Supreme Court of Ohio Clerk of Court - Filed April 20, 2015 - Case No. 2014-1691

In the Supreme Court of Ohio

Epic Aviation LLC,	:	Case No.: 2014-1691
	:	
Appellant,	:	On Appeal from the Ohio
	:	Board of Tax Appeals
v.	:	
	:	BTA Case No. 2012-A-1557
Joseph W. Testa, Tax Commissioner of Ohio,	:	
	:	
Appellee.	:	

REPLY BRIEF OF APPELLANT EPIC AVIATION LLC

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REPLY BRIEF OF APPELLANT EPIC AVIATION LLC

I. INTRODUCTION

The jet fuel purchased by AirNet Systems, Inc. ("AirNet") is not subject to sales or use tax because the fuel was purchased for use in the rendition of a public utility service within the meaning of R.C. 5739.02(B)(42)(a) and 5739.01(P).

II. LAW AND ARGUMENT

A. AirNet, A Big Air Carrier That Uses Small Planes, Qualifies As A Public Utility For Tax Purposes.

AirNet qualifies as a public utility for Ohio sales and use tax purposes because its operations place it among those air carriers that provide essential delivery services to the public. The extensive network of scheduled routes shows that AirNet is a major carrier with an enormous impact on the transportation industry, especially but not limited to, the delivery of bank checks and biological items including radiopharmaceuticals. (Merit Brief of Appellant, 3-10). Other factors that support the public utility tax exemption classification include that AirNet

is a common carrier and that AirNet has been recognized by important organizations like the U.S. Federal Reserve and the Red Cross that have benefitted from AirNet's transportation services.

The extensive and important contributions by AirNet to the transportation industry were laid out at length in the Supplement and summarized in the Merit Brief of Appellant. Those factors will not be repeated fully here, especially because the Tax Commissioner has not challenged any part of the evidence. To the contrary, the Tax Commissioner conceded that "the importance of [the] service performed by AirNet is clear and unequivocal". (Appellant's Appx. 18, Final Determination, Tax Refund Claim No. 201100027 (filed July 6, 2010) ("Final Determination") at 8). On this record, the Court should find that AirNet is a public utility and can claim exemption for fuel purchased for use directly in transporting freight. *See* R.C. 5739.01(P), 5739.02(B)(42).

B. Air Carriers Need Not Obtain A Certificate Of Public Convenience And Necessity In Order To Qualify For The Sales And Use Tax Exemption For Their Fuel Purchases.

In heading "A." at page 12, and throughout the Merit Brief of Appellee, the Tax Commissioner insists that only air carriers that obtain a certificate of public convenience and necessity qualify for the sales tax exemption. This argument is the cornerstone of the Tax Commissioner's Merit Brief. Other arguments are advanced, but all of these arguments are traceable back to this single requirement that the Tax Commissioner would impose on the qualification for the tax exemption. No doubt exists about the Tax Commissioner's single-minded reliance on a single element of air carrier regulation, as the Tax Commissioner references the certificate of public convenience and necessity in his Merit Brief fifty-four (54) times.

The Tax Commissioner's insistence that the certificate of public convenience and necessity is required for an air carrier to qualify as a public utility is surprising. First, under well-established precedent, the use of the word "including" in R.C. 5739.01(P) forecloses the Tax Commissioner's argument, as detailed below. Furthermore, the BTA squarely found that the holding of 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.'" (Appellant's Appx. 7, Decision and Order, BTA No. 2012-A-1557 (entered Sept. 3, 2014) at 3; *see also* Merit Brief of Appellant at 19). And, if the Tax Commissioner sought to challenge the BTA's determination, a cross-appeal should have been filed. R.C. 5717.04. *Polaris Amphitheater Concerts, Inc. v. Delaware Cty. Bd. of Revision*, 118 Ohio St.3d 330, 2008-Ohio-2454, ¶ 14 (The Court's jurisdiction to consider errors in appeals under R.C. 5717.04 is limited to a proper notice of appeal even if the "alleged error aggrieved the party only because of the success of another's appeal").

It should be unnecessary to elaborate on the settled principle that the word "includes" is a word of inclusivity—not exclusivity. Because, however, the Tax Commissioner builds his entire case around his argument that only a holder of a certificate of public convenience and necessity can claim the tax exemption, the argument of the Tax Commissioner invites a more expansive response.

For reference, the following language from R.C. 5739.01(P) is at issue:

> 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 issue is whether the word "includes" can be read to limit the qualifying class only to required holders of the certificate of public convenience and necessity, *i.e.*, air carriers regulated under Section 121, Title 14, C.F.R. ("Part 121 Carriers").

Contrary to the Tax Commissioner's assertion, the term "includes" is an inclusive term, not one of exclusivity. *In re Hartman*, 2 Ohio St.3d 154, 156, 443 N.E.2d 516 (1983). The word "includes" means that the reference that follows is a partial, not an exhaustive, listing of all that is subsumed within the stated category because "includes" is a word of expansion rather than one of limitation or restriction. *Id*. This Court, in affirming a decision of the BTA, has addressed the implication of the expression "includes" in a partial tax exemption statute in *Gilman v. Hamilton Cty. Bd. of Revision, et al.*, 127 Ohio St.3d 154, 2010-Ohio-4992, ¶ 15.

In *Gilman*, Julia Gilman, a trustee of a trust, which owned the residence in which she resided, sought the benefit of the homestead exemption and the resulting reduction in real estate taxes available to an "owner" who resides in the home. *Id.* at ¶ 3. Although Ms. Gilman was the trustee of the property and lived in the residence, she was not the settlor of the trust. *Id*. Her late husband had been the sole settlor. *Id*. The Hamilton County Auditor had denied Ms. Gilman the exemption because he read the statute as limiting the homestead exemption to a trustee that also was the settlor of a trust. *Id.* at ¶ 4. This argument was based on the following language of the statute at issue, R.C. 323.151(A)(2), that contained a recitation of qualifying "owners" that follow the word "includes:"

> [A]n owner includes the holder of one of the several estates in fee, a vendee in possession under a purchase agreement or a land contract, a mortgagor, a life tenant, one or more tenants with a right of survivorship, tenants in common, and a settlor of a revocable inter vivos trust holding the title to a homestead occupied by the settlor as of right under the trust.

Id. at ¶ 13 (quoting Am.Sub.H.B. No. 117, 146 Ohio Laws, Part I, 898, 1070).

One of the principal arguments of the auditor on appeal to the Supreme Court in *Gilman* was that the list of potential claimants of the homestead exemption expressed the qualification as a trustee that was a settlor. *Id.* at ¶ 2. Because Ms. Gilman was a non-settlor trustee, she could

not claim the benefit, according to this reading. *See id*. The auditor argued that the list that follows "includes" in R.C. 323.151(A)(2) is an exclusive list. *Id.* at ¶ 15. This argument by the auditor was explicitly rejected by this Court in *Gilman*:

> The auditor regards R.C. 323.151(A)(2)'s list of those encompassed by the term "owner" as exhaustive. We disagree. By using the phrase "owner includes," the General Assembly indicated its intent not to set forth an exhaustive list. Instead, the list clarifies that certain persons qualify in accordance with, or in addition to, an "owner" under the meaning of that term in common usage.

Id. (citing R.C. 1.42 (requiring that words and phrases be "read in context and construed according to the rules of grammar and common usage"); *Trans Rail Am., Inc. v. Enyeart*, 123 Ohio St.3d 1, 2009-Ohio-3624, ¶ 28 (by listing items that an "act" or "action" includes, the General Assembly showed its intent "to illustrate the types of actions that may be appealable, rather than to set out an exhaustive list")).

The 2006 amendment to the sales tax statute at issue occurred after the *Gilman* decision. The drafters of the amendment to R.C. 5739.01(P) relied on the recognized principle of statutory interpretation that the use of the word "including" would not result in limiting the exemption to Part 121 Carriers. The Tax Commissioner seeks to change the rules for the construction of legislative language after the fact—and with no explanation for why the long-standing rule of statutory construction should be jettisoned.

The Tax Commissioner seeks to apply the rule of expressio unius est exclusio alterius to limit the exemption to Part 121 Carriers. (Merit Brief of Appellee, 15). In *Craftsman Type Inc. v. Lindley*, the taxpayer argued that, while several types of transactions were specifically defined as taxable transfers, the statute failed to recite "reproduction proofs" and that, therefore, the General Assembly meant to exclude such transfers from the sales tax. 6 Ohio St.3d 82, 82, 451 N.E.2d 768 (1983). The Court specifically rejected the use of expressio unius est exclusio alterius to

construe a statute employing a variation of the word "includes" when the Court provided the following:

> Both the common and general statutory usage of the word "including" significantly discredit the providence of applying the doctrine of *expressio unius est exclusio alterius* to the instant action. Indeed, earlier this year, we rejected an interpretation of "including" identical to that presently advanced by appellant. In *In re Hartman* (1983), 2 Ohio St.3d 154, 156, this court stated: "'Including' is a word of expansion rather than one of limitation or restriction." Therefore, the omission of transactions involving reproduction proofs from the chronicle of transfers following "includ[ing]" in R.C. 5739.01(B) cannot reasonably be read as a concerted attempt by the General Assembly to exclude such transfers from imposition of the sales tax.

6 Ohio St.3d at 83. The Tax Commissioner improperly ignores controlling decisions of this Court that have already rejected the Tax Commissioner's position. The Tax Commissioner's failure to even acknowledge these controlling cases is particularly improper given that the parties raised them in prior briefing in this case. The Tax Commissioner provides no reason to abandon the controlling case law of which he is already aware.

Implicitly, the Tax Commissioner argues that the Court should ignore the General Assembly's use of the word "including" in R.C. 5739.01(P). But basic rules of statutory construction compel the application of a rule of construction that employs all the words of the statute to determine the statute's meaning. *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, ¶ 21 ("Our role . . . is to evaluate a statute 'as a whole and giv[e] such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." (citation omitted)).

C. The Language Of The Relevant Legislative Service Commission's Final Analysis Of Amended Substitute House Bill 699 Of The 126th General Assembly Strongly Supports The Exemption For AirNet.

The Tax Commissioner's Merit Brief also invites close scrutiny of the language of the Final Analysis issued by the Legislative Service Commission ("LSC") for Amended Substitute House Bill 699 of the 126th General Assembly ("LSC's Final Analysis"). (Merit Brief of Appellee, 13-14). According to the LSC's Final Analysis of the bill containing this amendment, the following explanation is provided:

> [R.C. 5739.01(P) now] provides that a public utility includes a citizen of the United States holding, and required to hold, a certificate of public convenience and necessity issued under federal law that authorizes the citizen to provide air transportation. The effect of so amending the definition is to exempt from sales and use taxes sales of property, fuel, or power used in, or used in the repair or maintenance of, foreign or interstate air transportation of passengers or property *by aircraft as a common carrier for compensation, or in furtherance of the transportation of mail by aircraft*.

(Appellee's Appx. A20, LSC's Final Analysis at 65).

The emphasized language (which also was emphasized by the Tax Commissioner in the Merit Brief of Appellee) states that air carriage by aircraft as a common carrier for compensation qualifies for exemption. This presents a more expansive description of the public utility exemption for air carriers than advanced by AirNet in this appeal or before the BTA. Nevertheless, now that the Tax Commissioner has opened the door to the use of the LSC language, its use presents an interpretation that is consistent with, if not plainly expressed, in the language of R.C. 5739.01(P).

This broader interpretation is also compatible with the Court's reasoning in *Castle Aviation*, which found that "there are many different criteria that can be used to determine whether an entity qualifies as a public utility," even though the common carrier analysis was not

applied in that case (*Castle Aviation* was decided before the 2006 amendment and LSC's Final Analysis) and Castle Aviation, a common carrier, did not qualify as a public utility under the Court's ruling. *Castle Aviation, Inc. v. Wilkins,* 109 Ohio St.3d 296, 2006-Ohio-2420, ¶ 27.

Further, as between the Tax Commissioner's position that only Part 121 Carriers qualify for exemption and the LSC's Final Analysis that both Part 121 and Part 135 carriers, as common carriers, qualify for exemption, the LSC's broader qualification is more consistent with the General Assembly's intent given its use of the word "includes." At a minimum, the LSC's Final Analysis demonstrates that the statutory interpretation AirNet advances is proper and that the interpretation the Tax Commissioner advances contravenes the statute.

It is important to note that AirNet's appeal in no way is dependent upon the Court's applying the LSC's Final Analysis as the Court's interpretation of the statute. But if the Court considers the LSC language in the Court's analysis, AirNet easily meets the express requirements of the language of the LSC's Final Analysis quoted above. First, AirNet is unquestionably a common carrier. (Appx. 1, AirNet Federal Aviation Administration Air Carrier Certificate (FAA Form 8430-18) ("AirNet Air Carrier Certificate")). The testimony at the hearing was clear that AirNet was a common carrier and operated only as a common carrier, never as a private carrier. (*See* Merit Brief of Appellant, 14-15, 22-27). The Tax Commissioner never has denied that AirNet is a common carrier, and the Tax Commissioner does not deny it in his Merit Brief. (*See* Merit Brief of Appellee, 14). No one disputes that AirNet carries freight and is compensated for that service. (*See* Merit Brief of Appellee, 25-27). Furthermore, AirNet carried U.S mail. (Suppl. 107, Hearing Transcript at 107).

In summary, although the language of the LSC's Final Analysis is not binding on this Court, the standard set forth in the LSC's Final Analysis is one permissible interpretation of the

amended statutory language that is consistent with prior case law. By accepting the LSC's interpretation of amended R.C. 5739.01(P), this Court could use the standard of "common carriage for compensation" to provide a bright-line standard for air carriers to qualify for the tax exemption: common carriers for compensation, including Part 121 and Part 135 carriers, qualify for the exemption; whereas, Section 91, Title 14, C.F.R. ("Part 91") private carriers do not qualify for the exemption. Under this standard, AirNet comfortably meets the standard to qualify for the exemption.

D. Common Carrier Status Is Relevant In Analyzing Public Utility Status For Air Carriers.

If the Court chooses to apply the language of the LSC's Final Analysis, the common carrier concept becomes very important in determining qualification for exemption. Even if the LSC's Final Analysis is ignored, however, the close relationship that exists between common carriage and public utility status means that the fact that AirNet is a common carrier is important. In contrast, an entity involved in private carriage does not have the obligation to the public that warrants conferral of public utility status. Part 91 carriers are limited to private carriage operation in which the owner of an aircraft flies in his or her own aircraft for personal or business purposes. *See generally* 14 C.F.R. 91, *et seq*. For example, corporate aircraft used to fly executives operate under Part 91 private carriage and would not qualify for the public utility exemption. In contrast, a common carrier would qualify for the public utility exemption in recognition of its role of holding itself out to carry freight to the public for compensation under conditions that accord the public the right to demand service.

Throughout these proceedings the Tax Commissioner never disputed that AirNet is a common carrier. AirNet's status is confirmed by the FAA certificate stating that AirNet is a common carrier. (*See* Appx. 1, AirNet Air Carrier Certificate). And AirNet provided explicit

testimony through Mr. Schaner that AirNet understood and acted upon the obligation to provide service to the public. (*See* Merit Brief of Appellant, 14-15, 26-27). Mr. Jackson testified as an expert witness and explained the industry's obligation to serve the public. (*See* Merit Brief of Appellant, 15, 26).

The Tax Commissioner nevertheless argues that AirNet cannot present a statute or regulation that shows that the public has a right to demand service. The Tax Commissioner never explains why the presence of a statute or regulation is determinative of this analysis.

AirNet showed that the common carrier was a creature of common law, not statute or regulation, and that the obligations incumbent on common carriers are derived from common law. Further, AirNet's Merit Brief addressed the assertion made below by the Tax Commissioner that common law cannot exist absent a court case expressing the law by providing the authorities that explain how judges find the common law, rather than create it, because the common law is derived from usage and custom. The Tax Commissioner presents absolutely nothing that begins to relieve AirNet of its common law obligation to provide service to the public. AirNet's status as a common carrier, in addition to the other aspects of its operations, provides a compelling basis for the entitlement to public utility status.

The testimony and discussion of the common law in this case are consistent with the very definitions of a "common carrier" and "private carrier." The definitions from *Black's Law Dictionary* bear this out:

> ***common carrier.*** A commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee. A common carrier is generally required by law to transport freight or passengers or freight, without refusal, if the approved fare or charge is paid. – Also termed *public carrier*.
>
> "[A] 'common carrier' is bound to take all goods of the kind which he usually carries, unless his conveyance is full, or the goods be especially dangerous; but may charge different rates to different

> customers." Thomas E. Holland, *The Elements of Jurisprudence* 299 (13th ed. 1924).
>
> * * * *
>
> ***private carrier*.** Any carrier that is not a common carrier by law. A private carrier is not bound to accept business from the general public. – Also termed *contract carrier*.

Black's Law Dictionary 242 (9th Ed.2009). Nowhere in *Black's* definition of "common carrier" is there a reference to the obligations being created by statute or regulation. Instead the reference is to obligations created "by law," which includes common law. *See Black's Law Dictionary* 242.

E. Other Objections By The Tax Commissioner Are Unsupported By The Record And Law And Are Restatements Of The Argument That Only Air Carriers With Large Aircraft Qualify.

The Tax Commissioner presents other arguments that are merely restatements of the argument that the sole criterion for the exemption is the holding of the certificate of public convenience and necessity.

- The Tax Commissioner argues that because AirNet is not subject to the fitness test applicable only to Part 121 air carriers, AirNet cannot qualify for exemption.
- Likewise, the Tax Commissioner argues that AirNet should be disqualified because its business plan was incompatible with Part 121 status because of the size of the AirNet planes.
- The Tax Commissioner argues that AirNet's status as an air taxi operator is itself disqualifying.

Each of these subsidiary arguments also fail.

As to the rigor of the fitness test versus the qualification for the economic authority obtained by AirNet, Messrs. Schaner and Jackson expressly refuted the argument that the fitness

test was substantially more rigorous than the requirements met by AirNet to obtain economic authority—the fitness test had more to do with additional paperwork than additional substantive requirements relevant to a package delivery company. (*See* Merit Brief of Appellant, 10-14). Moreover, and contrary to the Tax Commissioner's contention, the qualification for economic authority for the air taxi operator was itself a rigorous undertaking. (*See id.*). The only reason that the Tax Commissioner seized on this fitness test is that it applies only to Part 121 Carriers so, of course, AirNet would not undertake this particular test as a non-Part 121 carrier.

The Tax Commissioner also argues that AirNet cannot qualify for the exemption because AirNet's operational model resulted in AirNet's flying smaller planes and using smaller airports—rather than using large aircraft that can fly only into the larger airports, which would require AirNet to operate as a Part 121 Carrier. The Tax Commissioner calls upon AirNet to withdraw from the delivery of services that require the use of small and fast aircraft, like the delivery of checks and biological products, in order to qualify for the exemption. Withdrawing from these services would be contrary to the rendition of services to the public. This argument by the Tax Commissioner denies the connection between a "public utility" and the provision of services to the public and serves no purpose other than to deny exemption. It also begs the question: why would the General Assembly wish to deny exemption to an air carrier that served the public well by using small planes by statutorily mandating the use of large planes that serve the public less well in order to qualify as a public utility?

In a similar vein, the Tax Commissioner argues that the fact that AirNet qualified as an air taxi operator means that AirNet cannot be a public utility. The classification for the air taxi operator authority is set forth as follows:

> § 298.3. Classification
>
> (a) There is hereby established a classification of air carriers, designated as "air taxi operators," which directly engage in the air transportation of persons or property or mail or in any combination of such transportation and which:
>
> (1) ***Do not directly or indirectly utilize large aircraft in air transportation*;**
>
> (2) ***Do not hold a certificate of public convenience and necessity and do not engage in scheduled passenger operations as specified in paragraph (b) of this section***;
>
> (3) Have and maintain in effect liability insurance coverage in compliance with the requirements set forth in part 205 of this chapter and have and maintain a current certificate of insurance evidencing such coverage on file with the Department;
>
> (4) If operating in foreign air transportation or participating in an interline agreement, subscribe to Agreement 18900 (OST Form 4523 or OST Form 4507) and comply with all other requirements of part 203 of this chapter; and
>
> (5) Have registered with the Department in accordance with subpart C of this part.

(Emphasis added). (Appellee's Appx. A5, 14 C.F.R. 298.3).

By definition, an air taxi operator is an air carrier that does not hold a certificate of public convenience and necessity and does not use large aircraft. Thus, the argument that an air taxi operator cannot qualify as a public utility is merely another way of saying that only Part 121 Carriers do qualify. While the particular designation "air taxi operator" may suggest a smaller air carrier, in fact, the designation applies to important air carriers that provide significant freight transportation services to the public but do not fly large aircraft.

Ultimately, these arguments by the Tax Commissioner's reduce to the following: to qualify for exemption the air carrier must either hold a certificate of public convenience and necessity or must be regulated as if it were a holder of a certificate of public convenience and

necessity. Because these arguments are foreclosed by the language of R.C. 5739.01(P), which is not limited to only the air carriers flying larger planes for reasons expressed above, the Tax Commissioner's arguments should be rejected.

Another argument advanced by the Tax Commissioner goes beyond limiting the exemption to Part 121 Carriers. The Tax Commissioner argues that the public utility exemption should be denied because AirNet's rates are not set by either the federal or state governments and because AirNet's compensation is set by contracts. (Merit Brief of Appellee, 23-27). But no air carrier, including the Part 121 Carriers, has had its rates set by statute or regulation since the 1970s. (Suppl. 133-34, Hearing Transcript 133-34). Therefore, rate-setting has no determinative impact on whether an air carrier qualifies as a public utility under a statute amended in 2006.

F. *Castle Aviation* And Amended R.C. 5739.01(P) Both Reject The Certificate Of Public Convenience And Necessity As The Only Standard For Exemption.

In *Castle Aviation*, the Tax Commissioner vigorously and specifically argued that an air carrier that lacked the certificate of public convenience and necessity, *i.e.*, other than a Part 121 Carrier, was not a public utility under the prior statute. While *Castle Aviation* did not present facts sufficient to find that Castle Aviation qualified for the public utility exemption, the Court did not hold that only Part 121 Carriers would qualify for the exemption and that all Part 135 carriers would fail to qualify. This appeal thus represents the Tax Commissioner's resurrection of an argument that was not accepted in *Castle Aviation* and the Tax Commissioner's attempt to limit the exemption further than was done in that case.

Instead of accepting Part 121 Carrier status as the litmus test in *Castle Aviation*, the Court examined the facts and found that the record did not support a finding of public utility status. *See Castle Aviation*, 2006-Ohio-2420, ¶¶ 27-28. Applying the same criteria that the Court applied in *Castle Aviation*, AirNet is a public utility. Unlike the record in *Castle Aviation*, this record

presents overwhelming evidence of the public service provided by AirNet and extensive regulation—certainly not just health and safety standards—to which AirNet is subject. Even the Tax Commissioner has acknowledged that AirNet provides important services and is subject to extensive regulation. (Appellant's Appx. 18, 20, Final Determination at 8, 10).

It is noteworthy that at least since the issuance of the Final Determination by the Tax Commissioner, the Tax Commissioner has never tried to marshal the facts and present an argument that the activities of AirNet disqualify it from the exemption. Instead, the Tax Commissioner's argument focuses solely on the absence of one particular type of regulation required only for Part 121 Carriers. Because the Tax Commissioner has not analyzed the facts from any perspective other than compliance with Part 121, the Tax Commissioner at least tacitly acknowledges that if the requirement of the certificate of public convenience and necessity is not the sole litmus test, he has no basis to challenge the public utility classification.

It is also noteworthy that the Tax Commissioner applies the facts of *Castle Aviation* as if those facts were facts of this case—when they are not. For example, the Tax Commissioner posits the following: "[f]ar from the 'special regulation and control' associated with a 'public utility,' the DOT provided only for minimal 'economic regulations' upon AirNet." (Brief of Appellee, 19). That language is parroted from the Court in *Castle Aviation. See Castle Aviation*, 2006-Ohio-2420, ¶ 27. And that conclusion is directly contradicted by the record and is wrong in this case. In fact, AirNet's unrefuted witness testimony explained that the process of the application for economic authority that AirNet underwent was not minimal and, in some respects, was more difficult than meeting the fitness test of Part 121. (Merit Brief of Appellant, 10-14).

The principle that the public utility tax exemption is not to be based on a single regulatory classification is long-standing. The cases cited by the Tax Commissioner in the Tax Commissioner's own Opinion reveal that the tax laws have never been content to identify a regulatory classification and treat that as the standard for determining the existence of a public utility sales and use tax exemption. (*See* Merit Brief of Appellant, 16 (citing Appx. 26, 1991 Ohio Tax Commr. Op. No. 90-0012 at 2)). Yet, despite the weight of authority to the contrary, the Tax Commissioner in this case continues to insist that the one regulatory standard he proposes—Part 121 Carrier status—is the exclusive test for qualification for the exemption.

This case shows why the single regulatory classification, and, in particular, Part 121 Carrier classification, should not be the standard for determining the exemption. As even the Tax Commissioner himself observes, the difference between a Part 121 operator and an air taxi operator are that an air taxi operator is "operating certain smaller aircraft with more limited passenger options." (Merit Brief of Appellee, 2). Passenger options are irrelevant for a freight air carrier; the one meaningful difference is aircraft size. No reason exists to conclude that the General Assembly wanted the exemption limited to air carriers using large aircraft, regardless of the impact of the air carrier's services. But that would be the result if the Tax Commissioner prevails.

The Court's decision in *Castle Aviation* not to accept a specific type of regulation as the test combined with the General Assembly's decision to not limit the exemption to those required to hold certificates of public convenience and necessity work in harmony. Both determinations stand squarely against the Tax Commissioner's argument.

G. The Court Should Modify The Tax Commissioner's First Proposition Of Law And Reject The Second And Third Propositions Of Law.

In his first proposition of law, the Tax Commissioner correctly states that exemptions are construed narrowly but the Tax Commissioner fails to state the second part of the test. This Court consistently refuses to construe tax exemptions narrowly when doing so imposes requirements for exemption that do not appear in the statute. *See Wheeling Steel Corp v. Porterfield*, 24 Ohio St.2d 24, 27, 263 N.E.2d 249 (1970) (transportation equipment need not meet additional requirement of remaining tangible personal property after installation which additional requirement is not set forth in the statute as a qualification for exemption). *Newfield Publications, Inc. v. Tracy*, 87 Ohio St.3d 150, 152, 718 N.E.2d 420 (1999) (packaging equipment not disqualified from exemption from sales and use tax for packaging based on the unwritten requirement that packaging must go the customer rather than to the post office).

In *Newfield Publications*, this Court explicitly rejected a proposed narrow construction of a statute that would create an additional requirement for exemption on the following terms: "We read exemption statutes strictly, but we will not require more qualifications for an exemption than the General Assembly does." 87 Ohio St.3d at 153 (citing *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952), paragraph two of the syllabus; *Wheeling Steel Corp. v. Porterfield*, 24 Ohio St.2d at 27-28). In this case, the Tax Commissioner is imposing an additional requirement—obtaining a certificate of public convenience and necessity—that is not set forth in R.C. 5739.01(P), and that is contrary to the language of the statute.

The Tax Commissioner's second and third propositions of law focus on AirNet's status as air taxi operator and seek to create a per se test that no air taxi operator can qualify for exemption. An air taxi operator is an air carrier that flies small planes and does not obtain a certificate of public convenience and necessity. So the Tax Commissioner's second and third

propositions of law are, in reality, that air carriers like AirNet do not qualify because they are not Part 121 Carriers. But the statute does not limit the public utility exemption to Part 121 Carriers, as explained above. Therefore, the Tax Commissioner's expressing the standard as disqualification based on being an air taxi operator, rather than not being a Part 121 Carrier, serves only to disguise the true thrust of his argument.

H. AirNet Qualifies As A Public Utility For Tax Purposes.

If the decision of the BTA is affirmed in this case, no air carrier that is not a Part 121 Carrier will ever be recognized by the Tax Commissioner as qualifying for the public utility sales tax exemption. It is difficult to conceptualize any air carrier that could present more compelling evidence in support of exemption than AirNet. The Tax Commissioner rejected AirNet on audit when AirNet could not provide the certificate of public convenience and necessity. (*See* Merit Brief of Appellant, 2). Nothing in the Tax Commissioner's argument even begins to suggest that his position is other than that he will limit the exemption only to Part 121 Carriers.

The Tax Commissioner's position directly contravenes the Court's decision in *Castle Aviation*, which did not limit the exemption Part 121 Carriers, and the General Assembly's amendment to R.C. 5739.01(P), which provides that obtaining a certificate of public convenience and necessity is not necessary for qualification. The Tax Commissioner justifies this position because, in his view, the Tax Department is not in the best position to determine whether the air carrier qualifies, (Suppl. 10, Hearing Transcript 10), and the use of the "objective criteria" of the certificate of public convenience and necessity is "better" than any examination that the Tax Department could undertake of the activities of the air carrier. (Merit Brief of Appellee, 15). It is no answer for the Tax Commissioner to argue that he should not be made to do a case-by-case examination when that is what the law requires.

For its part, the review by the BTA was anything but exhaustive. The BTA provided no meaningful (1) analysis of the facts, (2) comparison of the facts present in *Castle Aviation* and this case, or (3) examination of the impact of the 2006 amendment of R.C. 5739.01(P). The BTA erred in assenting to the Tax Commissioner's improper seizure of the Court's reference to the regulatory scheme being important in *Castle Aviation* as effectively granting a license to consider only Part 121 Carrier status when determining whether an air carrier qualifies for sales tax exemption as a public utility.

III. CONCLUSION

AirNet deserves the classification of public utility. AirNet is entitled to its claimed relief. The Decision and Order of the Board of Tax Appeals should be REVERSED.

Respectfully submitted,

s/ Edward J. Bernert
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EPIC Aviation LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served upon Daniel Kim and Daniel Fausey, Office of the Ohio Attorney General, Taxation Section, attorneys for the Tax Commissioner, 30 E. Broad Street, 25th Floor, Columbus, Ohio 43215 by electronic and ordinary mail delivery this 20th day of April, 2015.

s/ Edward J. Bernert
Edward J. Bernert

U.S. Department of Transportation
Federal Aviation Administration

Air Carrier Certificate

This certifies that
AirNet Systems, Inc.
7250 Star Check Drive
Columbus, OH 43217

has met the requirements of the Federal Aviation Act of 1958 as amended, and the rules, regulations, and standards prescribed thereunder for the issuance of this certificate and is hereby authorized to operate as an air carrier and conduct common carriage operations in accordance with said Act and the rules, regulations, and standards prescribed thereunder and the terms, conditions, and limitations contained in the approved operations specificatic

This certificate is not transferable and, unless sooner surrendered, suspended, or revoked, shall continue in effect indefinitely.

By Direction of the Administrator

Verene L. Miller
(Signature)

Manager
(Title)

Great Lakes Region, CMH FS
(Region/Office)

Certificate number BSYA610C

Effective date: April 30, 1974
Reissued: May 16, 2005

Issued at GL07

FAA Form 8430-18 (6-87)