted as a direct or indirect gross receipts tax. *Aloha Airlines v. Director of Taxation*, 464 U.S. 7, 13-14 (1983).

A passenger-carrying, piloted and untethered hot air balloon operator carries individuals who are "traveling" under the AHTA. The FAA has determined that hot air balloons "travel" while flying. *See Balloon Flying Handbook* (Handbook) FAA-H-8083-11A (DOT/FAA, 2008) (www.faa.gov/library/manuals/aircraft/media/faa-h-8083-11.pdf). The FAA explains that hot air balloons launch, then "travel," then land. "The best launch site is of little use if there are no appropriate landing sites downwind." *Handbook*, p. 6-8. "A balloon is distinct from other aircraft in that it travels by moving with the wind and cannot be propelled through the air in a controlled manner." *Id.* at 2-2. "The pilot should always face the direction of travel." *Id.* at 7-11.

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.

Untethered hot air balloons also operate in "air commerce." 49 U.S.C. § 40102(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).

Finally, we note that an apparent savings clause to the AHTA prohibition on state or local gross receipts tax, namely 49 U.S.C. Section 40116(c), would not authorize a levy of a tax on a hot air balloon operator's gross receipts, even where the balloon takes off or lands within the state.[1] The subsection does not provide an exception for a tax on the flight of a commercial aircraft; it is not a "savings clause" from the categorical ban on flight-related taxes in the AHTA. *Township of Tinicum v. U.S. Dep't of Transportation*, 582 F. 3d 482 (3d Cir. 2009). The *Tinicum* decision denied the petition of Tinicum Township to review a DOT order invalidating, under the AHTA, a township tax on arriving or departing flights at Philadelphia International Airport, part of which is located within Tinicum's boundaries. DOT Order 2008-3-8 (March 24, 2008). The Court of Appeals held that Section 40116(c) merely establishes the state geographical nexus as a minimum requirement that must be met for a state or locality to impose a *permitted* tax relating to an aircraft flight or activity, but does not itself grant the permission to impose any tax or change the prohibition against taxes based on the *gross receipts* from passengers traveling in air commerce. *See also Virginia Dep't of Revenue, PD 2005-50* (2005 WL 1695963, April 8, 2005) (AHTA preempts a city business, professional or occupational license tax, based on gross receipts, to be imposed on a medical air transport company; subsection (c) "specifies the conditions that must be met prior to a state or locality imposing a tax related to a flight of a commercial aircraft or an activity or service on the aircraft. It does not, however, grant a state or a locality the permission to impose any type of tax on such business activity.") Consequently, a state may not impose a tax otherwise prohibited by 49 U.S.C. Section 40116(b) on passenger flights in air commerce simply because the flight lands or takes off within that state. Nor may a state or county tax the gross receipts of a hot air balloon operator merely because the aircraft operator lands or takes off within the state.

While not determinative, tax commissioners in two other states have held that the AHTA prohibits the state or local taxation of gross receipts from hot air balloon operations that carry passengers in air commerce. *See* New Mexico Rev. Ruling 422-98-1 (1998),

---

[1] The pertinent text of the AHTA reads:

(b) PROHIBITIONS.--Except as provided in subsection (c) of this section . . . , a State [and] 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.

(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.

* * * *

(e) OTHER ALLOWABLE TAXES AND CHARGES.--Except as provided in subsection (d) of this section [identifying taxes found to impose unreasonable burdens and discrimination against interstate commerce], a State or political subdivision of a State may levy or collect--

(1) taxes (except those taxes enumerated in subsection (b) of this section), including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and

(2) reasonable rental charges, landing fees, and other service charges from aircraft operators for using airport facilities of an airport owned or operated by that State or subdivision.

www.tax.state.nm.us/ruling/toc.htm; Arizona Dept. of Revenue, Transaction Privilege Tax Ruling TPR 92-1 (1992), www.azdor.gov/LegalResearch/Rulings.aspx. Our analysis of the application of the AHTA to gross receipts tax on air commerce is also consistent with prior judicial decisions, as we describe more fully below.

In 1983, the U.S. Supreme Court had occasion to rule on whether the State of Hawaii's four percent gross income tax on the airline businesses of Aloha and Hawaiian Airlines was preempted by the AHTA. In *Aloha Airlines*, the Court invalidated the Hawaii tax, finding that the AHTA's "plain language" preempts gross receipts taxes on the sale of air transportation or the "carriage of persons in air commerce," and that the Hawaii law imposed a state tax on the gross receipts of airlines selling air transportation and carrying persons traveling in air commerce. The Court further found that Hawaii's categorization of the tax as a "property" tax did not mask the fact that the law imposed a levy on the gross receipts of airlines and, because it was measured by gross receipts, it constituted at least an "indirect" tax on their gross receipts. (The Court quoted from the original version of the AHTA, enacted in 1973 and recodified, without substantive change, in 1994 in its current version. Pub. L. No. 103-272, 108 Stat. 745 (1994).

The *Aloha* Court cited with approval to an earlier Arizona state court decision, which found a state privilege tax on the gross receipts of Cochise Airline's intrastate operations invalid under the AHTA. In *State of Arizona v. Cochise Airlines*, 626 P.2d 596 (Ariz. 1980), the court found the AHTA to cover gross receipts derived from the carriage of persons traveling in air commerce, thereby protecting the gross receipts of an intrastate airline from the state tax. The court rejected, as a "self-contradictory" reading of the AHTA, Arizona's defense of the tax as a permitted "sales" tax under the AHTA. (The AHTA permits a state or subdivision to levy or collect "taxes, . . . including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services.")

State courts have also held that the AHTA preempts state or local license, business and franchise taxes on airlines measured by their gross receipts. *See, e.g., City of College Park v. Atlantic Southeastern Airlines, Inc.*, 391 S.E.2d 460 (Ga. App. 1990) (city license tax based on an airline's gross receipts); *Republic Airlines v. Dept. of Treasury*, 427 N.W.2d 182 (Mich. App. 1988) (state Single Business Tax measured by passenger revenue miles operated within the state); *Air Transport Association of America v. New York State Dept. of Taxation and Finance*, 458 N.Y.S.2d 709 (N.Y.A.D. 3), *aff'd*, 453 N.E.2d 319 (N.Y.), *cert. denied*, 464 U.S. 960 (1983) (state franchise tax measured as a percentage of gross receipts).

To be sure, the AHTA permits a state or locality to impose other taxes such as "property taxes, net income taxes, and franchise taxes." 49 U.S.C. § 40116(e). *See Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986) (upholding a state sales tax on an airline's purchase of aviation fuel); *see also Aloha Airlines*, 464 U.S. 7 at 11, n. 6. For example, a local entity may impose a property tax on airlines when the tax rate is not based on gross receipts. *United Air Lines, Inc. v. County of San Diego*, 2 Cal. Rptr. 2d 212 (Cal. App. 1991).

We hope that you find this discussion of the AHTA informative. Please be advised, however, that this is only guidance and does not constitute a final action of the Department on the matters you raised.

Should you have any questions, please feel free to contact me at 202-366-9151 or Nancy Kessler, Senior Attorney, at 202-366-9301. Thank you.

Sincerely,

Ronald Jackson

Ronald Jackson

cc: The Honorable Peter Franchot
Comptroller of Maryland
P.O. Box 466
Annapolis, MD 21404-0466