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),

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[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.")

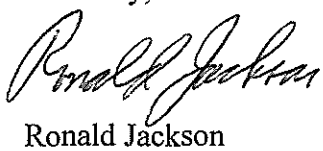
State courts have also held that the AHTA preempts state or local license, business and franchise taxes on airlines measured by their gross receipts. *See, e.g., City of College Park v. Atlantic Southeastern Airlines, Inc.*, 391 S.E.2d 460 (Ga. App. 1990) (city license tax based on an airline's gross 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

cc: The Honorable Peter Franchot
Comptroller of Maryland
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