IN THE SUPREME COURT OF OHIO
No. 2008-2018

OHIO GROCERS ASSOCIATION, et al.,	:	Case No. 08-2018
	:	
Plaintiffs-Appellees,	:	On Appeal from the
	:	Franklin County Court of Appeals,
v.	:	Tenth Appellate District
	:	
WILLIAM W. WILKINS [RICHARD A. LEVIN], in his official capacity as Ohio Tax Commissioner	:	Court of Appeals Case No. 07AP-813
	:	
Defendant-Appellant.	:	

BRIEF OF AMICI CURIAE THE OHIO MUNICIPAL LEAGUE, THE COUNTY COMMISSIONERS ASSOCIATION OF OHIO, THE OHIO TOWNSHIP ASSOCIATION, AND THE BUCKEYE STATE SHERIFFS' ASSOCIATION URGING REVERSAL IN SUPPORT OF WILLIAM W. WILKINS [RICHARD A. LEVIN], IN HIS OFFICIAL CAPACITY AS OHIO TAX COMMISSIONER

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I. INTRODUCTION

The Ohio Municipal League, the County Commissioners Association of Ohio, the Ohio Township Association, and the Buckeye State Sheriffs' Association ("Amici Curiae"), as amici curiae on behalf of Richard A. Levin, successor to William W. Wilkins, Ohio Tax Commissioner ("Tax Commissioner"), urge this Court to reverse the decision of the Tenth District Court of Appeals in the matter of Ohio Grocers Association *et al.* v. William W. Wilkins, in his official capacity as Ohio Tax Commissioner. *Ohio Grocers Association et al. v. Wilkins, Ohio Tax Commissioner* (2008), 178 Ohio App.3d 145, 2008-Ohio-4420, 897 N.E. 2d 188. (A copy is attached hereto as Appendix i). In this decision, the Tenth District reversed the decision of the Franklin County Court of Common Pleas and held the Commercial Activity Tax ("CAT") is a transactional tax which violates Sections 3(C) and 13 of Article XII of the Ohio Constitution.

This Court should reverse the decision of the Tenth District and enter judgment holding that the CAT is not a transactional excise tax and, therefore, does not violate Sections 3(C) and 13 of Article XII of the Ohio Constitution.

II. STATEMENT OF AMICUS INTEREST

The Ohio Municipal League is a non-profit Ohio corporation composed of a membership of more than 750 Ohio cities and villages. The County Commissioners Association of Ohio represents Ohio's 87 Boards of County Commissioners and the Summit County Executive and Council. The Ohio Township Association is a non-profit organization dedicated to the preservation and promotion of township government that represents 1,308 townships and 5,238 elected officials. The Buckeye State Sheriffs' Association is a non-profit organization representing all sheriffs of the State of Ohio with the primary purpose of promoting quality and professional law enforcement.

Amici Curiae have an interest in ensuring that the tax reform initiatives passed by the General Assembly in 2005, including the growth-friendly CAT, are upheld. The CAT, a gross receipts tax phased in over five years, replaces the corporate franchise tax and the business tangible personal property tax.

The corporate franchise tax revenue was used for State operations while the tangible personal property tax revenue was used by local governments and school districts for their operations. In exchange for implementing the growth-friendly CAT, the General Assembly agreed to reimburse local governments and school districts for the loss in tangible personal property tax revenue. Revenue from the CAT is deposited into the school district tangible property tax replacement fund and the local government tangible property tax replacement fund. Revenue from these funds is used to provide reimbursement to local governments and school districts. In tax years 2006 through 2010, local governments are reimbursed one hundred percent (100%) for the net revenue loss created by the phasing out of the business tangible personal property tax. In tax years 2011 through 2017, the reimbursement is gradually phased out for local governments.

Local governments use the business tangible personal property tax replacement dollars to provide local government services, including public safety services, street maintenance services, and economic and community development services. These services are vital to residents. Local governments, in these challenging economic times, have relied on the business tangible personal property tax replacement dollars to balance local government budgets. Local governments are also calculating future budgets with a reliance on the State providing the promised business tangible personal property tax replacement dollars.

A decision by this Court upholding the Tenth District Court of Appeals would not only negatively impact the ability of the State to provide promised replacement funds to local

governments, but may also invite other CAT taxpayers to challenge the CAT. The CAT is central to the tax reform initiatives passed by the General Assembly and it is imperative that its application, as determined by the General Assembly, remain in force.

III. STATEMENT OF THE CASE AND FACTS

Amici Curiae hereby adopt, in its entirety, and incorporate by reference, the statement of the case and the statement of facts contained within the Merit Brief filed by the Tax Commissioner.

Ohio's corporate franchise tax has been a business privilege tax that dates back to 1902. It has been imposed on both domestic and foreign corporations for the privilege of doing business in Ohio. R.C. 5733.01. The corporate franchise tax has been paid by corporations and the measurement has been based on either net worth or net income, whichever produces the higher tax. It has not been paid by consumers or purchasers at the time of a transaction.

The CAT, like the corporate franchise tax, is a business privilege tax. The CAT is paid by persons with taxable gross receipts in excess of $150,000. R.C. 5751.02. The CAT measurement is the value of gross receipts collected. It is not paid by consumers or purchasers at the time of a transaction. In fact, R.C. 5751.02 prohibits the CAT taxpayer from billing or invoicing another person for the tax.

IV. ARGUMENT

PROPOSITION OF LAW #1: The CAT is an excise tax on the privilege of doing business; it is a franchise tax, not a transactional tax or sales tax.

An "excise tax is a tax imposed on the performance of an act, the engaging in of an occupation, or the enjoyment of a privilege." *Columbus & Southern Ohio Electric Co. v. Porterfield* (1974), 41 Ohio App.2d 191 at 196-197, 324 N.E.2d 779; *Saviers v. Smith* (1920), 101 Ohio St. 132, 128 N.E. 269, 18 Ohio Law Rep. 74. Excise taxes are divided into the following two categories: (1) franchise taxes and (2) transactional taxes.

A franchise tax is a tax levied for the privilege of doing business and "private corporations are the subject of such tax." *Columbus & Southern Ohio Electric Co. v. Porterfield* at 196. The annual franchise tax levied on corporations by the State is an excise tax "on the exercise of a privilege and not on income, sales or receipts *** [and is] based upon the results of an entire year of doing business and tax liability is not fixed until the end of that annual period ***." *East Ohio Gas Company v. Limbach* (1986), 26 Ohio St.3d 63 at 67, 498 N.E.2d 453, 26 O.B.R. 54.

Transactional taxes or sales taxes are taxes on the exercise of the privilege or "right to acquire and use tangible personal property, and they apply only to the transaction by which that privilege is exercised." *Celina Mutual Ins. Co. v. Bowers* (1965), 5 Ohio St.2d 12 at 16, 213 N.E. 2d 175, 34 O.O.2d 7. In Ohio, the "sales tax is a tax on a consumer of goods." *Columbus & Southern Ohio Electric Co. v. Porterfield* at 198.

The CAT, enacted as part of a tax reform package by the Ohio General Assembly in 2005, replaced the personal property tax on inventory, machinery and equipment and the corporate franchise tax with a broad based low rate tax[1]. In enacting the CAT, the General Assembly declared the following: "[f]or 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 ***". R.C. 5751.02.

The CAT is a tax on the privilege of doing business in the State of Ohio and is not a tax on a transaction or sale. This assertion is supported not only by the General Assembly's

[1] The corporate franchise tax, which is being replaced and phased out by the CAT, is a tax on the privilege of doing business. R.C. 5733.01. Food retailers and wholesalers pay the corporate franchise tax based upon the income generated by sales of food and food products.

declaration that the CAT is not a transactional tax, but also by the operation and effect of the CAT.

The CAT is an annual business privilege tax and its applicability is determined by the gross receipts from business activities in the State of Ohio[2] not on individual transactions. The CAT is imposed on the person or private corporation receiving the gross receipts from the business activity and is not imposed on the purchaser or consumer of the goods. The amount of the CAT is determined at the end of a tax period or gross receipts collection period and not on an individual transaction. Finally, the CAT is not collected at the time of sale.

The CAT, therefore, is an excise tax on the privilege of doing business. It is a franchise tax, not a transactional tax or sales tax.

PROPOSITION OF LAW #2: Section 3(C) of Article XII of the Ohio Constitution prohibits the levying or collection of transactional excise taxes upon the sale or purchase of food for human consumption off the premises where sold and Section 13 of Article XII of the Ohio Constitution prohibits the levying or collection of transactional excise taxes upon any wholesale sale or purchase of food for human consumption; Sections 3(C) and Section 13 of Article XII of the Ohio Constitution do not prohibit an excise tax on the privilege of doing business.

Section 3(C) of Article XII of the Ohio Constitution prohibits the levying or collection of an excise tax "**upon the sale** or purchase of food for human consumption off the premises where sold." (Emphasis added). Section 13 of Article XII of the Ohio Constitution prohibits the levying or collection of a sales or excise tax "**upon any wholesale sale** or wholesale purchase of food for human consumption, its ingredients or its packaging." (Emphasis added). The plain language of these sections prohibits an excise tax **upon the sale of food**. "Upon the sale of food" means at the time the food is sold and prohibits a transactional tax on the sale of food. The

[2] Each person with taxable gross receipts over $150,000 in a calendar year must register with the Ohio Department of Taxation and pay the CAT. The CAT is structured on a tier basis. Persons with taxable gross receipts between $150,000 and $1 million pay a minimum privilege tax of $150. When the CAT is fully phased in, persons with taxable gross receipts in excess of $1 million pay the minimum privilege tax of $150 plus 0.26% on gross receipts in excess of $1 million.

CAT, however, is not a transactional tax or sales tax "upon the sale" of food as the tax is not paid by the purchaser of the food, is not calculated at the time of sale, and is not collected at the time of sale.

The plain language of Sections 3(C) and Section 13 of Article XII of the Ohio Constitution also do not prohibit an excise tax on the privilege of doing business and, therefore, are not applicable to the CAT.

PROPOSITION OF LAW #3: The CAT's inclusion of gross receipts from the sale of food does not violate Sections 3(C) and 13 of Article XII of the Ohio Constitution.

Appellees argue that because the CAT applies to gross receipts from the sale of food it violates Sections 3(C) and 13 of Article XII of the Ohio Constitution. The Tenth District Court of Appeals agreed with this argument. This argument is inconsistent with previous decisions of this Court and the U.S. Supreme Court.

The CAT is a broad-based low rate tax and is measured by taxable gross receipts from the tax period. Gross receipts is the measure of the CAT on the privilege of doing business in the State. The inclusion of items prohibited from direct taxation, such as food items, in the "measurement" of a tax does not result in an impermissible franchise tax. This Court has long-standing precedent recognizing this distinction.

In *Adams Exp. Co. v. State* (1896), 55 Ohio St. 69, 35 W.L.B. 393, 44 N.E. 506, this Court concluded that an excise tax on express companies is valid as the tax was not laid on gross receipts for the year, but gross receipts was "the standard by which to determine the amount of the excise tax to paid for the privilege of doing business in the state." *Id.* at 81.

In *Bank One Dayton v. Limbach* (1990), 50 Ohio St.3d 163, 553 N.E.2d 624, this Court reviewed Ohio's corporate franchise tax on financial institutions and the claim by financial institutions that Ohio's franchise tax violated the Borrowing and Supremacy Clauses of the United States Constitution which exempts stocks and obligations of the United States

government from state taxation. An exception to the Borrowing and Supremacy Clauses is provided for a nondiscriminatory franchise tax or another non-property tax instead of a franchise tax imposed on a corporation. The financial institutions argued that Ohio's corporate franchise tax is actually a property tax and, therefore, violates the Borrowing and Supremacy Clauses. This Court, however, concluded that a tax measured by the value of the federal obligations does not result in the levying of a tax on the federal obligations. Ohio's corporate franchise tax was held to be a valid franchise tax or other non-property tax and, therefore, did not violate the U.S. Constitution.

In *Mutual Holding Company v. Limbach* (1994), 71 Ohio St.3d 59, 641 N.E.2d 1080, 1994-Ohio-30, this Court held that a franchise tax is a tax on the privilege of doing business within the State and is not a tax on the property of the paying entity. This Court, therefore, concluded "measuring tax liability in terms of net worth does not convert a franchise tax into a property tax." *Id.* at 60.

These cases are consistent with decisions by the U.S. Supreme Court. The U.S. Supreme Court "has consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income property. *Werner Machine Company, Inc. v. Director of Division of Taxation* (1956), 350 U.S. 492 at 494, 76 S.Ct. 534, 100 L.Ed. 634.

The CAT is measured on gross receipts from business activity. Business activity includes sales of personal property, not just food, as well as the performance of various personal and professional services. The fact that business activity from the sale of food is included in the gross receipts measurement used to calculate the CAT does not result in the CAT being a tax upon food as prohibited by the Ohio Constitution.

PROPOSITION OF LAW #4: The CAT, a franchise tax on the privilege of doing business, is as applied to the Appellees analogous to the corporate franchise tax, a tax on the privilege of doing business.

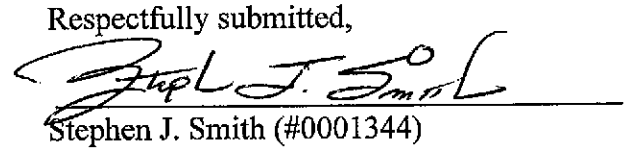
Prior to the enactment of the CAT, Appellees were subject to and paid the corporate franchise tax. Receipts from the sale of food were included in the corporate franchise tax.

The CAT is an updated form of the corporate franchise tax. If this Court upholds the Tenth District and accepts the argument of Appellees, any franchise tax with a measurement including receipts from the sale of food would be prohibited. This prohibition would enable a certain sector of the business community in Ohio to avoid taxation at the expense of other Ohio businesses and residents. This is not the intent of the CAT or Sections 3(C) and 13 of Article XII of the Ohio Constitution.

CONCLUSION

Based upon the foregoing, Amici Curiae respectfully request this Court to reverse the judgment of Tenth District and enter judgment on behalf of the Tax Commissioner upholding the CAT.

Respectfully submitted,



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The Buckeye State Sheriffs' Association
and Amici Curiae

CERTIFICATE OF SERVICE

A copy of the foregoing *Brief Of Amici Curiae the Ohio Municipal League, the County Commissioners Association of Ohio, the Ohio Township Association, and the Buckeye State Sheriffs' Association Urging Reversal In Support of Appellant, Richard A. Levin, Successor to William W. Wilkin, Ohio Tax Commissioner* has been sent via regular U.S. mail, postage pre-paid this 6th day of April, 2009 to:

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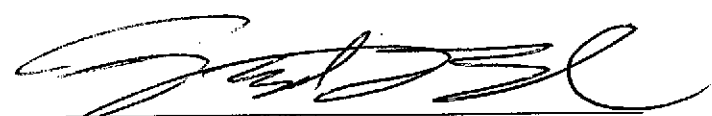

Stephen J. Smith (#0001344)

Court of Appeals of Ohio,
Tenth District, Franklin County.
OHIO GROCERS ASSOCIATION et al., Appellants,
v.
WILKINS, Ohio Tax Commr., Appellee.
No. 07AP-813.

Decided Sept. 2, 2008.

Background: Taxpayers, which were retail grocers, filed complaint for declaratory judgment and injunctive relief against Tax Commissioner, alleging that the state's commercial activity tax (CAT) was unconstitutional as applied to gross receipts derived from the wholesale sale of food and from the retail sale of food for human consumption off the premises where sold. Parties filed cross-motions for summary judgment. The Court of Common Pleas, Franklin County, C.P.C. No. 06CVH-2278, granted summary judgment to Tax Commissioner. Taxpayers appealed.

Holding: The Court of Appeals, McGrath, P.J., held that CAT was unconstitutional as applied.

Reversed and remanded.

West Headnotes

[1] Judgment 228 ⚷185(5)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(5) k. Weight and Sufficiency. Most Cited Cases

Judgment 228 ⚷185.1(4)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.1 Affidavits, Form, Requisites and Execution of
228k185.1(4) k. Matters of Fact or Conclusions. Most Cited Cases
Party moving for summary judgment cannot discharge its burden simply by making conclusory assertions that the nonmoving party has no evidence to prove its case; rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support his claims. Rules Civ.Proc., Rule 56.

[2] Statutes 361 ⚷58

361 Statutes
361I Enactment, Requisites, and Validity in General
361k57 Determination of Validity of Enactment
361k58 k. Judicial Authority and Duty in General. Most Cited Cases
A court's power to invalidate a statute is a power to be exercised only with great caution and in the clearest of cases.

[3] Constitutional Law 92 ⚷990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In General. Most Cited Cases

Constitutional Law 92 ⚷1004

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k1001 Doubt
92k1004 k. Proof Beyond a Reasonable Doubt. Most Cited Cases

Constitutional Law 92 ⚷1030

92 Constitutional Law

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92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1030 k. In General. Most Cited Cases
Laws are entitled to a strong presumption of constitutionality, and the party challenging the constitutionality of a law bears the burden of proving that the law is unconstitutional beyond a reasonable doubt.

[4] Constitutional Law 92 ⚷990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In General. Most Cited Cases
On review of statutory acts, a court is bound to give a constitutional rather than unconstitutional construction if one is reasonably available.

[5] Taxation 371 ⚷3626

371 Taxation
371IX Sales, Use, Service, and Gross Receipts Taxes
371IX(B) Regulations
371k3625 Validity of Acts and Ordinances
371k3626 k. In General. Most Cited Cases
Commercial activity tax (CAT), when applied to gross receipts from the wholesale sale of food and from the retail sale of food for human consumption off premises where sold, operated as, and was, an excise tax levied or collected upon the sale or purchase of food, which was prohibited by the State Constitution, as the CAT was measured solely by gross receipts and was based on aggregate sales, including those from the sales of food. Const. Art. 12, §§ 3, 13; R.C. § 5751.02.

West Codenotes
Unconstitutional as AppliedR.C. § 5751.02. **189
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Nancy H. Rogers, Attorney General, and Lawrence D. Pratt, Christine T. Mesirow, Alan Schwepe, and Sophia Hussain, Assistant Attorneys General, for appellee.

McGRATH, Presiding Judge.

*147 {¶ 1} Plaintiffs-appellants, Ohio Grocer's Association, Carfagna's Incorporated, CFZ Supermarkets, Inc., Reading Food Services, Inc., and The Sanson Company (collectively "appellants") appeal from the judgment of the Franklin County Court of Common Pleas denying their motion for summary judgment and granting summary judgment in favor of defendant-appellee, William W. Wilkins, in his official capacity as Ohio Tax Commissioner.

{¶ 2} Appellants filed their complaint for declaratory judgment and injunctive relief on February 17, 2006, alleging Ohio's commercial activity tax ("CAT"), codified in R.C. Chapter 5751, effective June 30, 2005, is unconstitutional. Specifically, it is appellants' position that the CAT's provision that imposes a percent tax on annual gross receipts greater than $1 million violates the Ohio Constitution when it is applied to gross receipts derived from the wholesale sale of food and from the retail sale of food for human consumption off the premises where sold.

{¶ 3} Appellants filed a motion for summary judgment on September 15, 2006. On December 5, 2006, appellee filed a memorandum in opposition and cross-motion for summary judgment. Appellants filed a memorandum in opposition and corresponding reply briefs were filed by each party. On August 24, 2007, the trial court issued a decision denying appellants' motion for summary judgment and granting appellee's cross-motion for summary judgment. This appeal followed, and appellants bring two assignments of error for our review:

I. The trial court erred in granting summary judgment in favor of [the Tax Commissioner] in his official capacity.

II. The trial court erred in denying summary judgment to plaintiffs.

[1] {¶ 4} This matter was decided in the trial court by summary judgment, which under Civ.R. 56(C) may

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be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, 605 N.E.2d 936, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 8 O.O.3d 73, 375 N.E.2d 46. Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the nonmoving party has no evidence to prove its case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264. Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support his or her claims. Id.

148** {¶ 5} An appellate court's review of summary judgment is de novo. ****190Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, 641 N.E.2d 265; *Bard v. Society Natl. Bank* (Sept. 10, 1998), Franklin App. No. 97APE11-1497, 1998 WL 598092. Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.* (1995), 106 Ohio App.3d 440, 445, 666 N.E.2d 316. Consequently, we must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. See *Dresher*, 75 Ohio St.3d 280, 662 N.E.2d 264; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42, 654 N.E.2d 1327.

{¶ 6} In 2005, the Ohio legislature enacted a series of tax revisions. The component of those revisions at issue here is the new CAT, as codified in R.C. Chapter 5751, effective June 30, 2005. According to appellee, the CAT is designed to replace other business taxes, many of which are being phased out over various time frames.

{¶ 7}R.C. 5751.02 provides:

(A) 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. For the purposes of this chapter, "doing business" means engaging in any activity, whether legal or illegal, that is conducted for, or results in, gain, profit, or income, at any time during the calendar year. Persons on which the commercial activity tax is levied include, but are not limited to, persons with substantial nexus with this state. The tax imposed under this section is not a transactional tax and is not subject to Public Law No. 86-272, 73 Stat. 555. 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.

(B) The tax imposed by this section is a tax on the taxpayer and shall not be billed or invoiced to another person. Even if the tax or any portion thereof is billed or invoiced and separately stated, such amounts remain part of the price for purposes of the sales and use taxes levied under Chapters 5739. and 5741. of the Revised Code. Nothing in division (B) of this section prohibits a person ***149** from including in the price charged for a good or service an amount sufficient to recover the tax imposed by this section.

{¶ 8} The CAT excludes persons having taxable gross receipts during a calendar year of less than $150,000, and other enumerated entities. The CAT is imposed at a flat rate of $150 for the first $1 million of annual taxable gross receipts (above $150,000), plus, when fully phased in, at the rate of two and sixth tenth mills (0.26 percent) per dollar of taxable gross receipts above $1 million. R.C. 5751.03. "Taxable gross receipts" are defined as gross receipts sitused in Ohio, which includes gross receipts from sales of tangible personal property, e.g., goods, received in this state by a purchaser. R.C. 5751.01(G) and 5751.033(E). "Gross receipts" means ****191** "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person, including the fair market value of any

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property and any services received, and any debt transferred or forgiven as consideration." R.C. 5751.01(F).

{¶ 9} It is the portion of the CAT applied to gross receipts from the sale of food to which appellants take exception. Appellants contend that this portion of the CAT runs afoul of two Ohio Constitutional provisions, namely, Section 3, Article XII, and Section 13, Article XII.

{¶ 10}Section 3, Article XII of the Ohio Constitution, as reenacted June 8, 1976, provides:

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.

{¶ 11}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 nonalcoholic beverages. This section shall not affect the extent to which the levy or collection of sales or ***150** 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.

{¶ 12} According to appellants, they and all Ohio retail grocers and Ohio food wholesalers must pay a 0.26 percent CAT on all receipts over $1 million annually, including those receipts received from the sale of food for human consumption. Because the CAT uses gross receipts from food sales to determine the tax owed, appellants contend this is equivalent to a sales or transactional tax on the sale or purchase of food that is expressly prohibited by the above outlined Ohio Constitutional provisions.

{¶ 13} To the contrary, appellee contends that this is a franchise tax imposed on the privilege of doing business in Ohio and is not a tax imposed on individual sales. Though the amount of tax owed is measured by gross receipts, appellee argues that that fact does not convert the franchise tax into a transactional one and thereby implicate the constitutional provisions referred to by appellants.

{¶ 14} The trial court concluded that the CAT is a franchise tax, which is a type of excise tax, which is imposed on the privilege of doing business in Ohio, but is not an excise tax levied or collected upon the sale or purchase of food that has constitutional implications. Though measured by taxable gross receipts, which include receipts from the sale or purchase of food, the trial court held that the CAT is not a transactional or sales tax prohibited by Sections 3 and 13, Article XII of the Ohio Constitution.

[2][3][4] {¶ 15}"A court's power to invalidate a statute 'is a power to be exercised ****192** only with great caution and in the clearest of cases.' Laws are entitled to a 'strong presumption of constitutionality,' and the party challenging the constitutionality of a law 'bears the burden of proving that the law is unconstitutional beyond a reasonable doubt.' " *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, at ¶ 41. *Buckley v. Wilkins*, 105 Ohio St.3d 350, 2005-Ohio-2166, 826 N.E.2d 811, ¶ 18, citing *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632. Further, "on review of statutory acts, a court is bound to give a constitutional rather than unconstitutional construction if one is reasonably available." *United Air Lines, Inc. v. Porterfield* (1971), 28 Ohio St.2d 97, 100, 57 O.O.2d 288, 276 N.E.2d 629.

{¶ 16} It is undisputed that the statute expressly delineates that the CAT is a tax imposed "for the privilege of doing business in this state" and that the CAT "is not a transactional tax." R.C. 5751.02(A). Regardless, however, of the descriptive vernacular used by

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the Ohio legislature, appellants contend that to find the true nature of a tax, we must look behind its label, and look instead at its operation. In support of this contention, appellants cite a litany of cases. See, ***151** e.g., *Bank One Dayton, N.A. v. Limbach* (1990), 50 Ohio St.3d 163, 166, 553 N.E.2d 624, citing *Educational Films Corp. of Am. v. Ward* (1931), 282 U.S. 379, 387, 51 S.Ct. 170, 75 L.Ed. 400 ("the nature of a tax must be determined by its operation, rather than by its particular descriptive language"); *Porterfield*, quoting *Am. Oil Co. v. Neill* (1965), 380 U.S. 451, 455, 85 S.Ct. 1130, 14 L.Ed.2d 1 (" '[w]hen passing on the constitutionality of a state taxing scheme it is firmly established that this court concerns itself with the practical operation of the tax, that is substance rather than form' ").

{¶ 17} Further, appellants contend that the Supreme Court of Ohio has repeatedly held that a tax levied upon a business's gross receipts is an "excise tax." *State ex rel.Cleveland v. Kosydar* (1973), 36 Ohio St.2d 183, 184, 65 O.O.2d 401, 305 N.E.2d 803; *E. Ohio Gas Co. v. Limbach* (1986), 26 Ohio St.3d 63, 66-67, 26 OBR 54, 498 N.E.2d 453. Because both Sections 3(C) and 13 of Article XII of the Ohio Constitution prohibit "excise taxes" from being imposed on certain food sales, appellants suggest that the CAT, when applied to gross receipts that include food sales, is clearly unconstitutional.

{¶ 18} To the contrary, appellee argues the CAT is a franchise tax, as it is imposed for the privilege of doing business in Ohio, regardless of whether one looks at the CAT's description or its operation. According to appellee, what the Ohio Constitution prohibits are excise taxes levied on the sale of food in certain situations and does not prohibit a tax, no matter what it is termed, from being imposed on the privilege of doing business within this state. We agree, however, with appellants' and the trial court's assessment that the Supreme Court has repeatedly recognized that a franchise tax is a form of an excise tax. See, e.g., *Wesnovtek Corp. v. Wilkins*, 105 Ohio St.3d 312, 313, 2005-Ohio-1826, 825 N.E.2d 1099 (the Ohio franchise tax is an excise tax for the privilege of doing business in this state); *KeyCorp v. Tracy* (1999), 87 Ohio St.3d 238, 240, 719 N.E.2d 529 (a franchise tax is an excise tax); *Hoover Universal, Inc. v. Limbach* (1991), 61 Ohio St.3d 563, 568, 575 N.E.2d 811 (the franchise tax, an excise tax, can be measured on net income received in a taxable year). Moreover, as defined by the Supreme Court of Ohio in *Saviers v. Smith* (1920), 101 Ohio St. 132, 128 N.E. 269,"[a]n excise [tax] is a tax imposed on the performance of an act, the engaging in an occupation or the enjoyment of a privilege****193** * * *." Id. at paragraph four of the syllabus.

{¶ 19} Section 3(C) of Article XII of the Ohio Constitution provides that laws may be passed providing for "excise and franchise taxes * * *, 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." From this it is gleaned that the intent was not to bar all taxes from being imposed in relation to food transactions,***152** as the exception in 3(C), Article XII does not include a prohibition of franchise taxes, but only a prohibition of excise taxes.

{¶ 20} Thus, while it would appear that the constitutional exceptions in Sections 3(C) and 13 of Article XII were not meant to apply to franchise taxes, judicial interpretation has clearly determined that a franchise tax is a form of an excise tax. As appellants suggest, excise taxes on certain food sales are precisely what the Constitution prohibits.

{¶ 21} Even setting nomenclature aside and focusing on the operation of the CAT, we reach the same conclusion. Though appellee suggests the CAT is a franchise tax and is not equivalent to a sales or transactional tax, by its very operation when applied to 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 sales of food. Because the CAT is not based on each transaction or each individual sale, appellee contends that the CAT is constitutional. However, though not based on individual sales at the time they are made, the CAT is merely based on the aggregate of all sales within a specified time frame. If the legislature is prohibited from collecting a tax on the individual sale, it logically follows that the legislature would be prohibited from collecting a tax on the aggregate of those same sales.

{¶ 22} We are cognizant of the Supreme Court of Ohio's decision in *Mut. Holding Co. v. Limbach* (1994), 71 Ohio St.3d 59, 641 N.E.2d 1080, wherein the court noted the following:

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A franchise tax, such as that imposed by R.C. 5725.18, is a tax on the privilege of doing business in Ohio. It is not a tax on the property of the paying entity. *Bank One,Dayton, N.A. v. Limbach* (1990), 50 Ohio St.3d 163, 553 N.E.2d 624; *Celina Mut. Ins. Co. v. Bowers* (1965), 5 Ohio St.2d 12, 34 O.O.2d 7, 213 N.E.2d 175. For the privilege of operating a domestic insurance company, Ohio imposes a tax that may be measured either in terms of net worth or premium value. R.C. 5725.18. Measuring tax liability in terms of net worth does not convert a franchise tax into a property tax. See *Internatl. Harvester Co. v. Evatt* (1945), 146 Ohio St. 58, 31 O.O. 546, 64 N.E.2d 53. R.C. 5725.18 is a franchise tax measured by net worth, not a tax on net worth.

Id. at 60, 641 N.E.2d 1080.

{¶ 23} Similarly, in *Bank One Dayton,* the appellants argued that the corporate franchise tax was actually a property tax, while the appellee argued it was a tax *measured* by the value of federal obligations and not levied on the assets themselves. In ruling in favor of the appellee, the court noted that the annual franchise tax was levied on the privilege of doing business in the state and not on income, sales, or receipts. Id. at 167, 553 N.E.2d 624.

***153** {¶ 24} Also in *Bank One Dayton,* the court cited *Werner Mach. Co. v. Dir. of Div. of Taxation* (1956), 350 U.S. 492, 76 S.Ct. 534, 100 L.Ed. 634, wherein the United States Supreme Court approved a tax ****194** scheme that included the value of federal bonds in corporation net worth to determine New Jersey's franchise tax. The court in *Werner* upheld the New Jersey Supreme Court's holding that the tax was a franchise tax and not a tax imposed directly on property, even though that property was used to determine the corporation's net worth. "The United States Supreme Court stated that it had 'consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property.' " *Bank One Dayton,* quoting *Werner* at 494, 76 S.Ct. 534, 100 L.Ed. 634.

{¶ 25} However, while in these cases it was deemed permissible to include certain tax-exempt properties and incomes when determining an entity's tax liability, it is important to note that the tax-exempt property or income was not the only measure of tax liability because the tax liability was based on an entity's net worth. Here, the sole factor used to determine tax liability is gross receipts, which is simply a group of individual sales or transactions. A tax-exempt transaction is not just a factor being considered to determine tax liability; rather, before us, a tax-exempt transaction is the *only* factor used to determine tax liability. Though the United States Supreme Court has upheld franchise taxes "measured by a yardstick" that includes tax-exempt income or property, in the case sub judice, the "yardstick" solely comprises transactions that include food sales that are constitutionally prohibited from being taxed.

{¶ 26} Though the CAT purports not to be a transactional tax, in its operation when applied to gross receipts, a transactional tax is in essence what it becomes. We are aware of one Ohio district that has reached a similar conclusion. In *Mosser Constr., Inc. v. Toledo,* Lucas App. No. L-07-1060, 2007-Ohio-4910, 2007 WL 2745222, the construction company brought suit against the city for payment, pursuant to the parties' contract, for a tax imposed on the company under R.C. 5751.02. The city argued that the CAT was an overhead cost that it was not responsible for because it is a tax levied on the privilege of doing business in Ohio and is not a transactional tax, and it is not similar to a sales, consumer, or use tax. The company argued that despite purporting not to be a transactional tax, the CAT functions as an excise tax on gross receipts. The Sixth District Court of Appeals held that the parties' contract provided for a shift of the tax burden to the city in the event of unforeseen changes in the law "if the tax was similar to a sales, consumer, or use tax." Id. at ¶ 36. "Since the amount of tax owed is tied to the amount of a business's gross receipts, the tax is similar to a sale or consumer tax and not an overhead tax." Id. While admittedly *Mosser* was not ***154** presented with the precise issue that is before us, it is important to note that when looking at the CAT's function, the Sixth District also held that despite its language to the contrary, the CAT, when applied to gross receipts, is a transactional tax.

[5] {¶ 27} For these reasons, we conclude that the CAT when applied to gross receipts from the wholesale sale of food and from the retail sale of food for human consumption off premises where sold, oper-

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ates as, and is, an excise tax levied or collected upon the sale or purchase of food, which is prohibited by Sections 3 and 13 of Article XII of the Ohio Constitution. Accordingly, we sustain appellants' two assignments of error.

{¶ 28} For the foregoing reasons, appellants' two assignments of error are sustained, the judgment of the Franklin **195 County Court of Common Pleas is hereby reversed, and this matter is remanded to that court for further proceedings consistent with law and this opinion.

Judgment reversed and cause remanded.

BROWN and TYACK, JJ., concur.
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