IN THE SUPREME COURT OF OHIO

ORIGINAL

OHIO GROCERS ASSOCIATION, et al.,	:	Case No. 2008-2018
	:	
Plaintiffs-Appellees,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
RICHARD A. LEVIN, Ohio Tax	:	
Commissioner,	:	Court of Appeals Case
	:	No. 07AP-813
Defendant-Appellant.	:	

MERIT BRIEF OF AMICUS CURIAE, TYSON SALES AND DISTRIBUTION, INC., IN SUPPORT OF APPELLEE

Kyle O. Sollie
Sara A. Lima
Counsel of Record
Reed Smith LLP
1650 Market Street
Philadelphia, PA 19103
T: (215) 851-8872
F: (215) 851-1420

Counsel for Amicus Curiae, Tyson Sales & Distribution, Inc.

Charles R. Saxbe
Donald C. Brey
Gerhardt A. Gosnell
Chester, Willcox & Saxbe
65 East State Street
Suite 1000
Columbus, OH 43215
T: (614) 221-4000
F: (614) 221-4012

Counsel for Plaintiffs-Appellees, Ohio Grocers Association, Carfagnas Incorporated, CFZ Supermarkets, Inc. Reading Food Services, Inc. and Sanson Company

Richard A. Cordray (0038034)
Attorney General of Ohio

Benjamin C. Mizer (0083089)
Solicitor General
Counsel of Record
Stephen P. Carney (0063460)
Elisabeth A. Long (0084128)
Deputy Solicitors
Lawrence D. Pratt (0021870)
Julie Brigner (006367)
Assistant Attorneys General

30 East Broad Street, 17th Floor
Columbus, OH 43215
T: (614) 466-8980
F: (614) 466-5087
bmizer@ag.state.oh.us

Counsel forDefendant-Appellant
Richard A. Levin, Ohio Tax Commissioner

TABLE OF CONTENTS

US_ACTIVE-101467477.11

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF INTERESTS OF AMICUS CURIAE

So far, no brief has distinguished between the two food-related provisions in Ohio's Constitution—Article XII Section 3(C) (applying to retailers) and Section 13 (applying to wholesalers). Yet those provisions are distinct: They were adopted 60 years apart; they have distinct language; they have distinct histories.

Tyson Foods, Inc., through its wholly-owned subsidiary Tyson Sales and Distribution, Inc. ("Tyson") sells high-quality, reasonably priced protein basics, such as chicken, beef, and pork in Ohio. Tyson's products are a diet staple for many Ohioans. On an average day, Tyson sells more than $2 million of food in Ohio. The Commercial Activity Tax (the "CAT"), when imposed on Tyson's sales of food, violates Section 13. Because Tyson makes only wholesale sales, only Section 13 is relevant to Tyson. Accordingly, Tyson, in this brief, focuses exclusively on Section 13 and thus offers a unique perspective.

STATEMENT OF FACTS

Tyson makes wholesale sales of food for human consumption, such as chicken, beef, and pork.[1] Tyson sells, on average, \$2 million of food in Ohio each day. So starting on the first day of any year, Tyson's sales exceed the \$1 million floor and thereafter all of its food sales are subject to the CAT. On each dollar of food sales over that floor, the CAT is imposed on Tyson following a simple formula:

$$\text{Receipts from sales of food} \times 0.26\% = \text{CAT}$$

Section 13 was adopted by Ohio's voters to prohibit this sort of tax. Section 13 was adopted by voters in 1994, shortly after the decision in *Cameron Coca-Cola Bottling Co. v. Tracy*[2] in 1993. In 1993, the only food-related provision in the Ohio Constitution was Section 3(C). The *Cameron Coca-Cola* court concluded that Section 3(C) applied only to retail sales to consumers, meaning that wholesale sales were outside its scope.[3] Shortly thereafter, Section 13 was adopted by the voters to address the "loophole" for "hidden wholesale taxes" that are "ultimately passed on to consumers."[4] The purpose of Section 13 was to restrict the legislature's use of food for revenue.[5]

---

[1] Tyson sells other products to which the CAT may apply. For simplicity's sake "food for human consumption" will be referred to as "food."

[2] *Cameron Coca-Cola Bottling Co. v. Tracy*, No. 93CVH02-729 (Franklin Co. C.P. July 28, 1993), attached as Exhibit 20 to Appellant's Merits Brief at A-178.

[3] *Id.* at 25.

[4] *See* Argument for Issue 4 on Official Questions and Issues Ballot for November 8, 1994 election (hereinafter "Section 13 Ballot") (Exhibit 12 to Appellant's Merits Brief, at A-116; transcribed for clarity at Exhibit A of this brief). *See also Petitioners Want Vote on Repeal of*

Continued on following page

Thus, regardless of how this Court interprets Section 3(C) with respect to retail sales, it must separately evaluate Section 13 with respect to wholesale sales. When it does, this Court will conclude that Section 13 forbids the CAT from being imposed on wholesale sales of food.

ARGUMENT

Proposition of Law: No party disputes that the CAT is an "excise tax." The CAT is imposed on any person making sales and is computed solely by reference to sales. When computed on wholesale food sales, it is "upon sales of food" and thus prohibited by Section 13.

I. The CAT is an excise tax imposed upon Tyson's wholesale sales of food.

Section 13 prohibits any "sales or other excise tax" imposed "upon wholesale sales of food."[6] The CAT is an excise tax imposed upon Tyson's wholesale sales of food. Therefore, it is prohibited by the constitution.

A. The CAT is an excise tax. No party disputes this.

Both the trial court and the Court of Appeals held that the CAT is an excise tax.[7] Even the State concedes the CAT is an excise tax.[8] Nevertheless, despite the fact that the CAT is an

---

Continued from previous page
Pop Tax, Cleveland Plain Dealer, 7B (August 9, 1994) (reporting Section 13 proponents intending to "stop wholesale taxes on food products and other hidden taxes on ingredients and packaging"). The evidence of the information presented to the voters is relevant because this Court must give effect to "the object of the people in adopting" the provision. *Castleberry v. Evatt*, 147 Ohio St. 30, 33 (1946).

[5] *Id.*

[6] OHIO CONST. ART. XII § 13 ("No sales or other excise taxes shall be levied . . . upon any wholesale sale . . . of food for human consumption . . .").

excise tax, the State attempts to raise doubt about whether the CAT is the kind of excise tax covered by Section 13.

1. The State labels the CAT a franchise tax, then distinguishes between a franchise tax and other excise taxes.

The State spends much of its Merits Brief arguing about the distinctions between franchise taxes and other excise taxes.[9] To do so, the State relies on the juxtaposition of the phrase "franchise and excise taxes" in the first clause in Section 3(C) with the phrase "excise tax" (without the word "franchise") in the next clause of Section 3(C), which is the clause that prohibits taxes on retail sales of food. Regardless, however, of whether that subtle distinction is relevant in interpreting Section 3(C),[10] that distinction does not appear in Section 13. Indeed,

---

Continued from previous page
[7] Opinion of the Court of Appeals of Ohio, Tenth Appellate District, No. 07AP-813 (September 2, 2008) at 12 ("the CAT...operates as, and is, an excise tax levied or collected upon the sale or purchase of food"), attached as Exhibit 3 to Appellant's Merits Brief at A-5 through A-16; Opinion of the Court of Common Pleas, Franklin County, Ohio, No. 06CVH02-2278 (August 24, 2007) at 5-6 (finding CAT to be a franchise tax and excise tax), attached As Exhibit 4 to Appellant's Merits Brief at A-17-A-28;

[8] Appellant's Merits Brief at 3 ("excise tax is an umbrella term that encompasses both sales and franchise taxes").

[9] Appellant's Merits Brief at 16 ("the prohibition against excise taxes on food sales does not touch franchise taxes"); 17 ("not all excise taxes are franchise taxes....Sales taxes are a subset of excise taxes, too, as are occupational taxes"); 18 ("the constitutional prohibitions apply only to sales taxes").

[10] The juxtaposition of the terms "franchise tax" and "excise tax" in Section 3(C) does not bear the weight the state places on it. With respect to a tax on a corporation, those terms are often used as synonyms. *See e.g., Aluminum Co. of Amer. v. Evatt*, 45 N.E.2d 118, 122 (1942) ("Under Section 5495... the franchise or excise tax....is levied upon foreign corporations ..."); *Cincinnati, Milford & Loveland Traction Co. v. State*, 113 N.E. 654, 655 (Ohio 1916) (an "excise tax" is "sometimes spoken of as a franchise tax"); *Southern Gum Co. et al. v. Laylin*, 64 N.E. 564, 595 (Ohio 1902) ("Here one tax is a property tax, and the other an excise or franchise tax").

there is no use of the term "franchise tax" in Section 13; there is no basis, therefore, to infer that Section 13 permits an excise tax on wholesale sales of food merely because it is a franchise tax. To the contrary, Section 13 extends to any excise tax upon sales of food: Section 13 expressly prohibits any "sales *or other excise taxes...*"

2. Even if the State may impose a "franchise tax" on wholesale sales of food, the CAT is not a franchise tax.

Yet even if the State is right—even if the State could impose a "franchise tax" on the wholesale sale of food—the CAT is still prohibited because the CAT is not a franchise tax. A "franchise" tax is a tax imposed on a corporate entity because it is "chartered by the government, endowed with unusual powers, given special immunities and limited liability" such that the government may levy a tax in exchange for that "privilege, on immunity, on special favor."[11] The "aggregation of capital by corporations imposes additional burdens" on the "state and the people."[12] In particular, burdens are imposed "by reason of property being held by artificial bodies, the persons comprising such bodies being exempt from liability to a great extent for the debts thereof."[13] As a result, the legislature has considerable leeway to tax the corporate "franchise" that it creates.

---

[11] *Cincinnati, Milford & Loveland Traction Co.*, 113 N.E. at 655.

[12] *Southern Gum Co.*, 64 N.E. at 595.

[13] The justification is similar for both domestic and foreign corporations. In the case of domestic corporations, the state is permitted to impose a tax on the value of the franchise, which is itself is made up of the "life and continued existence . . . with their accompanying powers" conferred to the corporation by the state. Similarly, a "foreign corporation can do business in the state only upon such terms and conditions as the state may impose, and therefore a franchise tax may be imposed...for the privilege of doing business in this state." *Id.*

US_ACTIVE-101467477.11

Consistent with this, the old Ohio franchise tax was imposed exclusively upon "corporations."[14] The old franchise tax was imposed on the corporation for "the privilege of exercising its franchise" in Ohio.[15] In contrast, the CAT is imposed on any "person" with taxable gross receipts from sales.[16] The term "person" includes "individuals, combinations of individuals of any form, ... trustees in bankruptcy, [and] partnerships."[17] Thus, the CAT is imposed on any person, including a natural person, who makes Ohio sales, regardless of whether that person benefits from the state-created corporate form. The CAT is not a "franchise tax" because it is imposed regardless of whether the taxpayer has any "franchise."

Indeed, the corporate form is a separate entity, and ownership in that separate entity is different from the ownership of the underlying assets owned by the corporation.[18] This difference is fundamental to franchise taxes, and explains many of the distinctions in the cases cited by the State in its brief. For example, in *Mutual Holding Company v. Limbach*,[19] the state imposed tax on a subsidiary and also on the corporate parent, measured in part by the value of

---

[14] *See* R.C. § 5733.06 (2004) ("The tax hereby charged each corporation..."); § 5733.01 (2004) (providing certain "corporations" are subject to tax); § 5733.04 (2004) (defining "taxpayer" as "a corporation subject to the tax").

[15] *See* R.C. § 5733.01 (2004). *See also* R.C. § 5733.06(E) (2004) (describing the tax as "an excise tax" "charged to corporations...for the privilege of engaging in business in this state").

[16] *See* R.C. § 5751.02(A) (2009). As is discussed below, a "person" only becomes subject to the tax by having "taxable gross receipts," which, in all respects relevant to this appeal, means having receipts from sales of food to Ohio customers. R.C. § 5751.033(E) (2009). Unlike the franchise tax, there would be no tax if there were no sales.

[17] *See* R.C. § 5751.01(A).

[18] *Southern Gum Co.*, 64 N.E. at 595.

[19] *Mutual Holding Company v. Limbach*, 641 N.E.2d 1080 (Ohio 1994).

the stock of the subsidiary held by the corporate parent. The court considered whether that was multiple taxation. The court concluded that it was not multiple taxation because a tax on the parent, measured in part by the value of the stock held by the parent, was different from a tax on the subsidiary measured by the value of the assets held by the subsidiary. The court's conclusion was based on the distinction between the property of a corporation and the property of a shareholder in a corporation. That distinction hinges on the separateness of the corporate franchise.[20]

The same distinction also formed the basis for the court's decision in *Bank One Dayton, N.A. v. Limbach.*[21] In that case, this Court addressed whether the franchise tax was in essence, an impermissible tax on United States obligations when such obligations were included in the computation of the tax base. Federal law permits a tax to be imposed on a U.S. obligation if the tax is a "franchise tax ... imposed on a corporation."[22] This Court held that the tax was on the bank's franchise, not on the bank's property, because it could "have no application independent of the corporation's enjoyment of the privilege of exercising its franchise."[23] This was in keeping with a line of U.S. Supreme Court cases that upheld the "privilege of exercising the

---

[20] *Id.* at 1082.

[21] *Bank One Dayton, N.A. v. Limbach,* 553 N.E. 2d 624 (Ohio 1990). A National Association is a corporate entity chartered by the federal government and endowed with certain powers related to the business of banking. 12 U.S.C. § 21 *et seq.*

[22] 31 U.S.C. § 3124.

[23] *Id.* at 628.

corporate franchise is no less an appropriate object of taxation ... merely because the corporate property" includes U.S. obligations.[24]

It is for precisely this reason that the State's "franchise tax" distinction does not apply to the CAT.[25] The CAT is not imposed only on corporations. In fact it is not even limited to business organizations. It is imposed on any person who makes sales in Ohio.

B. The CAT is "upon the sale of food." The distinctions made by the state in its brief do not advance the voters' goal in adopting Section 13.

1. The CAT is "upon the wholesale sale of food."

Tyson is a CAT taxpayer because, and only because, Tyson makes sales. (The CAT statute provides "there is hereby levied a commercial activity tax *on each person with taxable gross receipts* ...."[26]) Unless Tyson sells in Ohio, there is no tax. If Tyson sells in Ohio, tax is imposed. (Tax is imposed on gross receipts and a gross receipt is an "amount[] realized from *the sale* ... of the taxpayer's property . . ."[27]) The amount of tax is based entirely on the amount of Tyson's sales: For every $1,000 of food sales in Ohio, Tyson pays Ohio CAT of $2.60. If Tyson makes no sales in Ohio, it pays no CAT. Thus, the CAT is imposed "upon the wholesale sale of food."

---

[24] *Educational Films Corp. of Amer. v. Ward*, 282 U.S. 379, 388 (1931).

[25] Appellant's Merit Brief at 30 (arguing that because the State bestows a special benefit on a taxpayer to conduct its business, the incidence of the tax falls on the business, not on the factors used to measure the value of the business).

[26] R.C. § 5751.02(A) (emphasis added).

[27] R.C. § 5751.01(F)(1)(a) (emphasis added).

In contrast, the old Ohio franchise tax could be imposed on a corporation even if it made no Ohio sales,[28] and a corporation could make Ohio sales without being subject to the franchise tax.[29] Indeed, the Ohio franchise tax used sales as an apportionment factor—a means of determining the proportion of a corporation's total value and income attributable to Ohio.[30] Sales were not used as a tax base. Thus, sales were only relevant on a proportionate basis: An Ohio sale increased Ohio franchise tax only if the taxpayer increased its sales in Ohio at a greater rate than it increased its sales everywhere.[31]

The Ohio Court of Appeals recognized the distinction between the CAT and the old franchise tax, explaining that under the CAT, a "tax exempt [food] transaction is not just a factor being considered to determine tax liability rather before us, a tax exempt transaction is the *only*

---

[28] For example, a taxpayer that had positive net worth or positive income and that had property and payroll in Ohio would have paid Ohio franchise tax even if all of its sales were export sales. *See* R.C. § 5733.05 (tax computed by applying either net worth or net income to apportionment formula, which formula is made up of average of property, payroll and sales factors and multiplying by the tax rate, such that there may be positive tax even if sales factor equals zero).

[29] For example, a taxpayer with negative net worth or zero taxable income would pay no tax whatsoever, even if it made hundreds of millions of dollars of sales in Ohio. *See* R.C. § 5733.05 establishing that no tax would result if entire tax base equals zero because zero multiplied by anything is still zero.

[30] *See Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358 (1991).

[31] The sales factor is one of three fractions that are averaged together and applied to the net income or net worth of a corporation subject to tax. R.C. § 5733.05. The numerator of the sales factor is the total sales in Ohio that the corporation made during the relevant period and the denominator is the total sales that the corporation made everywhere. R.C. § 5733.05(B)(2)(C). Thus, the amount of tax is only increased when the corporation's sales factor numerator (that is, its Ohio sales) increases relative to the denominator (that is, the sales it makes everywhere).

factor being used to determine tax liability."[32] This was contrary to the franchise tax, where "the tax exempt property or income was not the only measure of tax liability since the tax liability was based on an entity's net worth."[33] In sum, the CAT, unlike Ohio's old franchise tax, is imposed "upon sales."

2. The State's distinctions are artificial; they ignore the voters' goal in adopting Section 13.

Notwithstanding the simple mathematics of the CAT, the State argues that the CAT is not imposed upon the sale of food because: 1) it is imposed upon the "privilege" of selling, not the sale itself; 2) it is reported and paid periodically, rather than transaction-by-transaction; 3) it exempts certain related-party transactions; and 4) the State gives CAT taxpayers exemptions and credits. None of those arguments are persuasive; none of these arguments advances the voters' goal in adopting Section 13:

- **Artificial distinction #1: The State distinguishes between the "privilege of selling" measured by sales and a tax on the sale itself.**

The CAT is self-described as a tax on the privilege of "doing business;"[34] for Tyson, following the CAT's definitions, the privilege of doing business is the privilege of making sales.[35] Therefore, the State's argument is that a tax imposed on the "privilege" of making sales

---

[32] Opinion of the Court of Appeals of Ohio, Tenth Appellate District, No. 07AP-813 (September 2, 2008) at 11, attached as Exhibit 3 to Appellant's Merits Brief at A-5 through A-16 (emphasis in original).

[33] *Id.* at 10.

[34] R.C. § 5751.02(A).

[35] In particular, the tax is triggered by the taxpayer having "taxable gross receipts," which means receipts from sales to Ohio purchasers. R.C. § 5751.02 (levying tax on "each person with
Continued on following page

is not a tax imposed upon the sales. Instead, the State argues, sales are simply a way of measuring the value of the privilege.[36]

The problem with the State's logic is that it is no logic at all. It is merely a tautology. If it were followed, the State could re-cast any tax as a tax on the "privilege" of doing something. The State could argue that sales are simply the measure of the value of that privilege. That would eviscerate the constitutional prohibitions adopted by the voters.

Moreover, the State's "privilege" argument is not even internally consistent. The State concedes that Ohio's sales and use tax, as a "transactional tax," cannot be imposed on sales of food.[37] Yet sales and use taxes themselves have been characterized by this Court as "privilege taxes."[38] The fact of the matter is that a tax on the "privilege" of selling or the "privilege" of "doing business," measured by the volume of sales, is a tax upon sales.[39]

Continued from previous page
taxable gross receipts for the privilege of doing business in this state"); § 5751.01(F), (G)(defining "taxable gross receipts" as gross receipts sitused to Ohio and "gross receipts" as "amounts realized from the sale . . . of taxpayer's property to . . . another"); 5751.033 (situsing receipts from sales of tangible personal property to Ohio if the purchaser receives the property in Ohio).

[36] Appellant's Merit Brief at 30.

[37] *See e.g.*, Appellant's Merits Brief at 3 (stating that the constitutional prohibition applies to "sales taxes").

[38] *See Mutual Holding Company v. Limbach*, 641 N.E.2d 1080, 1082 (Ohio 1994) ("sales and use taxes were levied on the exercise of privileges, the rights to acquire and to use tangible personal property") (*citing Celina Mut. Ins. Co. v. Bowers*, 213 N.E.2d 175 (Ohio 1965)).

[39] *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 374 (1991) ("A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes").

- **Artificial distinction #2: The State argues that the CAT is not imposed upon sales because it is measured and reported over a year-long period.**

The State suggests that the fact that the CAT is counted over a year-long measurement-and-reporting period means it is not imposed upon sales.[40] Yet as the Court of Appeals stated, "[i]f the legislature is prohibited from collecting a tax on the individual sale, it logically follows the legislature would be prohibited from collecting a tax on the aggregate of those same sales."[41] In practice, the Department itself recognizes that the CAT is based on sales transactions. For example, it publishes a list of individual items that are either taxable or non-taxable under the CAT.[42] Thus, the CAT is akin to Ohio sales and use taxes, which the State concedes are subject to the constitutional prohibitions on taxes on food.[43] Just like the CAT, use taxes are aggregated, reported, and remitted to the State on a monthly basis, not paid with each purchase.[44]

To support its argument on this point, however, the state cites cases involving the provision in the Ohio constitution prohibiting retroactive taxation.[45] For example, the state relies on *East Ohio Gas*, which involved the utilities gross receipts tax. The measurement and

[40] Appellant's Merits Brief at 30, 32.

[41] Opinion of the Court of Appeals of Ohio, Tenth Appellate District, No. 07AP-813 (September 2, 2008) at 9, attached as Exhibit 3 to Appellant's Merits Brief at A-5 through A-16

[42] Information Release 2005–08 ("Following is a sample list of different types of assets and whether the receipts from these assets are subject to the CAT: ". . . Fishing pole sold by a retailer—Yes; Personal sailboat—No; Sale of harvested crops—Yes; Sale of cow—No; Sale of poultry—Yes . . .").

[43] *See* Appellant's Merits Brief at 21.

[44] R.C. § 5741.12(B) (use tax returns due monthly unless Commissioner authorizes less frequent filings). *See also*, Ohio Universal Sales Tax Return, UST 1.

[45] Appellant's Merits Brief at 36 – 39 (*citing East Ohio Gas Co. v. Limbach*, 26 Ohio St. 3d 63 (Ohio 1986) and *Bank One Dayton, N.A. et al. v. Limbach*, 553 N.E.2d 624 (Ohio 1990)).

payment of that tax, however, is different from the CAT: The utilities tax is measured by the gross receipts received during the year *prior* to the year that the privilege is conducted. "Therefore, a company going out of business on June 30 is not subject to an excise tax on its gross receipts for the calendar year ending on that date, because such receipts are merely used as a measure of tax liability for the privilege of transacting intrastate business in the future, for the calendar year beginning July 1."[46] Accordingly, the tax at issue in *East Ohio Gas* was not solely contingent on sales because a utility could make sales in Year 1, but not pay tax on those sales if it discontinued business before Year 2.

That is simply not true with the CAT: Tyson begins incurring CAT on the first day of its tax year. It incurs tax every day thereafter on every sale it makes. Every quarter, it must report the volume of its sales and pay an estimated amount of tax on those sales.[47] It would be required to do so even if it only made sales during one day. At the end of the year, it must file an annual report reporting its annual sales.[48]

Like the utilities tax in *East Ohio Gas*, the old franchise tax, which was at issue in the *Bank One*[49] case, is imposed on the privilege of engaging in business during one period, and the value of that privilege is measured by income and net worth for the prior period. So for example, under the franchise tax, a taxpayer pays tax for the privilege of doing business in Year 2 based

---

[46] 1914 *Opinion of the Attorney General*, p. 1358. *Accord, The Commonwealth Telephone Co. v. Bowers*, 187 N.E.2d 30 (Ohio 1962); 1944 *Opinion of the Attorney General,* p. 154; Letter, Tax Commissioner, March 18, 1938.

[47] Ohio R.C. § 5751.05(c).

[48] Ohio R.C. § 5751.051.

[49] *Bank One Dayton, N.A. v. Limbach*, 553 N.E.2d 624, 628 (Ohio 1990).

on its income in Year 1. If a taxpayer withdrew from conducting business in Ohio at any point during the tax year (Year 2), it owed no franchise tax, even if it had value during the prior year (Year 1) — the measurement period.[50]

More important than these technical distinctions, however, in the *East Ohio Gas* case the court was interpreting a constitutional prohibition on retroactive taxation. The court had to interpret the goal of the retroactivity restriction, which is to prohibit any retroactive tax law that was unfair because of its retroactivity. The Ohio courts' decisions in those cases was in line with established precedent regarding the fairness of retroactive taxation, which involves whether a taxpayer's expectations are unfairly unsettled because, relying on prior law, the taxpayer engaged in conduct that it otherwise would not have engaged in.[51] *East Ohio Gas* could not argue that it had a reliance interest that was upset because of the law change. In fact, it could have stopped conducting business before the privilege period and avoided the tax entirely. Thus, the court's decision upholding the tax in that case was consistent with the goals behind the prohibition of retroactive taxation.

By contrast, this court must interpret the scope of Section 13, which the voters adopted to prevent "hidden taxes on food." The logic that is relevant to determining whether a tax is imposed upon sales of food is not the same logic that is relevant to determine whether a

---

[50] *See Bank One Dayton, N.A.*, 553 N.E.2d at 628 ("If appellant had ceased to do business before November 1, 1929, it would not have been subject to any tax under this statute, although it had received, during its preceding fiscal year, income which the statute makes the measure of the tax").

[51] *See Coca-Cola Bottling Corp. v. Lindsey*, 374 N.E. 2d 400 (Ohio 1978). *See also, United States v. Carlton,* 512 U.S. 26 (1994)(discussing prior precedent concerning retroactive taxation and impact of taxpayer's detrimental reliance on validity of change).

taxpayer's reliance interests are upset because of retroactive taxation. The fact that the CAT is measured, reported, and paid periodically does not change the fact that what is measured, reported, and paid is a tax on sales. If the regularity of measurement and reporting governed whether a tax was "upon a sale," the State could impose any tax on sales of food, so long as the tax were measured, reported and paid periodically, rather than with each transaction.

- **Artificial distinction #3: The State argues that the CAT is not imposed upon sales because certain related-party transactions are exempted.**

The CAT allows related parties, such as affiliated corporations, to makes sales to one another without triggering tax liability.[52] This reduces tax pyramiding. The State argues that this exemption shows that it is not a tax upon sales.[53] The State does not explain, however, why the $2.60 of CAT imposed on each $1,000 of Tyson's sales of food to its customers is not a tax upon those sales merely because Tyson could sell on a tax-free basis to an affiliate.[54] Indeed, the Ohio sales tax itself contains exemptions from sales tax in certain circumstances for sales among affiliated groups.[55] The State agrees that a self-described sales and use tax would be invalid

[52] R.C. § 5751.011

[53] Appellant's Merits Brief at 33.

[54] *Id.*

[55] For example, certain services otherwise subject to sales tax, such as automatic data processing, computer services, and electronic information services, are exempt when provided between members of an "affiliated group." R.C. § 5739.01(B)(3)(e). The definition of "affiliated group" for sales tax purposes encompasses the same criteria as the requirements for filing as a consolidated taxpayer under the CAT. *Compare* R.C. § 5739.01(B)(3)(e) (definition of "affiliated group" for sales tax) with R.C. § 5751.011 (requirements for consolidated taxpayer for CAT). In particular, members of an affiliated group, like persons who can elect to be treated as consolidated taxpayers, are persons owned at least 50% by a common owner. *Id.*

under Sections 3(C) and 13, yet the State does not explain the difference between the affiliate-sale exemption in the CAT and the affiliate-sale exemption in the sales tax.

- **Artificial distinction #4: The State suggests that the $1 million floor and other credits affect whether the CAT is imposed "upon sales."**

The State in its merits brief suggests that, because the first $1 million of annual sales are exempt from tax, the tax on sales in excess of $1 million is not imposed upon those sales.[56] Similarly, the state suggests that because it allows some credits against the tax, the tax is not imposed upon sales.[57]

The state's logic is difficult to follow. Tyson agrees that no tax is "imposed upon" the first $1 million of its sales each year. But Tyson does not understand how that exemption affects the character of the tax that is imposed on sales in excess of $1 million. It would be illogical for the legislature to gain the constitutional authority to impose a tax on sales by virtue of exempting a small portion of the sales or by virtue of granting a credit against a portion of the tax. Indeed, if the legislature could avoid the food-related prohibitions in the constitution by adding an exemption or credit, then the legislature could avoid any of the food-related constitutional restrictions.

II. Section 13 Should Not Be Evaluated Based on "the use of magic words or labels."

Ohio's voters adopted Section 13 to limit the legislature's use of food as a revenue source. Section 13 should be interpreted in light of that constitutional goal. Concepts and

---

[56] Appellant's Merits Brief at 3, 10.

[57] *Id.* at 34.

terminology used for other constitutional provisions with other constitutional goals are not helpful—especially if the goals of those other provisions are distinct from Section 13.

In particular, over the last 150 years, the United States Supreme Court has struggled with the "troublesome area"[58] of applying the Commerce Clause to state taxation. The Court's approach has ranged from prohibiting "direct" state taxes on interstate transactions while permitting "indirect" taxes on interstate commerce,[59] to prohibiting "privilege" taxes on interstate activities[60] while allowing "privilege" taxes imposed on property in the state. [61] At one point, "gross receipts" taxes on interstate transportation companies were allowed, but taxes imposed on goods transported between states were invalid.[62] The "tangled underbrush"[63] of cases actually caused states to change the wording of tax statutes in an effort to fit them into the proper rule.[64]

The Ohio courts had to follow the then-controlling Supreme Court precedent whenever deciding Commerce Clause cases. For example, in 1876, in *Western Union Telegraph Company*

---

[58] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 275 (1977).

[59] *Freeman v. Hewitt*, 329 U.S. 249 (1946).

[60] *Spector Motor Service v. O'Connor,* 340 U.S. 602 (1951).

[61] *Railway Express Agency v. Virgin*ia, 347 U.S. 359 (1954).

[62] *See Philadelphia & SMSS Co. v. Pennsylvania*, 122 U.S. 326 (1887) (repudiating this reasoning in prior cases and holding instead that the Commerce Clause barred a direct tax on gross receipts from interstate transportation).

[63] *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457 (1959).

[64] *See Complete Auto*, 430 U.S. at 284 (citing *Railway Express Agency v. Virginia*, 358 U.S. 434 (1959), which addressed Virginia's statutory amendment to impose a "franchise tax" on "intangible property" measured by gross receipts after its "license tax" was held unconstitutional as a tax on the privilege of doing business rather than a tax on property in the state).

v. Mayer, this Court addressed whether a gross receipts tax was imposed upon an "article of commerce" itself (the message travelling between states) or was instead a tax on the company measured by the "*fruits* of commerce after they had reached the treasury of the company."[65] The distinction, at that time, was material to whether the tax was a "state interference with the freedom of commerce among the states, and [was] in conflict with the constitution of the United States."[66]

However, in dealing with Commerce Clause problems, this "highly refined reasoning did not survive."[67] By 1977, the importance of "magic words and labels"[68] was repudiated by the Supreme Court in *Complete Auto*. In that case, the Supreme Court determined that the linguistic distinctions had "no relationship to economic realities" but instead stood "only as a trap for the unwary draftsman."[69] They instituted instead a four-prong test intended to measure the substance of the tax at issue against the purposes of the Commerce Clause.[70]

Thus, by the time Ohio's voters adopted Section 13 in 1994, the linguistic technicalities were no longer relevant. The *Western Union* case had become a jurisprudential dinosaur—even for Commerce Clause purposes. Certainly, then, the now-defunct semantic distinctions once

---

[65] *Western Union Telegraph Compnay v. Mayer*, 28 Ohio St. 521, 530-31 (1876).

[66] *Id.* at 528.

[67] Hellerstein & Hellerstein, STATE TAXATION, Part III.B at ¶ 4.07[2][a], *Direct Taxes on Gross Receipts from Interstate Commerce.*

[68] *Railway Express Agency v. Virginia*, 358 U.S. 434, 441 (1959).

[69] *Complete Auto*, 430 U.S. at 279.

[70] *Id.* at 287-88 (stating, "There is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect.").

relevant for Commerce Clause purposes are not helpful in this Court's determination of the intent of the voters in adopting Section 13.

III. This litigation does not upset the legislative bargain made in adopting the CAT

A host of amici comment on the potential revenue impact of this litigation. They suggest that the grocers and the food companies are illegitimately and unexpectedly upsetting a tenuous legislative bargain.

This is not true. The legislature understood that there was a high likelihood that the CAT, when imposed on food, violated Ohio's constitution. In fact, the legislature built into the CAT a statutory procedure whereby food sellers could bring an expedited challenge to a tax assessment based on the food-related constitutional prohibitions. Specifically, Ohio Revised Code § 5751.1, enacted as part of the CAT legislation, allows for a direct appeal to the Ohio Supreme Court from a determination of the tax commissioner "if the primary issue raised by the petitioner is...an issue arising under Section 3...or 13 of Article XII, Ohio Constitution."[71] The Chief Legal Counsel of the Ohio Department of Taxation, Fred Nicely, explained publically that the special procedural provisions were "done because purely legal issues cannot be addressed by the Ohio Board of Tax Appeals. This allows the issue to be addressed more quickly by the Ohio Supreme Court should there be a challenge."[72]

Accordingly, the legislature understood full well that there is a good chance the CAT cannot be imposed on food. Despite this, the legislature believed that the CAT was good policy

---

[71] As added by H.B. 66, Laws 2005, effective June 30, 2005.

[72] BNA Tax Management Multistate Tax Report, Vol. 12, No. 10 (Oct. 28, 2005).

anyway—even if there was a substantial risk that CAT revenue cannot come from food sales. Thus, this constitutional challenge does not upset the legislative bargain. This constitutional challenge was foreseen, and even built into the legislative text.

CONCLUSION

In 1994, Ohio voters had a choice between two alternatives. At the ballot, a voter could vote against Section 13. That would give the legislature the most flexibility in raising revenue from all sources, including from sales of food. Or the voter the could vote for Section 13. That would limit the legislature's ability to raise revenue somewhat, but would keep hidden taxes out of the cost of food. Like most policy choices, each alternative had pros and cons. The taxpayers voted to adopt Section 13. They chose to prohibit wholesale taxes on food, even if that meant diminished government flexibility in raising revenue. This Court should interpret Section 13 in light of that choice.

The CAT is prohibited on Tyson's sales of food.

Respectfully submitted,

Kyle O. Sollie
Sara A. Lima
Reed Smith LLP
1650 Market Street, 25th Floor
Philadelphia, PA 19103
T: (215) 851-8872
F: (215) 851-1420

Counsel for Amicus Curiae,
Tyson Sales and Distribution, Inc.

CERTIFICATE OF SERVICE

I certify that a copy of the Merit Brief of Amicus Curiae, Tyson Sales and Distribution, Inc, in support of Appellee, was served by e-mail and by U.S. mail this 21 day of May 2009, upon the following counsel:

Richard A. Cordray (0038034)
Attorney General of Ohio

Benjamin C. Mizer (0083089)
Solicitor General
Counsel of Record
Stephen P. Carney (0063460)
Elisabeth A. Long (0084128)
Deputy Solicitors
Lawrence D. Pratt (0021870)
Julie Brigner (006367)
Assistant Attorneys General
30 East Broad Street, 17th Floor
Columbus, OH 43215
T: (614) 466-8980
F: (614) 466-5087
bmizer@ag.state.oh.us

Counsel forDefendant-Appellant
Richard A. Levin, Ohio Tax Commissioner

Charles R. Saxbe
Donald C. Brey
Gerhardt A. Gosnell II
Chester, Wilcox & Saxbe LLP
65 E. State Street Suite 1000
Columbus, OH 43215

Counsel for Plaintiffs-Appellees
Ohio Grocers Association, et al.

I also sent courtesy copies to counsel of record for all known amici curiae on the 21 day of May, 2009.

SARA A. LIMA

TRANSCRIPTION OF BALLOT LANGUAGE FOR PROPOSED CONSTITUTIONAL AMENDMENT, ARTICLE XII, SECTION 13

ARGUMENT FOR STATE ISSUE 4

VOTE "YES" ON ISSUE 4 – TO STOP TAXES ON FOOD

A YES vote on Issue 4 will restore Ohio's tradition of protecting consumers from paying taxes on food.

When the constitutionality of a new wholesale soft drink tax was challenged in 1992, the court ruling opened a gaping hole in Ohio's constitution, which had been thought to prohibit food taxes.

The court ruled that retail food taxes are indeed illegal. But, it concluded that wholesale taxes on food are legal!

A YES vote on Issue 4 will close this loophold, and restore Ohio's constitutional prohibition on taxing food.

Specifically, Issue 4 will prohibit wholesale taxes on food and other hidden taxes on food ingredients and food packaging. It will also repeal the 1992 soft drink tax.

Repealing the soft drink tax will not affect existing state programs. The revenues go into the General Fund, and are not dedicated to any specific area.

We urge you to support Issue 4 because:

1. Taxing food is wrong. Food taxes especially hurt those who can least afford to pay, such as families with children and seniors on fixed incomes.

2. Allowing state government to enact hidden taxes on food will set a dangerous precedent. The state is already looking at new food taxes to raise revenues.

3. Hidden wholesale taxes on food are ultimately passed on to consumers. The soft drink tax already costs consumers $70 million annually. Future wholesale food taxes could cost us hundreds of millions of dollars per year.

Let's restore our constitutional tradition of prohibiting food taxes – before state government goes any further.

Join our broad-based committee of thousands of Ohioans in voting YES on Issue 4.

EXPLANATION AND ARGUMENT AGAINST STATE ISSUE 4

STATE ISSUE 4 is a constitutional amendment to repeal a state tax on soda pop. Don't be misled into believing it eliminates taxes on food. Since 1936 Ohio's Constitution has prohibited state taxes on food off the premises where sold.

This amendment is being proposed primarily by out-of-state soda pop vendors which seek to use the Ohio Constitution to promote their limited special interestes. Here are five reasons why every Ohio votor – and taxpayer – should vote NO on ISSUE 4.

(1) Contrary to its supporters' misleading claims, ISSUE 4 is not a reaction to a tax on food. Its purpose is to prohibit the current wholesale tax on soft drinks and other carbonated, non-alcoholic beverages. The tax amounts to a penny a can, which is modest and fair.

(2) State law has never defined soft drinks as food. They are NOT a nutrition source for children or adults. So they should be subject to taxation just like other non-food products. It's only fair.

(3) If passed, ISSUE 4 will reduce state funds available for education and childrens programs in Ohio. The soda pop tax generates $130 million per budget period, which is needed to support education and other vital programs for children.

(4) Consumers don't pay Ohio's pop tax. The soda pop companies do. Marketplace competition continues to hold down pop prices at the store.

(5) To balance the state budget and prevent cuts in school funding, the wholesale pop tax was approved in 1992 by a bipartison majority of the state legislature and Governor George Voinovich. Passage of ISSUE 4 could result in harmful cuts in education and other state programs – or it will necessitate the adoption of another tax hike even more objectionable to consumers.

On November 8th, vote NO on ISSUE 4!