

IN THE SUPREME COURT OF OHIO

OHIO GROCERS ASSOCIATION, et al.,	:	Case No. 2008-2018
	:	
Plaintiffs-Appellees,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
WILLIAM W. WILKINS [RICHARD A.	:	
LEVIN], in his official capacity as Ohio Tax	:	Court of Appeals Case
Commissioner,	:	No. 07AP-813
	:	
Defendant-Appellant.	:	

MERIT BRIEF OF AMICI CURIAE OHIO AFL-CIO, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES OHIO COUNCIL 8, COMMUNICATIONS WORKERS OF AMERICA DISTRICT 4, FRATERNAL ORDER OF POLICE OF OHIO, INCORPORATED, OHIO ASSOCIATION OF PROFESSIONAL FIREFIGHTERS, OHIO ASSOCIATION OF PUBLIC SCHOOL EMPLOYEES (OAPSE)/ AFSCME LOCAL 4, OHIO EDUCATION ASSOCIATION, OHIO FEDERATION OF TEACHERS, AND SERVICE EMPLOYEES INTERNATIONAL UNION DISTRICT 1199 IN SUPPORT OF DEFENDANT-APPELLANT

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Statement of Interest of Amici Curiae

Amicus Curiae Ohio AFL-CIO is a federation of 48 different international unions and 1,600 local labor unions representing employees throughout the State of Ohio. The Ohio AFL-CIO represents and advocates for the rights of all working families, seeks to bring economic justice to the workplace, and works to achieve social justice and equality for all Ohioans. The Ohio AFL-CIO and the other Amici Curiae represent over 1,000,000 working men and women. The other Amici Curiae are the:

- American Federation of State, County Municipal Employees Ohio Council 8 which represents city, county, hospital, university, and board of education employees, employees of non-profit organizations, and other public service employees.
- Communications Workers of America District 4 which represents workers in telecommunications, informational technology, publishing, print and electronic media, manufacturing, higher education, local government and health care.
- Fraternal Order of Police of Ohio, Incorporated which represents police officers at the local, county, state and federal level.
- Ohio Association of Professional Firefighters which represents firefighters throughout the State.
- Ohio Association of Public School Employees (OAPSE)/AFSCME Local 4 which represents employees of public schools, public libraries, Head Start agencies, and Boards of Mental Retardation and Developmental Disabilities.
- Ohio Education Association which represents teachers and others who work in Ohio's schools, colleges and universities.

- Ohio Federation of Teachers which represents public education employees, higher education faculty and support staff, and public employees.
- Service Employees International Union District 1199 represents health care and social service workers.

The Amici Curiae believe that the decision of the Court of Appeals is wrong and should be reversed.

Statement of the Case and Facts

The Amici Curiae adopt the Statement of the Case and Facts in Defendant-Appellant's Merit Brief.

Argument

Proposition of Law:

The Commercial Activity Tax (“CAT”) is a franchise tax imposed on the privilege of doing business in Ohio, not a transactional excise tax and, therefore, does not violate Article XII, Sections 3(C) and 13 of the Ohio Constitution as applied to retailers and wholesalers of food.

The Franklin County Court of Appeals acknowledged the appropriate deference to be given to an Act of the General Assembly when considering a constitutional challenge to it. *Ohio Grocers Association v. Wilkins*, 178 Ohio App.3d 145, 2008-Ohio-4420, ¶15. However, after acknowledging the rule, the Court ignored it. It did not give the Commercial Activity Tax (“CAT”) a “strong presumption of constitutionality” nor did it cite to any proof or provide any irrefutable reasoning demonstrating “beyond a reasonable doubt” that the CAT violated either Section 3(C) or Section 13 of Article XII of the Ohio Constitution. In the area of taxation, the General Assembly is entitled to the presumption that it acted in accordance with the constitution and all doubt concerning the constitutionality of the taxing law must be resolved in favor of the enactment. R.C.

1.47(A); *Columbia Gas Transm. Corp. v. Levin* (2008), 117 Ohio St.3d 122, 130, 2008-Ohio-511, ¶41.

There is no doubt that the challenged tax is annually levied upon the privilege of doing business in Ohio. The statute says as much. The question is whether the Court of Appeals was correct in disregarding what is plainly stated in the statute and construing it as a prohibited tax on the Grocers' aggregated gross receipts which are, in part, derived from sales of food items which are prohibited from being taxed? Amicus agrees with the arguments made in Defendant-Appellant's Brief. The CAT does not become a transactional tax simply because the Grocers' aggregated gross receipts are derived from sales of nontaxable food items.

To sustain a finding that the statute is unconstitutional, it must be beyond doubt that the law conflicts with the Ohio Constitution. Contrary to the Court of Appeals' reasoning in ¶21 of its opinion, it does not logically follow that the legislature is prohibited from collecting a tax on the aggregate of those same sales because it is prohibited from taxing each individual sale. The CAT is not imposed on the sale. It is measured by the Grocers' sales, nontaxable and taxable. The CAT cannot be transactional because it is imposed once and annually; whereas, a transactional tax is imposed at the time of each sale. The subject matter of the tax is no longer the food items. It is a tax on the gross receipts.

The United States Supreme Court dealt with a different tax in a case presenting a like issue in *Michelin Tire Corporation v. Wages* (1976), 423 U.S. 276, 96 S. Ct. 535. The state of Georgia applied its *ad valorem* tax to products which were imported from abroad and awaiting redistribution and sale in a Georgia warehouse. The distributor

claimed that the state was prohibited from taxing the goods because Article I, Section 10, Clause 2 of the United States Constitution¹ prohibited taxation on imports and exports. The Supreme Court recognized that at some point the imports ceased to be imports and were taxable despite their original nontaxable status. The same reasoning is applicable here and is well-stated and researched in Defendant-Appellant's Brief.

R.C. 5751.02 provides:

For the purpose of funding the needs of this state and its local governments beginning with the tax period that commences July 1, 2005, and continuing for every tax period thereafter, **there is hereby levied a commercial activity tax on each person with taxable gross receipts for the privilege of doing business in this state.... The tax imposed under this section is not a transactional tax....** The tax imposed under this section is in addition to any other taxes or fees imposed under the Revised Code. **The tax levied under this section is imposed on the person receiving the gross receipts and is not a tax imposed directly on a purchaser.** The tax imposed by this section is an annual privilege tax for the calendar year that, in the case of calendar year taxpayers, is the annual tax period and, in the case of calendar quarter taxpayers, contains all quarterly tax periods in the calendar year. A taxpayer is subject to the annual privilege tax for doing business during any portion of such calendar year. (emphasis added.)

The CAT replaced the corporation franchise tax and the tangible personal property tax. It is to be a broad-based, low-rate tax applied to a broader range of business entities. The CAT is an annual privilege tax imposed on Ohio's businesses. The CAT is measured by taxable gross receipts from the annual tax period. The base includes gross receipts from a broad range of business activities. The tax reform that replaced the tangible personal property tax and the corporate franchise tax with the CAT would be compromised if certain businesses would escape taxation on certain sales. If certain

¹ "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws...."

business segments are allowed to escape from this tax, the tax rate will likely be increased. An increase in the overall tax rates to compensate for this reduction may be, during this time of economic crisis, counter productive to Ohio's efforts to retain and create jobs.

The change in the tax code which resulted in the CAT was in part to encourage capital investment and stimulate economic growth in Ohio. We are not saying that we are necessarily in favor of the CAT overall or that there could not be a different way to impose taxes on businesses. But that is not the issue before the Court; the CAT is the method selected by the legislature. The decision of the Tenth District Court of Appeals is wrong and should be reversed.

The Tenth District's decision ignores

- the plain meaning of the statutory language creating the CAT, which identifies it as a tax on "the privilege of doing business in [Ohio]" and "not a transactional tax." (R.C. 5751.02);
- the operation of the CAT, which has all the hallmarks of a franchise tax and none of a sales tax; and
- this Court's clear rulings on two key points: (a) that a tax imposed on the privilege of doing business, measured by gross receipts, is not a transactional tax, *E. Ohio Gas Co. v. Limbach* (1986), 26 Ohio St.3d 63; and (b) that a tax imposed on the privilege of doing business is not a tax imposed on an underlying component of such business, *Mut. Holding Co. v. Limbach* (1994), 71 Ohio St.3d 59, and *Banc One Dayton, N. A. v. Limbach* (1990), 50 Ohio St.3d 163.

A. The CAT is a franchise tax, not a transactional tax.

The CAT is a tax on the privilege of doing business in Ohio, and it applies to each person with taxable gross receipts in excess of \$150,000. R.C. 5751.02(A). Each such person is responsible for paying the CAT and may not bill or invoice the tax to another

person. R.C. 5751.02(B). All persons with taxable gross receipts over \$150,000 in a calendar year must register for and pay the CAT. R.C. 5751.04(A); R.C. 5751.05(A) & (B); R.C. 5751.051(A)(1) & (2).

The imposition of taxes is a fundamental way for governments to raise the revenues needed to provide services. As stated by this Court in *State ex rel. Zielonka v. Carrel* (1919), 99 Ohio St. 220, 222:

The right to impose taxes, by a long line of decisions, both state and federal, is within the conceded powers of sovereignty. In truth, experience teaches us that the exercise of this power is the highest and most necessary attribute of government. Without it government must cease to exist among men, and as a substitute we would return to the primeval method of levying tribute by brute force.

The Grocers maintain that the CAT should not apply to certain sales by them. The CAT is a tax imposed for the privilege of doing business in Ohio. The CAT should be uniformly applied and paid by all businesses doing business in this State. Businesses that do business in the State should pay the full tax.

R.C. 5751.02 is clear that the CAT is a tax on the privilege of doing business in Ohio—a franchise tax, rather than a transactional tax. R.C. 5751.02 states, "...there is hereby levied a commercial activity tax on each person with taxable gross receipts for the privilege of doing business in this state The tax imposed under this section is not a transactional tax."

The CAT operates as a franchise tax, not as a transactional tax. For example:

- the CAT is imposed on the person receiving the gross receipts, not on the purchaser (R.C. 5751.02);
- the CAT is imposed on the privilege of doing business for a calendar year measured by the value of that privilege (gross receipts) over the year, not on an individual transaction (R.C. 5751.02);

- the amount of the tax obligation under the CAT does not become fixed until the end of the period over which the gross receipts used in measuring the value of the privilege has expired, rather than at the point of sale (R.C. 5751.051);
- unlike a sales tax, which is subject to the constitutional limitation on retroactivity, the actual rate of taxation under the CAT does not become fixed until the end of the measurement period (R.C. 5751.051);
- unlike a transactional tax, the CAT is not collected at the point of sale;
- the \$150 fixed minimum tax is paid prospectively with the annual return from the prior year for the privilege year, and the rate component of the tax is not paid until the quarterly period has elapsed (R.C. 5751.051);
- the CAT incorporates credits borrowed from the corporate franchise tax that are not found in transactional taxes like the sales tax (see R.C. 5751.50, R.C. 5751.51, R.C. 5751.52 and R.C. 5751.53);
- the CAT provides for the exclusion of receipts between members of consolidated elected taxpayer groups (a concept that could not apply to a transactional tax) and that prevents a person from calculating the tax due on a transaction-by-transaction basis, because the group's tax liability depends upon other members of the group (see R.C. 5751.011(C)(1)(a));
- the tax base used to measure the privilege under the CAT consists of far more than the income derived from the taxpayer's sales transactions. With certain enumerated exceptions, "gross receipts" include "the total amount realized by the person ... that contributes to the production of gross income of the person." (R.C. 5751.01(F)); and
- "gross receipts" include "[a]mounts realized from the sale...of the taxpayer's property to...another." (R.C. 5751.01(F)(1)(a)).

The CAT is a tax on the privilege of doing business in the State. A taxing authority may employ various factors (such as property, net worth, net income, sales, gross earnings, and gross receipts) to measure the value of the privilege and the tax is on

the privilege, not on the factors used as the measuring stick. *Mut. Holding Co.*, 71 Ohio St.3d at 60; *Banc One Dayton*, 50 Ohio St. 3d at 167; *E. Ohio Gas Co.*, 26 Ohio St. 3d at 67. Franchise taxes are based upon the results of an entire period of doing business; the tax liability is not fixed until the end of that reporting period. *E. Ohio Gas Co.*, 26 Ohio St.3d at 67; *Banc One Dayton*, 50 Ohio St.3d at 167.

The type of taxes prohibited by Sections 3(C) and 13 of Article XII of the Ohio Constitution are excise taxes on sales or purchases.

Section 3, Article XII of the Ohio Constitution, as re-enacted June 8, 1976, provides in pertinent part:

Laws may be passed providing for:

(C) Excise and franchise taxes and for the imposition of taxes upon the production of coal, oil, gas and other minerals; except that no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold.

Section 13, Article XII of the Ohio Constitution, adopted November 8, 1994, provides:

No sales or other excise taxes shall be levied or collected (1) upon any wholesale sale or wholesale purchase of food for human consumption, its ingredients or its packaging; (2) upon any sale or purchase of such items sold to or purchased by a manufacturer, processor, packager, distributor or reseller of food for human consumption, or its ingredients, for use in its trade or business; or (3) in any retail transaction, on any packaging that contains food for human consumption on or off the premises where sold. For purposes of this section, food for human consumption shall include non-alcoholic beverages. This section shall not affect the extent to which the levy or collection of sales or other excise taxes on the retail sale or retail purchase of food for human consumption is permitted or prohibited by Section 3(C) of this Article.

The CAT is a franchise tax on the privilege of doing business in Ohio and is not the type of tax prohibited by Sections 3(C) and 13 of Article XII of the Ohio

Constitution. Section 3(C) of Article XII of the Ohio Constitution prevents the levy or collection of an excise tax “upon the sale or purchase of food for human consumption off the premises where sold.” Section 13, XII of the Ohio Constitution prohibits the levy or collection of sales or other excise taxes “upon any wholesale sale or wholesale purchase of food for human consumption....” Nothing within Sections 3(C) and 13 of Article XII prohibit a tax on the privilege of doing business in the State that is measured by gross receipts from such sales. The CAT is a franchise tax on the privilege of doing business in Ohio.

The CAT replaced the corporation franchise tax as Ohio’s tax on businesses for the privilege of doing business in the State. Because the CAT is a business privilege tax, entities that are subject to industry-specific business privilege taxes, such as public utilities, financial institutions, and insurance companies are not subject to the CAT. R.C. 5751.01(E)(2), (3) and (9). The General Assembly did not exempt wholesalers and retailers of food. There is no reason that they should receive special treatment and be excluded from having to pay a tax on the privilege of doing business in the State.

B. The CAT is not converted into a transactional tax because it includes gross receipts from food sales as a factor in measuring the value of the privilege that is taxed.

The Court of Appeals erroneously determined that the CAT by its operation is a transactional tax. The Court said “...by its very operation when applied to the gross receipts derived from the sales of food, a transactional tax is precisely what the CAT becomes. This is so because the tax is measured *solely* by gross receipts and is based on aggregate sales, including those from the sale of food....” (emphasis in original.) App. Op. ¶ 21.

The conclusion of the lower court ignores prior holdings of this Court. See *Express Co. v. State* (1896) 55 Ohio St. 69, 81 (“[t]he tax is not laid upon the gross receipts...but those receipts are taken as the standard by which to determine the amount of tax to be paid for the privilege of doing business in the state...”); *Mut. Holding Co.*, 71 Ohio St.3d at 60 (“[m]easuring tax liability in terms of net worth does not convert a franchise tax into a property tax”); *Wheeling Steel Corp. v. Porterfield* (1970), 21 Ohio St.2d 57, 60-61 (“[t]he statutory Ohio franchise tax ... is purely a privilege tax and not a tax on income, sales or receipts”); *Aluminum Co. of Am. v. Evatt* (1942), 140 Ohio St. 385, 395 (“[t]he employment of various factors in determining the part of the business of a corporation (whether domestic or foreign) done in Ohio is no indication that the subjects of such factors are being taxed. Instead, they are being used merely to compose a measuring stick.”); *S. Gum Co. v. Laylin* (1902), 66 Ohio St. 578, 596 (franchise tax measured by subscribed and issued outstanding capital stock does not make the tax one imposed on personal property).

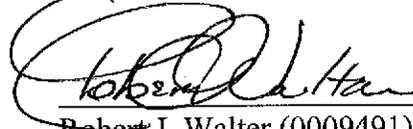
In *E. Ohio Gas Co.*, this Court rejected an argument that an annual privilege tax imposed on public utilities measured by gross receipts was a transactional tax: “[t]he critical legal distinction which appellant ignores is that the tax is not imposed on gross receipts as they are received. Annual gross receipts are merely the measure of the tax on the privilege.” 26 Ohio St. 3d at 67; see also *Banc One Dayton*, 50 Ohio St. 3d at 167 (“[b]oth the excise tax on public utilities and the franchise tax on corporations are levied on the exercise of a privilege and not on income, sales or receipts.”).

The fact that the CAT is measured by gross receipts that include sales from food does not make it a tax on food. The CAT is a franchise tax on the privilege of doing business in Ohio.

Conclusion

The decision of the Court of Appeals should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the Merit Brief of Amici Curiae in Support of Defendant-Appellant was served by U.S. mail this 6th day of April 2009, upon the following:

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