

**In the
Supreme Court of Ohio**

EPIC AVIATION, LLC,

Appellant,

v.

JOSEPH W. TESTA
TAX COMMISSIONER OF OHIO

Appellee.

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:
: Case No. _____
:
: Appeal from Ohio Board of Tax Appeals
:
: Case No. 2012-1557
:

NOTICE OF APPEAL

Appellant, EPIC Aviation, LLC (“Appellant”), on behalf of its customer, AirNet Systems, Inc., hereby gives notice of its appeal to the Supreme Court of Ohio from a Decision and Order of the Ohio Board of Tax Appeals (“BTA”) journalized in Case No. 2012-1557 rendered on September 3, 2014. A true copy of the Decision and Order of the BTA being appealed is attached hereto as Exhibit A and incorporated herein by reference. This appeal is taken as a matter of right pursuant to Ohio Revised Code (“R.C.”) 5717.04.

During the relevant period, AirNet operated an airline that qualified as a “public utility” within the meaning of R.C. 5739.02(B)(42)(a) and R.C. 5739.01(P). AirNet purchased the subject fuel for use directly in the rendition of the public utility service and thus the purchase of the fuel was exempt from Ohio sales and use tax.

The BTA erred in the following respects:

1. By failing to permit the requested refund and refusing to find that the purchases of the fuel qualified for exemption under the Ohio statutes relevant to public utilities and pursuant to

the standards set forth in *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St. 3d 290, 2006-Ohio-2420, including by not limited to, the requirements of special regulations and control by governmental regulatory agencies, which requirements and control applied to AirNet;

2. The error of denying the refund because AirNet is regulated under Section 135, Title 14, Code of Federal Regulation (“Part 135”) rather than Part 121 of Title 14, Code of Federal Regulations (“Part 121”) and the fact that AirNet did not obtain a certificate of public convenience and necessity;

3. The error of finding that the regulations to which AirNet was subject as well as the relevant Operations Specifications were not sufficiently restrictive or special to qualify AirNet as a public utility;

4. The error in finding that the providing of services pursuant to contracts prevents AirNet from qualifying as a public utility for tax purpose or supports a finding that AirNet was not subject to sufficient regulation and control generally (and not subject to government regulation that controls the relations between it and the public as its customers) to qualify as a public utility;

5. The error of denying the public utility status upon failing to uphold the only bases asserted by the Tax Commissioner in his final determination for denial of the exemption;

6. The error of denying public utility status based on the BTA’s conclusion that an entity that voluntarily chooses to carry certain types of freight could not qualify as a public utility based on the level of regulation attendant to that type of freight;

7. The errors in reaching certain conclusions that are wholly unsupported by the record, including:

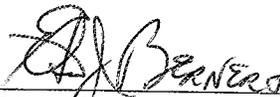
a. concluding that AirNet was subject to similar regulations to Castle Aviation contrary to undisputed testimony to the contrary; and

b. concluding that the Part 121 regulations were more rigorous than those of Part 135 operations contrary to undisputed testimony to the contrary; and

8. The denial of the public utility status for sales and use tax purposes by the Tax Commissioner as affirmed by the BTA violates AirNet's rights to equal protection under the Fourteenth Amendment to the U.S. Constitution and Article I, §2 of the Constitution of the State of Ohio because the Tax Commissioner denied the status based on the absence of the Part 121 certification even though the Ohio statute does not utilize such classification as the criterion for qualification and the case law requires the use of a flexible approach. Accordingly, the Tax Commissioner's practice was not rationally related to the determination of whether AirNet qualifies as a public utility for purposes of the sales and use tax.

Because of the errors stated above, Appellant requests that the Decision and Order of the BTA be reversed and the refund authorized.

Respectfully submitted,



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EXHIBIT A

OHIO BOARD OF TAX APPEALS

EPIC AVIATION, LLC, (et. al.),)	CASE NO(S). 2012-1557
)	
Appellant(s),)	
)	(SALES TAX)
vs.)	
)	DECISION AND ORDER
JOSEPH W. TESTA, TAX COMMISSIONER OF)	
OHIO, (et. al.),)	
)	
Appellee(s).)	

APPEARANCES:

For the Appellant(s)

- EPIC AVIATION, LLC
Represented by:
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For the Appellee(s)

- JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO
Represented by:
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COLUMBUS, OH 43215-3428

Entered Wednesday, September 3, 2014

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

Appellant appeals a final determination of the Tax Commissioner wherein he denied appellant's application for refund of sales tax paid on purchase of jet fuel by its customer, AirNet Systems, Inc. ("AirNet"). We proceed to consider the matter upon the notice of appeal, the statutory transcript ("S.T.") certified by the commissioner, the record of the hearing before this board ("H.R."), and the parties' briefs.

Appellant filed its application for refund based on the exemption in R.C. 5739.02(B)(42)(a) for purchases for use "in the rendition of a public utility service." AirNet provides cargo air transportation services, and specializes in the transport of time-sensitive cargo, i.e., checks for transfer among financial institutions, radio pharmaceuticals, and sensitive government documents. The commissioner denied the application, finding that AirNet is not a "public utility" within the meaning of the statute, and the present appeal ensued.

In our review of this matter, we are mindful that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. Consequently, it is incumbent upon a taxpayer challenging a determination of the commissioner to rebut the presumption and to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer*

Co. v. Porterfield (1968), 13 Ohio St.2d 138. In this regard, the taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

R.C. 5739.02(B)(42)(a) provides that "[s]ales where the purpose of the purchase is to *** use or consume the thing transferred ***directly in the rendition of a public utility service." R.C. 5739.01(P) defines "used directly in the rendition of a public utility service" as follows:

"[P]roperty that is to be incorporated into and will become a part of the consumer's production, transmission, transportation, or distribution system and that retains its classification as tangible personal property after such incorporation; fuel or power used in the production, transmission, transportation, or distribution system; and tangible personal property used in the repair and maintenance of the production, transmission, transportation, or distribution system ***. Tangible personal property and services used primarily in providing highway transportation for hire are not used directly in the rendition of a public utility service. *In this definition, 'public utility' includes a citizen of the United States holding, and required to hold, a certificate of public convenience and necessity issued under 49 U.S.C. 41102.*" (Emphasis added.)

The last sentence was added to the statute in 2006, following the Supreme Court's decision in *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 290, 2006-Ohio-2420. In that case, the court affirmed this board's decision finding that an air taxi operator who did not hold a certificate of public convenience and necessity was not a "public utility" under R.C. 5739.01(P). As the regulations that the appellant was subject to in *Castle Aviation* are substantially similar to those that AirNet is subject to, we find the following explanation by the court instructive:

"Before an aircraft owner can provide air-transportation service as an air carrier, it must obtain separate authorization or exemption from two different sections of the United States Department of Transportation: (1) economic authority from the Office of the Secretary of Transportation in the form of a certificate of public convenience and necessity, Section 41102, Title 49, U.S. Code, and (2) safety authority from the FAA in the form of an air carrier certificate and operations specifications issued under either Part 121 or Part 135, Title 14, C.F.R. While Section 298.11, Title 14, C.F.R. provides that air taxi operations may be exempted from the economic requirement to obtain a certificate of public convenience and necessity, there is no prohibition against an air taxi operator voluntarily choosing to obtain a certificate of public convenience and necessity.

"If a carrier chooses to obtain a certificate of public convenience and necessity, it must undergo certain review by the Department of Transportation, including meeting a requirement that it be found fit, and must submit periodic financial and traffic reports and maintain a higher level of insurance coverage. Section 41102, Title 49, U.S. Code. An air carrier that has obtained a certificate of public necessity and convenience [sic] is commonly referred to as a 'certified air carrier.' Castle has elected, under Section 298.11, Title 14, C.F.R. to be exempted from the requirement to obtain a certificate of public convenience and necessity. As a result, Castle merely has to register with the Department of Transportation and submit proof of insurance coverage. Section 298.3, Title 14, C.F.R.

"Apart from the issue of the certificate of public necessity and convenience [sic], which is controlled by the Department of Transportation, is the question of safety rules, which are determined by the FAA. There are two classes of operating safety rules, Part 121 and Part 135 of Title 14, C.F.R. The requirements set forth in Part 135 are less rigorous than those imposed under Part 121.

"Section 119.21, Title 14, C.F.R. sets forth the criteria to determine whether Part 121 or Part

135 rules are applicable to a given operation. Because the types of planes Castle operates and the way in which it operates, its operations are conducted under the less rigorous safety requirements of Part 135. If Castle wished to do so, it could subject itself to the more rigorous Part 121 rules, but it has chosen not to do so.” Id. at ¶¶11-14.

After reviewing the cases involving the definition of “public utility” under Chapter R.C. 5739, the court concluded that it had “consistently found that one of the most important criteria, if not the most important, for the application of R.C. 5739.01(E)(2)[, the predecessor to R.C. 5739.02(B)(42)(a),] to the rendition of a public utility service is special regulation and control by a governmental regulatory agency.” Id. at 27. The court ultimately concluded that Castle Aviation failed to show that it was subject to such regulation, and therefore, did not qualify for the sales tax exemption:

“Castle’s operations are similar to many other private business operations in that they must comply with various regulations, e.g., safety or environmental regulations, in order for the business to operate; however, those regulations do not control the relation between the business and the public as its customers. In a nontax case, *A & B Refuse Disposers, Inc. [v. Ravenna Twp. Bd. of Trustees]* (1992), 64 Ohio St.3d 385], the court rejected the assertion that any business that simply claims that its services are open to the public can be categorized as a public utility, stating: ‘This view is an unduly expansive construction of our holding [in *Marano v. Gibbs* (1989), 45 Ohio St.3d 310, ***] in that such a definition encompasses traditional business enterprises which are, in various degrees, regulated by diverse public authorities, e.g., dry cleaners, restaurants, and grocery stores. They are not and should not be deemed public utilities.’ 64 Ohio St.3d at 389, ***.” Id. at ¶29.

See, also, *Sundorph Aeronautical Corp. v. Lindley* (Jan. 10, 1986), BTA No. 1982-D-842, unreported; *Childers v. Wilkins* (May 18, 2007), BTA No. 2004-R-1326, unreported.

The record demonstrates that AirNet is subject to substantially similar regulations as Castle Aviation. AirNet is a Part 135 air taxi operator. It has chosen not to obtain a certificate of public convenience and necessity, and has chosen not to subject itself to the more rigorous safety standards of Part 121. However, AirNet argues that the nature of its operations distinguish it from *Castle Aviation* and from other Part 135 operators, because of its “hub and spoke operation,” its “detailed and extensive public schedule,” its “vital” role in the “check-clearing process for the U.S. Banking process,” its recognition “for its role in transporting biological products,” its “selection by the U.S. State Department through a subcontract to transport sensitive government documents,” and its revolutionary super-expedited delivery service. Appellant’s Brief at 15-16. In addition, appellant argues that “[t]he increased regulation and control arising from the events of September 11, 2001 makes a significant difference in this case compared to the regulatory environment pre-2001 that was relevant to the *Castle Aviation* case.” Id. at 25.

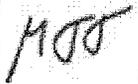
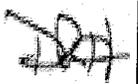
While we agree with appellant’s contention that holding a certificate of public convenience and necessity is not a requirement of R.C. 5739.01(P), given the legislature’s use of the term “includes” in its 2006 addition to the definition of “public utility,” see *Gilman v. Hamilton Cty. Bd. of Revision*, 127 Ohio St.3d 154, 2010-Ohio-4992, we find that the analysis of *Castle Aviation*, supra, is still applicable to this case. The court in *Castle Aviation* did not affirm denial of the exemption based only upon Castle’s lack of a certificate of public convenience and necessity. Rather, the court looked at the amount and degree of “special regulation and control by a government regulatory agency.” *Castle Aviation*, supra, at ¶27.

Upon review of the evidence presented in this case, we find that AirNet is not subject to the great degree of “special regulation and control” that *Castle Aviation* required to qualify as a “public utility” under R.C. 5739.01(P). Much of the regulation to which AirNet is subject is based on the types of services it provides, i.e., transportation of checks for the banking industry, and time-sensitive biological and pharmaceutical products. AirNet has voluntarily undertaken these obligations through its contracts with its customers. No government regulation has imposed an obligation to provide such services upon AirNet. Like any private

business, AirNet has chosen to perform these services and undertake the additional risks associated with them, i.e., extensive background checks for employees involved in transporting government documents, H.R. at 52, audits by the U.S. Nuclear Regulatory Commission related to transport of radio pharmaceuticals, H.R. at 59. We find insufficient evidence that AirNet is subject to government regulation that controls the relation between it and the public as its customers. Id. at ¶29. Therefore, we find that it is not a "public utility" under R.C. 5739.01(P) and that the application for refund under R.C. 5739.02(B)(42)(a) was properly denied.

Finally, we acknowledge appellant's specification of error on appeal that the denial of the refund denies it the right to equal protection under the U.S. and Ohio constitutions. While the Supreme Court has authorized this board to accept evidence on constitutional points, it has clearly stated that this board has no jurisdiction to decide constitutional claims. *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229; *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195. Therefore, we acknowledged appellant's constitutional claims on appeal, but make no findings in relation thereto.

Accordingly, we find that the final determination of the Tax Commissioner was reasonable and lawful, and, therefore, must be, and hereby is, affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Mr. Johrendt		
Mr. Harbarger		

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



A.J. Groeber, Board Secretary

BEFORE THE BOARD OF TAX APPEALS
STATE OF OHIO

EPIC AVIATION, LLC,

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v.

JOSEPH W. TESTA
TAX COMMISSIONER OF OHIO

Appellee.

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Case No. _____

Appeal from Ohio Board of Tax Appeals

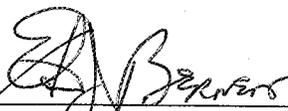
Case No. 2012-1557

PRAECIPE

TO THE OHIO BOARD OF TAX APPEALS

Demand is hereby made that the Ohio Board of Tax Appeals (“Board”) prepare, transmit and file with the Supreme Court of Ohio a certified transcript of the records and proceedings of the Board pertaining to its Order in the above-styled matter; including in said certified transcript, the Board’s Order, the original papers in the case or a transcript thereof, and all evidence with originals or copies of all exhibits as adduced in said proceeding considered by the Board in making its Order.

Respectfully submitted,



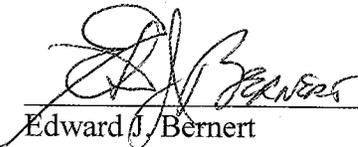
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*Counsel for Appellant
EPIC Aviation, LLC*

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Appeal and Praecipe were filed by hand-delivery with the Ohio Board of Tax Appeals, 30 East Broad Street, 24th Floor, Columbus, Ohio 43215, and were served upon the Ohio Tax Commissioner, 22nd Floor, 30 East Broad Street, Columbus, Ohio 43215, by certified mail return receipt requested, and by hand delivery with the Taxation Section of the Office of the Ohio Attorney General 25th floor, 30 East Broad Street, Columbus, Ohio this 1st day of October, 2014.



Edward J. Bernert