

IN THE SUPREME COURT OF OHIO

Appeal from the Ohio Board of Tax Appeals

COLUMBIA GAS TRANSMISSION CORP.,)	
)	
Appellee,)	
)	
v.)	CASE NO. 2006-1443
)	
THOMAS M. ZAINO [William W. Wilkins],)	Appeal from BTA Case
TAX COMMISSIONER OF OHIO,)	No. 2003-K-1876
)	
Appellant.)	

REPLY BRIEF OF AMICUS CURIAE, THE OHIO SCHOOL BOARDS ASSOCIATION,
IN SUPPORT OF TAX COMMISSIONER

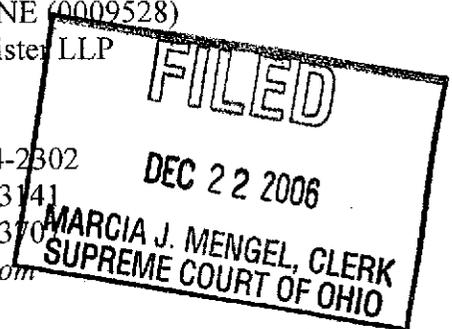
MARYANN B. GALL (0011812)
(Counsel of Record)
MARY BETH YOUNG (0073451)
PHYLLIS J. SHAMBAUGH (0061620)
JONES DAY
P.O. Box 165017
Columbus, Ohio 43216
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
mbgall@jonesday.com

JIM PETRO (0022096)
Attorney General of Ohio
BARTON A. HUBBARD (0023141)
Assistant Attorney General (Counsel of Record)
CHERYL D. POKORNY (0029797)
Deputy Attorney General
JANYCE C. KATZ (0042425)
Assistant Attorney General
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
Telephone: (614) 466-5967
Facsimile: (614) 466-8226
bhubbard@ag.state.oh.us

ATTORNEYS FOR APPELLANT

ATTORNEYS FOR APPELLEE/
CROSS-APPELLANT
COLUMBIA GAS TRANSMISSION
CORPORATION

FRED J. LIVINGSTONE (0009528)
Taft, Stettinius & Hollister LLP
3500 BP Tower
200 Public Square
Cleveland, Ohio 44114-2302
Telephone: 216-241-3141
Facsimile: 216-241-3700
flivingstone@taftlaw.com



ATTORNEY FOR AMICUS CURIAE, THE OHIO
SCHOOL BOARDS ASSOCIATION

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ARGUMENT

- I. THE COMMISSIONER'S PRIMARY BUSINESS TEST IS SUPPORTED BY THE STATUTE AND THE CASE LAW, AND THUS TAXPAYER IS REQUIRED TO BE CLASSIFIED AS A PIPELINE COMPANY.
 - A. R.C. 5727.02 APPLIES AND REQUIRES ADOPTION OF THE PRIMARY BUSINESS TEST.

Columbia Gas's contention that R.C. 5727.02 does not distinguish between the types of public utilities and merely establishes a test for determining whether an entity is a public utility at all is completely contrary to the plain language of the statute. R.C. 5727.02 states:

"[a] 'public utility,' 'electric company,' 'natural gas company,' 'pipe-line company,' 'water-works company,' 'water transportation company' or 'heating company' does not include any of the following: any person that is engaged in some other primary business to which the supplying of electricity, heat, natural gas, water, water transportation, steam, or air to others is incidental."

Columbia Gas is interpreting the statute as the definitional provision of a public utility. It completely ignores R.C. 5727.01(A) which provides definitions for the entire chapter and already includes a definition for a public utility. Thus, the purpose of R.C. 5727.02 cannot be to define a public utility and establish a test for determining whether an entity is a public utility. Instead the statute's sole purpose is to provide exemptions from taxation for certain entities that do not satisfy the criteria for any of the types of public utilities listed because the functions they perform are only incidental to their primary business.

Furthermore, when determining whether the exemption provided in R.C. 5727.02 applies to an entity, the plain language of the statute requires it to be read disjunctively. The well-settled law in Ohio is that "[t]he words and phrases contained in Ohio's statutes and administrative regulations are to be given their plain, ordinary meaning and are to be construed 'according to the rules of grammar and common usage.'" *Clark v. State Bd. of Registration for Prof'l Eng'rs*

and Surveyors (1997), 121 Ohio App.3d 278; *Pizza v. Sunset Fireworks Co., Inc.* (1986), 25 Ohio St.3d 1; *In re Marrs' Estate* (1952), 158 Ohio St. 95. Plain and ambiguous language cannot be ignored, and absent ambiguity, statutory language is not to be enlarged or construed in any way other than that which its words demand. *Clark*, 121 Ohio App.3d, at 284.

The statute states a “‘public utility,’ ‘electric company,’ ‘natural gas company,’ ‘pipeline company,’ ‘water-works company,’ ‘water transportation company’ *or* ‘heating company’” does not include any person engaged in some other primary business. The word “or” is defined as a function word indicating an alternative between different or unlike things. *Pizza*, 25 Ohio St.3d, at 4. The separation of exemptions through the use of the term “or” requires that the exceptions be read apart from each other. *Id.* Therefore, by using the term “or,” the plain language of R.C. 5727.02 is not providing a test for determining whether the all listed entities are public utilities at all. Instead the statute is establishing a test for determining whether all the separate entities listed are covered by the statute, and a “public utility” is just one of the entities listed in the statute that may be exempted. If the statute intended to establish a test for determining whether an entity was a public utility at all, it would state something similar to a “public utility, *which includes a natural gas company, pipeline company, etc.*, does not include any person engaged in some other primary business.”

Furthermore, to support Columbia Gas’s argument that if an entity is not a natural gas company under R.C. 5727.02 then it also cannot be a public utility, the conjunctive term “and” would need to be used in the statute. By using the disjunction “or” instead of the conjunction “and,” the statute cannot be said to only apply to a determination if something is a public utility at all. Instead a “public utility” is only one of the entities to which R.C. 5727.02 applies.

The plain language of R.C. 5727.02 requires it to be applied to Columbia Gas. The statute should be read: "... natural gas company ... does not include any of the following: any person that is engaged in some other primary business to which the supplying of ..natural gas... to others is incidental." Because Columbia Gas is engaged primarily in the business of a pipeline company and because the supplying of natural gas to consumers is incidental to that business, it cannot be classified as a natural gas company for assessment purposes.

B. THE PRIMARY BUSINESS REQUIREMENT IS SUPPORTED BY THE CASE LAW.

Columbia Gas attempts to down play the primary business requirement implicit in taxing statutes by stating such test does not apply outside of the sales tax or personal property tax context. Columbia Gas, however, is missing the general point that this Court has repeatedly relied upon a primary business test when taxable property or activities overlap into a non-tax regime or into other methods of taxation. *Mead Corp. v. Glander* (1950), 153 Ohio St. 539; *A.J. Weigand, Inc. v. Bowers* (1960), 171 Ohio St. 78. In *Parisi Transp. Co. v. Wilkins* (2004), 102 Ohio St.3d 278, this Court went out of its way to insert the word "primary" in its opinion even though the facts of the case did not require it. This Court explained that:

We have added the word 'primary' to address those situations where there may be operations that would provide an exception from taxation for the equipment and other operations that would require levying the tax. The primary and principal use of the equipment in question is determinative of the exception. *Manfredi Motor Transport Co. v. Limbach* (1988), 35 Ohio St.3d73,75, 518 N.E. 2d 936

Id. at 281. Thus, the primary business test is not solely applicable in the sales tax or property context, and as the Court has done in the above cases, it may adopt a primary business test in this context.

Furthermore, Columbia Gas had always correctly been treated as a pipeline company in the past, as that is what its primary business has always been. Now, solely for the tax benefit,

Columbia Gas is seeking to be treated as a natural gas company. Columbia Gas is relying on the notion that the industry has changed and it now can fall under the definition of both a natural gas company and a pipeline company. Just because an industry or business has evolved, however, does not change the Court's obligation to strictly interpret a statute. See *Akron Transp. Corp. v. Glander* (1951), 155 Ohio St. 471 (courts must strictly construe the statute and only the legislature can alter a statute to comply with a changing industry).

In fact, as Columbia Gas has pointed out on page 24 of its brief, the General Assembly has tailored statutes to fit changing situations in industries. If there is a need to recognize the changed circumstances of pipeline companies, it is up to the General Assembly to do so. Columbia Gas should be directing its attention to the General Assembly and not to the courts.

Furthermore, assuming *arguendo* that Columbia Gas does qualify as a natural gas company, that doesn't change the fact that it also qualifies as a pipeline company. Columbia Gas should not be able to determine its classification solely on tax benefit reasons, and nothing in the statute leads to the conclusion that classifying an entity as a natural gas company is the default classification. Moreover, Columbia Gas says it can be classified as both a natural gas company and a pipeline company, but for tax purposes, its entire business falls under only one definition. If Columbia Gas believes that its multiple types of businesses should be classified as only one business for tax reasons, the only logical way to determine which classification the business falls under then is to insert a primary business test. Therefore, as the Court has adopted primary business tests in the past to reconcile conflicting tax treatments of a business, so should such a test be adopted in Columbia Gas's context.

II. THE TAX COMMISSIONER IS OBLIGATED TO FOLLOW THE CLASSIFICATIONS OF THE REGULATORY AUTHORITIES SUCH AS PUCO AND FERC.

Columbia Gas claims following the definitions of the PUCO is not mandatory and only illustrative when determining how an entity is classified for under tax statutes. Although relying on PUCO definitions may not be mandatory, this Court has repeatedly adhered to or relied on such definitions when making tax classification determinations. See e.g., *MCI Telecomm. Corp. v. Limbach* (1994), 68 Ohio St.3d 195; *Chrysler v. Tracy* (1995), 73 Ohio St. 3d. 26; *Akron Transp. Corp. v. Glander* (1951), 155 Ohio St. 471. By looking to the PUCO definitions as guidance, these well-reasoned decisions have created uniformity and consistency between the two regulatory regimes. Therefore, in an effort to follow past precedent, this Court should also look to and follow the PUCO definitions. Columbia Gas has always been classified as a pipeline company under the PUCO definitions, and so should also be treated under the tax statutes.

III. AMICUS'S ALTERNATIVE ARGUMENT IS SUFFICIENTLY COVERED IN THE TAX COMMISSIONER'S NOTICE OF APPEAL AND MAY BE ASSERTED BEFORE THIS COURT.

Amicus has argued alternatively in its brief that the assessment of Columbia Gas's property be based on the percentage of its business acting as a natural gas company and the percentage of its business acting as a pipeline company. Columbia Gas has challenged that argument claiming that the Tax Commissioner has failed to include it in his notice of appeal to the Board of Tax Appeals and therefore the Board of Tax Appeals has no jurisdiction over same. However, a party can assert an alternative argument if it is not a separate objection too distinct from the theory argued in the party's brief. *Id.*; *MCI v. Limbach* (1994), 68 Ohio St.3d 195; *Goodyear Tire & Rubber Co. v. Limbach* (1991), 61 Ohio St.3d 381; *Buckeye Int'l., Inc. v. Limbach* (1992), 64 Ohio St.3d 264.

In *Goodyear*, the taxpayer entered sale and leaseback agreement with another company solely for the purpose of purchasing the company's federal income tax deductions for depreciation. The Tax Commissioner found the deductions resulted from the lease of property out-of-state, however, and thus disallowed the taxpayer's claim under the statute. On appeal to the Board of Tax Appeals, the taxpayer claimed that the statute did not apply to taxpayer's situation and that only net income, not net loss, was allocable. The BTA rejected both arguments.

Subsequently, on appeal to the Supreme Court, the taxpayer added the argument that the agreement with the other company was not truly a lease. The Supreme Court permitted the argument stating that a taxpayer only needed to specify the actions and findings of the Commissioner that the taxpayer contends are the asserted error. *Id.*, at 383. Since the taxpayer stated that it objected to the Tax Commissioner's allocation of the net rental loss, contended how the loss should be apportioned and cited the statute that should be applied, it was permitted to make the additional argument based on those alleged errors. *Id.*

In *Buckeye*, the taxpayer was the surviving company in a merger, and when reporting the economic substance of the purchase, it allocated a portion of the purchase price to its personal property. *Buckeye*, 64 Ohio St.3d 264, 267. On audit, the Tax Commissioner determined the true value of the property was actually higher. The taxpayer appealed and contended in its notice of appeal that: "the Commissioner erred in failing to follow the general requirement of R.C. 5711.18 that in valuing 'personal property used in business, the book value thereof less depreciation at such time shall be listed, and such depreciated book value shall be taken as the true value of such property.'" *Id.* at 268.

The Board of Tax Appeal affirmed the Commissioner's determination and the taxpayer appealed to this Court. The Commissioner challenged the taxpayer's raising the issue of double counting because it was not presented to the Board of Tax Appeals, and thus could not be presented to the Supreme Court. *Id.* The Court ruled that the issue of double counting related to the value of the property mentioned in the paragraph of the notice of appeal stated above and was not a separate and distinct error. *Id.* Furthermore, the Court stated "[i]n resolving questions regarding the effectiveness of the notice of appeal, we are not disposed to deny review by a hyper-technical reading of the notice." *Id.*

Similar to the cases cited above, the Tax Commissioner in this case sufficiently specified the actions and findings of the Board of Tax Appeal that he stated are error. He stated that the Board of Tax Appeal erred in assessing Columbia Gas's taxable property at 25% for natural gas companies as opposed to 88% for pipeline companies, cited the applicable statutes, R.C. 5727.01 and R.C. 5727.111 and stated that the taxpayer should be assessed as a pipeline company and subject to the rate of 88%. Columbia Gas was sufficiently notified of the errors claimed and the amicus is merely presenting an alternative argument relating to those errors. This alternative argument is not so separate and distinct that would be required to be specifically pled because it makes reference to both percentages and statutes. As stated above, the Court should not deny considering an argument by a hyper-technical reading of the notice.

Furthermore, taxing Columbia Gas's business separately for its natural gas company activities and pipeline company activities is workable and legally justified. Under Ohio law, a business may be a dual-capacity taxpayer and thus subject to different tax rates or exemptions for each aspect of the taxpayer's business. *American Dist. Tel. Co. v. Porterfield* (1968), 15 Ohio St.2d 92 (separating taxpayer's *activities* between those applicable to a sales tax and those which

were exempt as a personal service); *Merch. Cold Storage Co. v. Glander* (1948), 150 Ohio St. 524 (ruling that a portion of the equipment purchased by the taxpayer would have been exempted from taxation to the extent it was used in the taxpayer's separate business of providing cold storage to its customers).

In each of the above-cited cases, the Court articulated a method of separating the taxpayer's activities for alternate tax treatment. With respect to Columbia Gas, it admitted that 51.7% of its natural gas moved through its pipelines on behalf of costumers other than LDCs. Thus, if Columbia Gas can so easily separate its business in this manner, so too can it separate its business between the activities that allow it to be qualified as a natural gas company and a pipeline company. Because Columbia Gas is arguably both a pipeline company and a natural gas company, its business must be separated into both categories for the purpose of taxation. It would be unreasonable to assess the entire business of Columbia Gas as a natural gas company, when only a small portion of its actions qualify for that business.

IV. AMICUS CONCURS WITH THE TAX COMMISSIONER ON ISSUES NOT ADDRESSED HEREIN

Amicus has not addressed all issues raised in this case. Insofar as it has not, it joins with the Tax Commissioner's presentation of same in his briefs.

CONCLUSION

This Court should reverse the BTA and sustain the Tax Commissioner's classification of Columbia Gas as a pipeline company. First of all, the Commissioner followed this Court's long standing precedent of classifying companies for tax purposes as they are classified for regulatory purposes. Secondly, the Commissioner followed the Court's precedents and section 5727.02(A) regarding the primary business of the taxpayer as the factor determining such classification. Finally, if this Court believes that some recognition should be given to the end user aspect of

Columbia Gas's business, it should regard this taxpayer as a dual use taxpayer, both as a natural gas company and as a pipeline company and remand the case to the Tax Commission to allocate proportionally.

Respectfully submitted,



Fred J. Livingstone (0009528)
TAFT, STETTINIUS & HOLLISTER LLP
3500 BP Tower
200 Public Square
Cleveland, Ohio 44114-2302
Telephone: (216) 241-2838
Facsimile: (216) 241-3707
Attorney for Amicus Curiae,
The Ohio School Boards Association

CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Amicus Curiae the Ohio School Boards Association, In Support of the Tax Commissioner was served upon Jim Petro, Attorney General and Barton A. Hubbard, Assistant Attorney General and Counsel of Record, Taxation Section, 30 East Broad Street, 16th Floor, Columbus, Ohio 43215, upon Maryann B. Gall, Todd S. Swatsler, Mary Beth Young, Phyllis J. Shambaugh, and Kasey T. Ingram, Jones Day, P.O. Box 165017, Columbus, Ohio 43216, and upon Andrea Wolfman, Thelen, Reid & Priest, LLP, 701 Eighth Street, NW, Washington, D.C., 20001 on the 22nd day of December, 2006.



Fred J. Livingstone
Attorney for Amicus Curiae,
The Ohio School Boards Association