

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.	:	

**APPELLANT EPIC AVIATION, LLC'S MOTION AND MEMORANDUM IN SUPPORT
OF MOTION FOR THE SUPREME COURT TO HEAR ORAL ARGUMENT**

Edward J. Bernert (0025808)
COUNSEL OF RECORD
Elizabeth A. McNellie (0046534)
Trischa Snyder Chapman (0086420)
Baker & Hostetler LLP
Capitol Square, Suite 2100
65 East State Street
Columbus, OH 43215
Telephone: (614) 228-1541
Fax: (614) 462-2661
ebernert@bakerlaw.com
emcnellie@bakerlaw.com
tchapman@bakerlaw.com

*Attorneys for Appellant,
EPIC Aviation LLC*

Daniel Kim (0089991)
COUNSEL OF RECORD
Daniel W. Fausey (0079928)
Assistant Attorneys General
30 E. Broad Street, 25th Floor
Columbus, OH 43215
Telephone: (614) 466-5967
Fax: (866) 513-0356
daniel.kim@ohioattorneygeneral.gov
daniel.fausey@ohioattorneygeneral.gov

*Attorney for Appellee,
Tax Commissioner of Ohio*

MOTION FOR THE SUPREME COURT TO HEAR ORAL ARGUMENT

Pursuant to Rule 17.07(A) of the Rules of Practice of the Supreme Court of Ohio, Epic Aviation, Inc. (“Appellant”) respectfully moves the Court to hear oral argument itself, in lieu of argument before a master commissioner, in this appeal from the Ohio Board of Tax Appeals. The case presents an issue of great public importance because of the recent change in the relevant law and because of the importance of the issue to the aviation industry and the economy in Ohio. The basis for this motion is set forth in the attached memorandum in support.

Respectfully submitted,

s/ Edward J. Bernert
Edward J. Bernert (0025808)
COUNSEL OF RECORD
Elizabeth A. McNellie (0046534)
Trischa Snyder Chapman (0086420)
Baker & Hostetler LLP
65 East State Street, Suite 2100
Columbus, Ohio 43215
Telephone: (614) 228-1541
Facsimile: (614) 462-2616
ebernert@bakerlaw.com
emcnellie@bakerlaw.com
tchapman@bakerlaw.com

*Attorneys for Appellant,
EPIC Aviation LLC*

**MEMORANDUM IN SUPPORT OF MOTION FOR THE SUPREME COURT TO HEAR ORAL
ARGUMENT**

I. BACKGROUND

Epic Aviation, Inc. (“Appellant”) sold jet fuel to AirNet Aviation Systems, Inc. (“AirNet”) and collected Ohio sales tax. Appellant accommodated AirNet by filing an application for refund, as permitted by Ohio law, for the benefit of AirNet. The application, however, was denied by the Audit Division of the Tax Department and that determination was upheld by the Tax Commissioner. AirNet is the real party in interest because the tax was collected from AirNet by Appellant for payment to the State.

AirNet was based at the Rickenbacker Air Field in Columbus. During the audit period, AirNet was the third largest air carrier of freight in the United States. The audit policy of the Tax Commissioner is to limit the exemption for purchases by air carriers of planes, repair parts and fuel to only those air carriers flying the largest aircraft and holding a certificate of public convenience and necessity such as FedEx and United Parcel Service, both of which are based outside Ohio. AirNet seeks the exemption for its purchases that are used directly in providing a public utility service. AirNet’s activities and the state and federal regulations to which it is subject qualify AirNet for this exemption. The Tax Commissioner, however, disagrees and the Ohio Board of Tax Appeals affirmed the Tax Commissioner’s determination.

II. THE LAW HAS CHANGED SINCE THE LAST TIME THIS COURT CONSIDERED THIS EXEMPTION.

The basis for AirNet’s exemption from the payment of sales and use tax is set forth in R.C. 5739.02(B)(42)(a) for items used directly in the rendition of a public utility service. The definition of “public utility” for tax purposes for air carriers is set forth in R.C. 5739.01(P). If AirNet was a public utility under Ohio tax law, then the jet fuel should have been purchased

without tax. Likewise, if AirNet was not a public utility, then the tax was owed on the purchase of the fuel.

This appeal requires the review of this Court’s decision in *Castle Aviation v. Wilkins*, 109 Ohio St.3d 290, 2006-Ohio-2420. This is the first appeal to address the public utility exemption for aircraft since 2006, and the Ohio tax law and the federal regulation of the aviation industry have changed since the audit period at issue in *Castle Aviation*. Moreover, the Tax Commissioner applies the *Castle Aviation* holding much more narrowly against exemption than is warranted under the Court’s reasoning in that decision.

Since this Court’s decision in *Castle Aviation*, the Ohio General Assembly has amended the definition of “public utility” relevant to air carriers in Amended Substitute H.B. 699, 126th General Assembly. The relevant statute with the new language is as follows:

(P) “Used directly in the rendition of a public utility service” means that property 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, including only such motor vehicles as are specially designed and equipped for such use. 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.

2006 Am.Sub.H.B. No. 699. The new language, which is specifically relevant to air carriers, is the focal point of the appeal.

AirNet has provided an extensive record, including the testimony of two witnesses with considerable expertise in the aviation industry. The facts are developed in this case much more thoroughly than was true in *Castle Aviation*. Because of this Record, the Court will have sufficient background to make its decision on the application of *Castle Aviation* and the implications of the new statutory amendment. Oral argument before the Court will be beneficial in providing an opportunity to present the many elements necessary to determine whether an air carrier qualifies as a public utility for Ohio tax purposes.

III. THE AVIATION INDUSTRY IS VITAL TO THE STATE OF OHIO.

While Ohio is the Birthplace of Aviation, the promotion of the highly-mobile aviation industry in Ohio remains important—and Ohio is perceived to be falling behind. The Ohio General Assembly recently enacted, and the Governor signed, a law to promote the Ohio aerospace and aviation industries. 2014 Am.Sub.H.B. No. 292 (attached as Exhibit A). It has become clear that members of the aviation industry, in fact, are making purchases of aircraft, repair parts, and fuel outside Ohio because exemptions are available in other states that are not available in Ohio under the Tax Commissioner’s unreasonably narrow application of the public utility sales tax exemption. While the General Assembly and other state agencies are seeking to promote the aviation industry in Ohio, the Tax Commissioner’s improper interpretation of the law is discouraging aviation commerce in Ohio.

The announcement of the decision of the Court in this case will have a significant effect on the perception of Ohio as a place for members of the aviation industry to make purchases. Accordingly, Appellant respectfully submits that the oral argument in this appeal should be heard by the Court.

Respectfully submitted,

s/ Edward J. Bernert

Edward J. Bernert (0025808)

COUNSEL OF RECORD

Elizabeth A. McNellie (0046534)

Trischa Snyder Chapman (0086420)

Baker & Hostetler LLP

65 East State Street, Suite 2100

Columbus, Ohio 43215

Telephone: (614) 228-1541

Facsimile: (614) 462-2616

ebernert@bakerlaw.com

emcnellie@bakerlaw.com

tchapman@bakerlaw.com

Attorneys for Appellant,

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

EXHIBIT A

(130th General Assembly)
(Amended Substitute House Bill Number 292)

AN ACT

To enact section 122.98 of the Revised Code to create the
Ohio Aerospace and Aviation Technology Committee.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That section 122.98 of the Revised Code be enacted to read as follows:

Sec. 122.98. (A) There is hereby created the Ohio aerospace and aviation technology committee, consisting of the following members:

(1) Three members of the senate, appointed by the president of the senate, not more than two of whom may be members of the same political party;

(2) Three members of the house of representatives, appointed by the speaker of the house of representatives, not more than two of whom may be members of the same political party;

(3) Fifteen members representing the aviation, aerospace, or technology industry, the military, or academia. One such member shall be appointed by the governor, and fourteen such members shall be appointed by majority vote of the six members representing the senate and house of representatives.

The legislative members of the committee shall be appointed not later than September 1, 2014, and the remaining members shall be appointed within ten days thereafter. The initial term of all members shall end on December 31, 2016. Thereafter, the term of all members shall end on the thirty-first day of December of the year following the year of appointment. Vacancies shall be filled in the manner of the original appointment.

The first legislator appointed to the committee by the speaker of the house of representatives after the effective date of H.B. 292 of the 130th general assembly shall serve as the first chairperson of the committee and shall serve until December 31, 2016. Every general assembly thereafter, the chairperson shall alternate between the first legislator appointed by the president of the senate and the first legislator appointed by the speaker of the house of representatives.

(B) The duties of the committee shall include, but are not limited to, all of the following:

EXHIBIT A

Am. Sub. H. B. No. 292

130th G.A.

2

(1) Studying and developing comprehensive strategies to promote the aviation, aerospace, and technology industry throughout the state, including through the commercialization of aviation, aerospace, and technology products and ideas;

(2) Encouraging communication and resource-sharing among individuals and organizations involved in the aviation, aerospace, and technology industry, including business, the military, and academia;

(3) Promoting research and development in the aviation, aerospace, and technology industry, including research and development of unmanned aerial vehicles;

(4) Providing assistance related to military base realignment and closure.

(C) The Ohio aerospace and aviation council shall serve as an advisory council to the committee.

(D) The committee shall compile an annual report of its activities, findings, and recommendations and shall furnish a copy of the report to the governor, president of the senate, and speaker of the house of representatives not later than July 1, 2015, and the first day of July of each year thereafter.

EXHIBIT A

Am. Sub. H. B. No. 292

130th G.A.

William J. Batchelder

Speaker _____ of the House of Representatives.

Kurt Iwan

President _____ of the Senate.

Passed June 4, 2014

Approved JUNE 17, 2014

John Kasich

Governor.



EXHIBIT A

Am. Sub. H. B. No. 292

130th G.A.

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

Mark C. Flanders

Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the
18 day of June, A. D. 2014.

Jon Hosta

Secretary of State.

File No. 125

Effective Date September 17, 2014

EXHIBIT A

File No. 125

(130th General Assembly)
(Amended Substitute House Bill Number 292)

AN ACT

To enact section 122.98 of the Revised Code to create the Ohio Aerospace and Aviation Technology Committee.

Introduced by

Representative Perales

Cosponsors: Representatives Grossman, Rosenberger, Fedor, Landis, Baker, Rogers, Sheehy, Blair, Sicelton, Foley, Butler, Barnes, Burkley, Driehaus, Hagan, C., Henne, Williams, Adams, R., Amstutz, Anielski, Antonio, Beck, Bishoff, Blessing, Boose, Boyce, Brown, Buchy, Carnicy, Celebrezze, Clyde, Condit, Derickson, DeVitis, Dovilla, Duffey, Gerberry, Gonzales, Green, Hackett, Hayes, Huffman, Kunze, Letson, Lundy, McClain, McGregor, Milkovich, O'Brien, Patterson, Pelanda, Pillich, Ramos, Reherford, Roegner, Romanchuk, Ruhl, Scherer, Schuring, Slesnick, Strahorn, Terhar, Thompson, Winburn, Young Speaker Batchelder
Senators Bacon, LaRose, Uecker, Smith, Brown, Balderson, Beagle, Burke, Coley, Eklund, Faber, Gardner, Hite, Hughes, Jones, Kearney, Manning, Obhof, Peterson, Schaffer, Tavares, Widener

Passed by the House of Representatives,

December 11, 2013

Passed by the Senate,

June 4, 2014

Filed in the office of the Secretary of State at Columbus, Ohio, on the

13 day of JUNE, A. D. 2014

Jan Harte
Secretary of State.

*Concurred in
Senate amendments
June 4, 2014.*