

**In the
Supreme Court of Ohio**

EPIC AVIATION, LLC,	:	
	:	
Appellant,	:	Case No. 2014-1691
	:	
v.	:	On appeal from the
	:	Ohio Board of Tax Appeals
	:	
JOSEPH W. TESTA,	:	
TAX COMMISSIONER OF OHIO,	:	BTA Case No. 2012-A-1557
	:	
Appellee.	:	

**RESPONSE OF APPELLEE, JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO,
IN OPPOSITION TO
APPELLANT'S MOTION FOR ORAL ARGUMENT BEFORE THE FULL COURT**

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MEMORANDUM IN OPPOSITION

Appellee, Joseph W. Testa, Tax Commissioner of Ohio (“Commissioner”), hereby opposes the motion of appellant, Epic Aviation LLC (“Epic”), for oral argument before the full Court. Through its appeal, Epic essentially seeks error correction on settled law, despite the absence of any error below. And, contrary to Epic’s stated reasons for requesting a full Court argument, there is nothing novel about the legal issue presented here.

This appeal arises from a decision from the Ohio Board of Tax Appeals (“Board”), in which the Board directly applied this Court’s controlling decision in *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 290, 2006-Ohio-2420. In bringing this appeal, Epic does *not* ask this Court to wade through a complex set of legal questions, or reconcile potentially conflicting case law. Rather, the ultimate question before this Court is whether the Board correctly applied this Court’s decision in *Castle Aviation* to the facts presented in this case. Because *Castle Aviation* is on all fours with this appeal, oral argument before the full Court is simply not needed.

Here, Epic filed a refund claim on behalf of AirNet Systems, Inc. (“AirNet”), relating to Epic’s sale of jet fuel to AirNet (and subsequent collection of sales tax for those sales). In filing that claim, Epic claimed that AirNet qualified as a “public utility” under R.C. 5739.01(P). As the Board properly recognized, *Castle Aviation* controls the outcome of this case. In *Castle Aviation*, this Court stressed that one of the “most important” criteria in determining whether an entity qualifies as a “public utility” is whether that entity is subject to “special regulation and control by a governmental regulatory agency.” 2006-Ohio-2420, ¶ 27. In elaborating upon what such regulation entails, this Court noted that the taxpayer in *Castle Aviation* operated in a manner “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.” *Id.* ¶ 29. A full Court review is not necessary to examine whether AirNet was subject to “special regulation and control,” as this Court envisioned in *Castle Aviation*.

In making its request, Epic seeks to draw attention to the fact that, after *Castle Aviation*, the General Assembly added the following language to R.C. 5739.01(P):

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.

Yet, this Court’s decision in *Castle Aviation* did not turn on whether the taxpayer in that case held a certificate of public convenience and necessity. Similarly, here, the Board explicitly applied *Castle Aviation* to the facts in this case, and it determined that the amendment of R.C. 5739.01(P) did not render *Castle Aviation* inapplicable. The Board rested its decision upon an examination of the amount and degree of “special regulation and control” subjected upon AirNet – using the roadmap provided by this Court in *Castle Aviation*. Regardless of whether the General Assembly had amended R.C. 5739.01(P) as it did, the Board’s application of *Castle Aviation* to the facts here would have been the same.

Epic contends that “the new language [of R.C. 5739.01(P)] . . . is the focal point of the appeal.” This is a curious statement. In its merit brief, Epic argues that that new language should be construed such that holding a certificate of public convenience and necessity is sufficient, but not necessary, to qualify as a “public utility.” Given that AirNet indisputably does *not* hold such a certificate, Epic’s claim for exemption does not rely upon that certificate – or, in turn, an interpretation of that new language. It is incongruous for Epic to contend, on one hand, that its appeal does not rely upon that language – but now, on the other hand, contend that such language is a “focal point” of the appeal. In any event, it bears repeating that the Board

determined that this Court's decision in *Castle Aviation* remained applicable, notwithstanding the new language in R.C. 5739.01(P). As such, that new language does not somehow create a novel or complex legal question regarding this case that warrants oral argument before a full Court.

Epic also seeks a full-Court argument because, as it contends, "this case will have a significant effect on the perception of Ohio" as a desirable business location for those in the aviation industry. Epic cites a recently-enacted law, R.C. 122.98, which supposedly intends "to promote the Ohio aerospace and aviation industries," as evidence of the Commissioner's "unreasonably narrow application of the public utility sales tax exemption." This statute, however, simply has no bearing on whether the Commissioner reasonably denied Epic's exemption claim, or on any other legal questions facing this Court in this appeal.

Among his duties, the Commissioner is charged with the handling of tax exemptions under R.C. 5739.01(P). As discussed in the Commissioner's merit brief, all sales in Ohio are presumed taxable. *See* R.C. 5739.02. Tax exemptions are a matter of legislative grace and are the exception to this rule. *See, e.g., Ohio Children's Soc'y, Inc. v. Porterfield*, 26 Ohio St.2d 30, 32-33 (1971). As such, tax exemption statutes must be strictly construed, because they are "in derogation of rights of all taxpayers and effectively shift[] a greater tax burden to the nonexempt." *Id.* If ever in doubt, this Court thus must resolve a claim *against* exemption.

In contrast, the Commissioner neither administers nor enforces R.C. 122.98. Plus, that statute includes no language whatsoever relating to the taxability of activities conducted within the Ohio aviation industry. Even if R.C. 122.98 may intend to promote that industry, the statute is a nonstarter when it comes to discussing the applicability of a tax exemption.

This Court has noted that when the General Assembly "sees fit to encourage certain activities *by the granting of a tax exempt status*, it is the duty of the courts strictly to construe

exemption provisions, rigidly applying only the express intent of the General Assembly.” *Id.* at 33 (emphasis added). In other words, even had R.C. 122.98 expressly included some form of tax exemption, this Court would be bound to construe such a provision strictly. Of course, the statute does no such thing – indeed, it does not even fall within the Commissioner’s province – and yet Epic presents it as evidence that the General Assembly somehow expanded the tax exemption under R.C. 5739.01(P). Had the General Assembly intended to supersede *Castle Aviation*, or expand upon the current scope of the “public utility” tax exemption, then it would have amended R.C. 5739.01(P) again – rather than enact a different statute, R.C. 122.98. As such, a full-Court argument is simply not necessary to consider a statute has no impact on the tax exemption at issue here.

Finally, Epic contends that “exemptions are available in other states that are not available in Ohio under the Tax Commissioner’s unreasonably narrow application of [R.C. 5739.01(P)].” Ultimately, this is a policy concern, better heard by the General Assembly, and not this Court. The General Assembly “is the final arbiter of public policy, [and it] is not the role of the courts to establish legislative policies or to second-guess the General Assembly’s policy choices.” *E.g.*, *State ex rel. Cydrus v. Ohio Pub. Emps. Ret. Sys.*, 127 Ohio St.3d 257, 2010-Ohio-5770, ¶ 24 (citations and internal quotations omitted). Insofar as Epic seeks to characterize its appeal as an example of the Commissioner placing Ohio at a competitive disadvantage relative to other states, that complaint simply need not be heard by the master commissioner – let alone a full Court.

In sum, the Board squarely applied this Court’s controlling precedent in *Castle Aviation*, as well as its own consistent case law, in rejecting Epic’s exemption claim under R.C. 5739.01(P). Accordingly, the Commissioner respectfully requests that this Court deny Epic’s request for oral argument before the full Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing “Response Of Appellee, Joseph W. Testa, Tax Commissioner of Ohio, In Opposition To Appellant’s Motion For Oral Argument Before The Full Court,” was served by e-mail on April 30, 2015, upon the following:

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