ORIGINAL

In the Supreme Court of Ohio

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

REPLY BRIEF OF DEFENDANT-APPELLANT, RICHARD A. LEVIN, OHIO TAX COMMISSIONER

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INTRODUCTION

The Ohio Grocers Association ("Grocers") claims that "common sense and logic" dictate a result in its favor in this case, and it hums a simple tune: that a tax "measured by" food sales, even in part, is the same as a tax "upon" those sales. Grocers Brief ("Br.") at 2. What the Grocers call "common sense," however, is an idea that the Court has rejected over and over again for a century. In no uncertain terms, this Court has explained that "[m]easuring tax liability in terms of net worth does not convert a franchise tax into a property tax." *Mut. Holding Co. v. Limbach* (1994), 71 Ohio St. 3d 59, 60. Or, put another way, "[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." *East Ohio Gas Co v. Limbach* (1986), 26 Ohio St. 3d 63, 66-67. The foundation of the Grocers' case therefore runs contrary to well-settled precepts of this Court's tax jurisprudence.

As the Tax Commissioner's opening brief explained, the Grocers must show one of two things to prevail, but they succeed on neither. First, the Grocers could win by showing that the constitutional ban on taxing food sales covers more than just transactional excise taxes on sales or purchases of food. On that score they fall short, however, because the plain language of the provisions refers to excise taxes "upon the sale or purchase of food." The provisions' history and the Court's precedent confirm that the provisions restrict nothing beyond actual transactional taxes. Likewise, the Grocers' appeal to a generalized sense that food is special, and therefore broadly shielded from all forms of taxation, does not comport with the constitutional provisions' text or history.

The Grocers could succeed in a second way—by showing that the CAT is a sales tax or other transactional tax "upon the sale or purchase of food." But they effectively concede that they cannot make that showing, acknowledging at one point that "the CAT is not the same as a sales tax." Grocers Br. at 19. The Grocers nonetheless insist that the CAT, while not a sales tax, is still a tax "upon the sale" of food. But that is a distinction without a difference. And in any event, this Court's "measuring stick" jurisprudence erases any doubt that the CAT is permissible. In those cases, as quoted above, the Court has explained that basing tax liability on a measurement that includes the value derived from some item is not the same as actually taxing that item.

Finally, not only does settled law foreclose the Grocers' view, but adopting that view would have devastating consequences. It would result in a massive revenue loss, and, more broadly, it would upset established principles of tax law. Abandoning the measuring-stick principle would upend many settled tax rulings that rest on that principle. And accepting the Grocers' invitation to replace legal principles with economists' formulae would turn such cases into a battle of experts, with the outcome hinging on degrees of indirect effects that fluctuate with economic conditions. By contrast, including all of the Grocers' receipts in measuring the value of the privilege they enjoy in doing business, and thus their CAT liability, will not affect any other area of tax law; it will simply ensure that they pay their constitutionally valid share.

ARGUMENT

A. Article XII, Sections 3(C) and 13 of the Ohio Constitution prohibit only transactional taxes upon the retail or wholesale sale or purchase of food.

The plain language of Article XII, Sections 3(C) and 13 prohibits taxes upon certain food sales and purchases. Because these prohibitions apply only to excise taxes "upon food sales and purchases," they do not reach non-transactional excise taxes. The Grocers ask the Court to disregard this plain language and instead interpret these provisions as prohibiting *all* excise taxes related to food or any taxes on income or receipts derived from food—including franchise taxes measured by *all* gross receipts, to the extent that those receipts were generated by food sales.

The Grocers ignore the significance of the word "upon" in Sections 3(C) and 13 for good reason: It is logically impossible to levy a franchise tax *upon* food.

Even if the text of these provisions were ambiguous—and it is not—the history and purpose of Sections 3(C) and 13 confirm that their prohibitions apply only to transactional taxes. The Grocers claim that Ohioans recognized food as "a unique commodity" and intended, by adopting Sections 3(C) and 13, to prohibit "all hidden taxes on food." Grocers Br. at 1. Under the Grocers' reading, in other words, Sections 3(C) and 13 bar the State not only from taxing food sales, but also from taxing food-related proceeds in *any* way. But that reading disregards the reason that both provisions were adopted—to prevent a newly enacted sales tax from being applied to *sales and purchases* of food.

1. The plain language of Sections 3(C) and 13 prohibits only transactional taxes on retail or wholesale food sales and purchases.

Article XII, Section 3 authorizes the General Assembly to pass laws "providing for . . . (C) Excise and franchise taxes." Ohio Const. art. XII, § 3. However, "no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold." *Id.* Similarly Article XII, Section 13 states that "[n]o 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." Ohio Const. art. XII, § 13. Both Sections prohibit taxes "levied . . . *upon the sale or purchase* of food for human consumption." And "*levied upon* the sale or purchase" means just that—a tax imposed on a particular *transaction.* In fact, it would be impossible to levy a franchise tax upon a sale or purchase, because franchise taxes are not transactional. Neither Section 3(C) nor Section 13 expressly or impliedly prohibits a tax imposed on the privilege of doing business in Ohio, even if the value of that privilege, and thus the basis for tax liability, is measured by gross receipts generated by food sales.

The distinction between transactional taxes levied "upon a sale" and franchise taxes "measured by" gross receipts realized from a sale was well recognized when Sections 3(C) and 13 were adopted. Franchise taxes had long been a central part of Ohio's system of taxation, and this Court had repeatedly acknowledged the distinction between a tax "measured by" and a tax "upon" a transaction. See, e.g., *East Ohio Gas*, 26 Ohio St. 3d at 66-67 (even though annual gross receipts are used to measure a public utility's privilege of doing business in Ohio for purposes of a public utilities excise tax, "the tax is not imposed on gross receipts as they are received"); *Wheeling Steel Corp. v. Porterfield* (1970), 21 Ohio St. 2d 59, 61 (distinguishing the Ohio franchise tax, a privilege tax, from taxes on income, sales, or receipts); *Aluminum Co. of America v. Evatt* (1942), 140 Ohio St. 385, 407 ("[N]o tax is being laid upon sales" when a franchise tax is levied); *S. Gum Co. v. Laylin* (1902), 66 Ohio St. 578, 596 (distinguishing a tax paid "upon . . . property" and a tax "measured by the amount" of property, and finding no double taxation); *Western Union Telegraph Co. v. Mayer* (1876), 28 Ohio St. 521, 530-31 (states can both tax the property of corporate estates and exact a tax "proportioned . . . to the value of the privileges granted" to a corporation). A franchise tax is "not a tax on . . . sales. It is laid upon the privilege of doing business in Ohio . . . *measured by* the value of Ohio business done in proportion to the total business done." *Wheeling Steel Corp.*, 21 Ohio St. 2d at 60-61 (emphasis added). As such, a franchise tax is not levied on any transaction—so a franchise tax cannot in any way be levied "upon the sale or purchase of food."

The Grocers ignore the critical phrase "upon the sale or purchase," and they instead muddle the plain meaning and intent of Sections 3(C) and 13 by asserting broadly, but vaguely, that food is unique and thus should not be taxed. The Grocers support this position with three arguments, but none is persuasive. First, the Grocers argue that "Section 3(C) does not exclude franchise taxes from its prohibiting language simply because the term 'franchise taxes' is separately listed in Section 3(C)'s introductory clause." Grocers Br. at 10. The Grocers' argument necessarily disregards the basic interpretive principle that "all words [in a provision] should have effect and no part should be disregarded," *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, ¶ 19, as well as the courts' obligation to construe tax exemptions narrowly, *State ex rel. Keller v. Forney* (1923), 108 Ohio St. 463, 467. In his opening brief, the Commissioner relied on *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513, 1994-Ohio-496, for the proposition that franchise taxes cannot be a subset of the term "excise taxes" for purposes of Section 3(C), because reading "excise taxes" in Section 3(C) to include "franchise taxes" would render the term "franchise taxes" useless in that provision.[1]

The circumstances of Section 3(C)'s adoption do not, as the Grocers would have it, undermine *Maurer*'s support for this textual reading. The parties agree that Section 3(C)'s authorizing and prohibiting clauses were first adopted as separate provisions—Article XII, Sections 10 and 12, respectively—and later combined, and that the meaning of original Sections 10 and 12 did not change when the two were merged into Section 3(C). The parties' disagreement, then, centers on the question of Section 12's original meaning. When Section 12 was enacted, Section 10 plainly gave the General Assembly authority to levy excise *and* franchise taxes. Because these "provisions of the Constitution address the same subject matter, they must be read *in pari materia* and harmonized if possible." *Toledo Edison Co. v. City of Bryan*, 90 Ohio St. 3d 288, 292, 2000-Ohio-169. Moreover, this Court narrowly construes

[1] The Grocers also maintain that *Maurer* is irrelevant because Ohio courts have long recognized that franchise taxes are a type of excise tax. But *Maurer* did not turn on prior definitions of the terms at issue. The Commissioner's argument is that, regardless of how "excise tax" is normally defined, it cannot be the case that "excise tax" in Section 3(C) includes all franchise taxes.

Section 3(C)'s prohibitions, in accord with the principle that constitutional exemptions to the General Assembly's tax authority are strictly construed. See *Ilersich v. Schneider* (1964), 176 Ohio St. 255; *Cameron Coca-Cola Bottling Co. v. Tracy* (July 28, 1993), Franklin Co. C.P. 93CVH02-729.[2] Accordingly, Section 3(C)'s prohibition clause would only negate the General Assembly's authority to levy excise and franchise taxes if it prohibited *both* excise *and* franchise taxes upon food sales and purchases. But because franchise taxes by their nature cannot be levied "upon" transactions, but are levied upon business privilege, no such prohibition can logically be applied without also eliminating or re-writing the "upon the sale" clause.

Second, the Grocers erroneously claim that Section 13's express prohibition of "sales or other excise taxes" proves that "Ohio's constitutional prohibitions are not intended to be limited to 'sales taxes' on food." Grocers Br. at 9. Section 13 refers to "other excise taxes" only to ensure that the General Assembly could not avoid the constitutional prohibition of wholesale taxes on food sales simply by enacting a sales tax by another name. *Bank One Dayton, N.A. v. Limbach* (1990), 50 Ohio St. 3d 163, 166 ("The nature of a tax must be determined by its operation, rather than by its particular descriptive language."). This constitutional provision did nothing more than "expand the current restrictions of Section 3(C)" from retail food sales and purchases to wholesale food sales and purchases. Ohio Sec'y of State, State Issue 4 Certified Ballot Language (Nov. 8, 1994) (copy certified Feb. 27, 2009) (Ex. 12, Appx. at A-112) (quoting Argument for State Issue 4). Accordingly, Section 3(C)—which prohibits only certain *transactional* taxes—informs the meaning of Section 13, but Section 13 does not inform the

[2] The Grocers make the unremarkable observation that nothing in *Ilersich*, 176 Ohio St. 255, or *Cameron Coca-Cola Bottling Co., supra,* excludes franchise taxes from the definition of excise taxes in Section 3(C). But the Commissioner's opening brief cited *Ilersich* and *Cameron Coca-Cola Bottling Co.* as examples of cases where this Court has rejected broad constructions of Section 3(C)'s prescriptive language. See Tax Commissioner's Brief ("Comm'r. Br.") at 20-21.

meaning of Section 3(C). See Ohio Const. art. XII, § 13 ("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)."). Even if Section 13's reference to "other excise taxes" includes some other type of excise tax in its prohibition, however, the phrase "upon the sale or purchase of food" limits the prohibition's scope to transactional taxes—not franchise taxes like the CAT—for the above reasons.

Third, the Grocers do not advance their cause by observing that the drafters of Sections 3(C) and 13 could have used the word "sales" or "transactional" if they meant to narrow the scope of the prohibition. Grocers Br. at 8-9. The Grocers object that the drafters did not use the word "sales" or "transactional" as adjectives *before* the word tax, ignoring the fact that the phrase "tax . . . upon the sale or purchase" uses the word "sale," and "sale or purchase" essentially means "transaction." Thus, the Grocers' objection is not that the drafters did not use such words, for the drafters *did*; instead, the Grocers seem to insist that the drafters needed to use the same term twice to make it clear. But repetition is not the same as clarity, and although some state constitutions that the Grocers cite took a redundant approach, Ohio was not required to repeat itself to reach the same result. See, e.g., California Const. art. XII, § 34 (barring "sales or use tax on the sale of . . . food").

While no extra words are needed to *limit* the prohibition to transactional taxes, the drafters would have had to use different language to *expand* its scope to bar franchise taxes measured by food sales and purchases. This is true for two reasons: (1) constitutional exceptions to the General Assembly's tax authority are strictly construed; and (2) transactional taxes "upon" an item and franchise taxes "measured by" sales of an item were distinguished when Sections 3(C) and 13 were enacted. See *Lake Shore Elec. Ry. Co. v. Pub. Util. Comm.* (1926), 115 Ohio St.

311, 319. Had the drafters wished to achieve the Grocers' current goal, they would have expressly said that franchise taxes may not include food sales as a measure of the privilege of doing business. See *State ex rel. Rhodes v. Brown* (1973), 34 Ohio St. 2d 101 (narrowly construing constitutional provision limiting eligibility of gubernatorial candidates and reasoning that drafters could have copied federal constitutional language if they sought a broader limit).

2. The history of Sections 3(C) and 13 confirms that their proscriptions target only transactional taxes, not franchise taxes.

As the Grocers concede, Sections 3(C) and 13 were both "adopted in response to specific sales taxes on food." Grocers Br. at 16. The reactive posture of both amendments shows that they were intended to prohibit transactional taxes on certain food sales and purchases. When current Section 3(C) appeared on the ballot in 1936, voters understood that it would repeal the sales tax on food, enacted in 1934. The amendment's text, which prohibited the General Assembly from levying any "excise tax . . . *upon the sale or purchase of food*," Ohio Sec'y of State, Certified Ballot Language (Nov. 3, 1936) (copy certified Feb. 27, 2009) (Ex. 11, A-110), expressly tracked the 1934 law levying "an excise tax . . . on each retail sale," 115 Ohio Laws Pt. II 306. Consistent with this language, the amendment's proponents explained to voters four times in a five-paragraph ballot argument that the amendment would "repeal the *sales* tax on food." Ohio Sec'y of State, Certified Ballot Language (Nov. 3, 1936) (copy certified Feb. 27, 2009) (Ex. 11, A-110) (quoting argument of the Committee for the Amendment) (emphasis added). Opponents told voters it would eliminate "the *sales* tax on food" and urged them to vote against "the proposal to exempt food for human consumption from the *sales* tax." *Id.* (quoting argument of the Committee Against the Amendment) (emphasis added). Similarly, when Section 13 appeared on the ballot, it was intended to "expand the current restrictions of Section 3(C)" to wholesale food sales and purchases. See Ohio Sec'y of State, State Issue 4 Certified

Ballot Language (Nov. 8, 1994) (copy certified Feb. 27, 2009) (Ex. 12, Appx. at A-112) (quoting Argument for State Issue 4). A ballot argument explained, "[w]hen the constitutionality of a new wholesale soft drink tax was challenged in 1992, the court ruling [upholding the tax] opened a gaping hole in Ohio's constitution . . . . A YES vote on Issue 4 will close this loophole, and restore Ohio's constitutional prohibition on taxing food." *Id.* (referring to *Cameron Coca-Cola Bottling Co.*, *supra*, at 27).

The Grocers do not dispute this history; instead, they insist that this narrow text represents the broader principle "that Ohio's Constitution is intended to prohibit food sales from being a source of revenue for the state." Grocers Br. at 17. By the Grocers' logic, the adoption of Section 3(C), Section 13, and the 1976 technical amendment reflected the electorate's decision to prohibit Ohio from relying on food sales as a source of *any* state revenue, even indirectly. But that argument ignores what the Ohio voters *did*: They prohibited transactional taxes upon food sales and purchases. It does not follow that the electorate also intended to exempt the contributions that food sales make to a business's receipts when measuring a business's receipts for purposes of assessing a franchise tax on the privilege of doing business.

B. The CAT operates as a franchise tax, and it does not become a transactional tax merely because it uses gross receipts as a measure of the privilege taxed.

Even if the constitutional text's use of the term "excise" initially reaches franchise taxes like the CAT, the CAT's operation shows that it is not a tax "upon" food sales or purchases. First, the CAT's operation should be analyzed by looking at the tax's legal incidence, not at an economist's formulae about indirect effects. Second, the Court's well-established "measuring-stick" principle broadly rejects the Grocers' simplistic claim that a tax "'measured by' gross receipts is a tax on such gross receipts." Grocers Br. at 2. The Grocers offer no persuasive distinction between this case and the many cases applying the measuring-stick principle. Indeed, the Court's universal application of the principle in so many contexts undercuts the Grocers' attempt to cabin the principle to the particulars of every case but this one. Finally, the CAT's operational details confirm that it functions as a franchise tax, not a sales tax, in its legal incidence.

1. The CAT's operation is assessed by the legal incidence of how the tax is assessed, not by economists' formulae about indirect effects.

The Grocers' argument about the CAT's operation relies heavily on a false dichotomy between (1) relying upon mere "labels," which they inaccurately accuse the Tax Commissioner of espousing, and (2) examining how the CAT "operates substantively" by indulging an economist's formulae for economic incidence analysis. This dichotomy is false because everyone agrees that the Court should look to actual operation, not mere labels. The real dispute is whether to examine the CAT's operation as a matter of *legal incidence* or *economic incidence.* Legal incidence involves how the statute formally imposes the tax: who pays, and how liability is measured. Economic incidence analysis, by contrast, "looks beyond" legal incidence and seeks to calculate who "really" pays a tax—that is, whether businesses absorb the cost or pass it on, whether to customers or others, and the relative share each party bears. On that score, the Court has always analyzed legal incidence, not economic incidence, and the Grocers offer no sound reason to inject instability into the Court's tax jurisprudence by changing that approach.

As an initial matter, the Grocers accuse the Commissioner of valuing labels over substance, but the Commissioner has never suggested that labels control or that substance does not matter.[3]

[3] While the Grocers pledge fealty to substance rather than labels, they rely on mere labeling in arguing that the CAT must be viewed as a sales tax because New Mexico's and North Carolina's "gross receipts" taxes have been held to be sales taxes. See Grocers Br. at 23 (citing *United States v. New Mexico* (1982), 455 U.S. 720, and *DirecTV, Inc. v. Tolson* (E.D.N.C. 2007), 498 F. Supp. 2d 784. New Mexico and North Carolina use the label "gross receipts tax" for taxes that plainly operate as sales taxes; each has features just like Ohio's sales tax and unlike the CAT.

To the contrary, the Commissioner discussed the CAT's operational details for several pages, Br. at 31-35; compared the CAT's operation to taxes at issue in the Court's precedents, *id.* at 35-42; and critiqued the appeals court's analysis of the "tax's operational character," *id.* at 43. The parties agree, then, that a substantive analysis is required. The question is simply how the operational substance should be evaluated—by the Grocers' economic-incidence approach, or by the legal-incidence approach long established by this Court's decisions.

First, the Court should adhere to legal-incidence analysis because it is dictated by the Court's prior decisions. For example, in *Bank One Dayton,* the Court cited approvingly the United States Supreme Court's decision in *Werner Machine Co. v. Dir. of Div. of Taxation* (1956), 350 U.S. 492, which refused to treat a franchise tax as a property tax simply because the tax measured the value of certain property that could not be taxed directly. 50 Ohio St. 3d at 167. The *Werner* Court acknowledged that it did so "even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property." *Id.* (citing *Werner,* 350 U.S. at 494). This Court, following *Werner,* did not ask whether economists would describe the Ohio tax at issue as imposing an indirect burden on the property at issue. In fact, the Commissioner is aware of no case, nor have the Grocers cited one, in which this Court has asked whether a tax was "passed on" to another person or whether a tax imposed burdens derivatively on other income or property or transactions beyond the one directly taxed.

Second, the difference between legal incidence and economic incidence is not merely academic; all agree that the two are different things. In fact, the Grocers' expert economist, Dr. Lawson, preceded his economic analysis with repeated caveats about the difference between economic incidence and legal incidence. See Expert Report of Dr. Lawson, *The Economics of the Commercial Activities Tax* ("Lawson Report"), at 2, Second Supp. at SS-13-14. In his words, "[f]or the purposes of economic incidence[,] legal incidence does not matter." *Id.* It follows that, for purposes of legal incidence—the analysis this Court uses—economic incidence does not matter.

Finally, the Court should continue to focus on legal incidence because analyzing economic incidence is unworkable. The Court has long examined statutes to determine, as a matter of law, how the statute operates. But economic incidence turns every case into a battle of experts that calls on the courts to assess whose mathematical model is the better one. That approach would make rules of law turn on matters of degree, not of kind, such as whether some disputed effect is strong enough to trigger the relevant rule of law. And worse, even after this Court or another court resolved an issue on such grounds, the result would be unstable, because the results of such formulae evolve over time as circumstances change.[4]

In sum, the Court should indeed look past "labels" and examine the CAT's operation, but it should examine that operation with traditional legal analysis, and it should not open Ohio law up to the uncertainty of economic-incidence analysis.

2. The Court's "measuring-stick" cases universally hold that a franchise tax's measurement may include a factor without amounting to a tax *upon* that factor.

The Grocers insist that "[c]ommon sense and logic tells us that a tax 'measured by' food sales is a tax upon the sale and purchase of food," but that simplistic equation runs contrary to the many cases in which the Court has rejected it, explaining instead that including some factor

[4] In fact, this case is a textbook example of how the economic-incidence approach is both hard to apply and unstable. The Grocers' own expert said all business taxes, not just the CAT, are passed on to "either consumers, in the form of higher prices; employees, in the form of lower wages; suppliers, in the form of lower prices for their goods and services; or owners, in the form of lower profits." Lawson Report at 2, SS-13-14. Thus, if the offensive aspect of the CAT is that it is "passed on" to consumers, the Court would need to resolve just how much is passed on to consumers, as no violation could occur, even under the Grocers' general theory, if the costs were borne mostly or wholly by employees, suppliers, and shareholders. And regardless of which side won, the other side could come back with new numbers when times change.

in measuring tax liability is not the same as taxing that factor. E.g., *Mut. Holding Co.*, 71 Ohio St. 3d at 60 ("Measuring tax liability in terms of net worth does not convert a franchise tax into a property tax. R.C. 5725.18 is a franchise tax measured by net worth, not a tax on net worth" (citations omitted).); *Bank One Dayton*, 50 Ohio St. 3d at 167 (noting validity of "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"); *East Ohio Gas*, 26 Ohio St. 3d at 67; *Aluminum Co. of Am.*, 140 Ohio St. at 395 ("The 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.*, 66 Ohio St. at 596 (franchise tax measured by subscribed and issued outstanding capital stock does not make the tax one imposed on personal property).

The Grocers seek to distinguish these cases, and to avoid the application of this measuring-stick principle, by simply noting that none of those cases involve this exact constitutional provision or this exact tax. But the Grocers' argument ignores how consistently the Court has treated the principle as a universal one, not tied to a particular provision. In all of the cases that the Commissioner cited for this principle, the common issue was whether to characterize a tax measured by a factor as a tax "upon" that factor. The context in which the question arose made no difference to the general principle that applied, for in each case the result would have been different if the Court had accepted, rather than rejected, the Grocers' view that "measuring a factor is the same as taxing that factor."

For example, in *East Ohio Gas,* the issue may have involved the retroactivity clause rather than food sales, but if the Court had held that the tax on utilities' gross receipts was "actually" a tax "upon" the underlying sales that generated those receipts, the outcome would have changed. The tax-rate hike at issue would have been unconstitutionally retroactive, because the underlying sales occurred largely *before* the new rate was enacted, whereas the tallying of total receipts occurred *after* the enactment. Similarly, in *Western Union Telegraph,* if the tax on gross receipts were considered the "same as" a tax on the underlying telegram sales that generated the receipts, the tax would have been unconstitutional under then-controlling Commerce Clause doctrine. See Comm'r Br. at 40. No matter the details, these cases turned on the measuring-stick principle: the *East Ohio Gas* Court called it "the critical legal distinction" that resolved the case. 26 Ohio St. 3d at 67.

The Court further confirmed the universality of the principle in *Bank One Dayton* by relying on *East Ohio Gas* to hold that including federal bonds in a measurement did not amount to a tax "upon" those bonds. See *Bank One Dayton,* 50 Ohio St. 3d at 167 (citing *East Ohio Gas,* 26 Ohio St. 3d. at 67). The Grocers' description of *Bank One Dayton* as involving "federal statutory interpretation," Grocers Br. at 29, as opposed to the Ohio constitutional issue here, *id.* at 28, does not change the fact that the legal question is the same. In *Bank One Dayton,* the federal statute forbade States from imposing taxes "upon" federal bonds. Here, Ohio's Constitution forbids a tax "upon" sales of food. In both cases, Ohio taxes the privilege of doing business, and in both it measures the value of that privilege by assessing some result that is derived from a "basket" of other items—in *Bank One Dayton,* net worth; here, gross receipts. In both cases, the taxpayer objected that the value connected with a nontaxable item could not be included in the basket. The taxpayer in *Bank One Dayton* lost, however, because including an item in a measurement is not the same as taxing that item. The same should hold true here.

Finally, the Court has been down this road before, and it briefly experimented with adopting the Grocers' approach—but it quickly returned to the better path that it has taken for over a century. In *Wrenn Paper Co. v. Glander, Tax Commr.* (1952), 156 Ohio St. 583, the Court jettisoned the measuring-stick principle and held that nontaxable securities could not be included in a measurement of net worth for a franchise tax. But in *Fifth Third Union Trust Co. v. Peck* (1954), 161 Ohio St. 169, the Court explained that "[a]pplication of the principle announced in the *Wrenn Paper Co.* case will result in absurd situations," *id.* at 175, and it restored the measuring-stick principle, holding that the "tax levied . . . is a franchise tax based on the value of the capital stock and is not a tax on the securities as such," *id.* at 172. The Court took the right approach by correcting course in *Fifth Third Union Trust*, and the Court should not repeat a mistake that would soon require another correction.

3. The CAT operates as a franchise tax on the privilege of doing business, not as a tax upon the sale or purchase of food.

In light of the measuring-stick principle and the rule that the CAT's operational character must be assessed by legal incidence rather than economic effects, little is left of the Grocers' claim that the CAT can be characterized as a tax "upon" the sale or purchase of food. Even the Grocers' smaller points about the CAT, however, are mistaken, and some warrant correction.

First, the Grocers do not adequately respond to the Commissioner's explanation of the CAT's many aspects, such as business-based credits, that show it is a tax "upon" businesses for the privilege of doing business, not a transactional tax "upon" sales or purchases. The Grocers make the unobjectionable point that an "income tax is no less an income tax" because some income is excluded, that a property tax is no less a property tax because some property is excluded from the base, and that a sales tax is no less a sales tax because some sales are exempt. Grocers Br. at 27. But that parallel construction, while true, is beside the point, for it attempts to insert a square peg into a round hole. It is not the mere presence of *any* credits that shows that the CAT is a privilege-of-doing-business tax as opposed to a sales tax. The point is the credits' *nature*; all are the type that make sense only in the business-tax sense, and none can be reconciled with a transactional tax. As the Commissioner explained, the CAT's jobs-creation tax credit is not only a continuation of a credit against the corporate franchise tax, but also, it cannot be credited against a sales tax, as the credit is tied to a business, not to a particular sale. See Comm'r. Br. at 34. The Grocers cannot point to any credits or exemptions that similarly cross categories of taxes, such as excluding certain sales from a *property* tax, or excluding the value of certain property from the *income* tax, and so on. Instead, the business-based credits in the CAT show that it is a business-based tax to begin with.

Second, the Grocers insist that the CAT cannot be a true franchise tax because, they say, a franchise tax can only be levied for the privilege of doing business in the corporate form, and the CAT taxes non-corporate entities—but the Grocers' premise is invalid. Ohio may have chosen, for many years, to focus its *general* corporate franchise tax on corporations, but that does not mean that it is required to do so. Thus, the cases describing the privilege as tied to corporate status are merely describing the statutory choice as it existed; that link is neither a constitutional command nor mandated by any other rule about what is inherent in a "franchise" tax. Moreover, Ohio has long imposed industry-specific franchise taxes on insurance companies, financial institutions, and utilities, regardless of whether those businesses used non-corporate forms such as mutual holding companies and partnerships. See R.C. 5725.18 et seq. (domestic insurance companies); R.C. Chapter 5729 (foreign insurers); R.C. Chapter 5727 (public utilities).

Third, even if the Court accepts, to some degree, the Grocers' claim that the CAT is not a "true" franchise tax, that claim does not establish that the CAT is a transactional sales tax. That is, even if the term "franchise tax" is somehow restricted to "corporate" status, the CAT is still a "business privilege" tax.[5] In any event, it does not fall within the constitutional bans on imposing tax "upon the sale or purchase" of food unless the CAT amounts to such a "tax upon sales." Here, the Grocers' conflicted concession—that the CAT is, as a matter of "fact . . . not a sales tax"—should be fatal, as it is hard to see the difference between a sales tax and a tax "upon sales." But even if one ignores that concession, the Grocers have not shown that the CAT operates as a tax "upon" sales.

Fourth, the Grocers mistakenly insist that the CAT becomes a sales tax merely because increased sales lead to increased CAT liability, and they suggest that this feature distinguishes it from the effect that sales had under the corporate franchise tax. The corporate franchise tax was based on net income or net worth, and the Grocers claim boldly that "the amount of sales *does not correlate in any way* to net income or net worth." Grocers Br. at 18 (emphasis added). While no one disputes that some sales might generate little or no income or even occur at a loss, it is a stretch to say that sales never correlate "in any way" to income. As a general rule, increased sales have always led to increased business taxes, and nothing is new about that.

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[5] The Grocers' reliance on *United Airlines v. Porterfield* (1971), 28 Ohio St. 2d 97, is another example of the Grocers' misplaced focus on the term "franchise" and corporate status. The relevant distinction is between business-privilege taxes and transactional taxes, regardless of what the former are titled. See Grocers Br. at 15 (citing *United Airlines*, 28 Ohio St. 2d at 105). In *United Airlines,* the Court noted that the airline tax at issue was imposed on the *privilege of being in the airline business, id.* at syllabus ¶ 2, regardless of business form, while the corporate franchise tax was specifically for the privilege of doing business in the corporate form, *id.* at 105, so the two were not duplicative. First, the Court said that the airline tax was not "*another franchise tax* on the right to do business in Ohio in the corporate form," *id.* (emphasis added), i.e., that it was a franchise tax but not a corporate one. The Court never said, as the Grocers claim, that the airline tax was "not a franchise tax." Second, and more important, even if the broader label of business-privilege taxes (rather than franchise taxes) applies to all non-corporate franchise taxes, they are not taxes "upon" sales, whether of airline tickets or food.

Finally, the Grocers' attempt to describe their claim as an "as-applied" challenge, and their assertion that the CAT operates as a sales tax in certain cases, breaks down in application. The Grocers seem to recognize that the CAT is not levied "upon food sales" to the extent it: (1) includes receipts generated by non-food sales, Grocers Br. at 3; (2) excludes the first million dollars' worth of receipts, *id.* at 22; (3) is offset by credits that are business-based, not transaction-based, *id.* at 27; and excludes receipts generated between affiliated taxpayers, *id.* at 27-28. But the Grocers paper over those differences by noting that the CAT is "just like" a sales tax *as to intervals in which no variances apply*. But that leads to the untenable conclusion that the CAT "is" a franchise tax "as applied to" receipts generated by some sales, but then "is" a sales tax for other receipts, and then reverts to being a franchise tax for subtracting credits. That type of shifting characterization does not work here, nor does it work in any other area of tax law. For example, *Bank One Dayton* held that nontaxable federal bonds could be included in measuring a bank's net worth for franchise tax purposes. But no one has ever suggested that if a bank owned *solely* such federal bonds, so that its net worth was based *solely* on a nontaxable item, it could then claim that the result would be different "as applied" to them.

For all these reasons, the CAT is not a tax upon sales, and the Grocers' claim fails.

C. The Grocers' view leads to adverse consequences.

Finally, although the Grocers claim that the Commissioner's view will lead to disastrous results, the reverse is true. While the Grocers' claimed harms are illusory, adopting the Grocers' view would introduce untenable legal principles and throw Ohio's tax jurisprudence and administration into doubt.

Overall, the Grocers' denial of harms stems from their insistence that a carve-out for them will be one small departure. In truth, however, the Grocers' desired result cannot be obtained without adopting a legal principle that has other adverse consequences. For example, the

Grocers' arbitrary distinction of the measuring-stick principle cannot be limited to a one-time use. If the Court rejects that principle, it will upend settled cases. Even if the Court were to adopt the Grocers' implicit suggestion to carve out a one-time exception to the measuring-stick rule, while re-affirming the validity of past cases, that ad hoc approach would leave taxpayers and the State wondering whether future cases will also qualify for a "one-time" exemption from principle.

Similarly, if the Court were to accept the Grocers' reliance on economic analysis to show that a tax on businesses is "just like" a sales tax because businesses often pass along the costs, that approach, too, would upend settled principles of tax jurisprudence, as explained above. Moreover, accepting the Grocers' characterization of the CAT as a "sales tax" would sow uncertainty under the body of federal law that applies "nexus" concerns differently for sales taxes versus franchise taxes. See Grocers Br. at 33 (discussing *Quill v. North Dakota* (1992), 504 U.S. 298). To be sure, a ruling here would not decisively answer *Quill* questions, but because these principles of tax law are connected, the *Quill* issues undoubtedly would be implicated by adopting the Grocers' approach.

Finally, the Grocers' claim of countervailing harm does not hold up. The Grocers argue that if the CAT is valid, the State could impose a "true" sales tax on food by merely labeling it a tax on the privilege of consumption, or a use tax, or a similar formula. That threat is hollow for several reasons. First, as explained above, the Commissioner has never argued that labels alone may trump any substantive inquiry. Second, the plain text of the constitutional provisions extends to any excise tax upon the "sale or purchase," and the use tax—unlike franchise taxes on businesses—has long been recognized as complementary to the sales tax and derived from the purchase of an item. Finally, nothing about upholding the CAT today prevents the Court from later drawing a line if the General Assembly adopts a tax that, unlike the CAT, truly is a sales or purchase tax, that is, a tax upon the sale or purchase of food.

The balance, then, tilts heavily against the Grocers. The harm that results from their approach—in the form of immediate revenue losses and doctrinal unbalance—far outweighs the speculative effects that the Grocers posit.

CONCLUSION

For the reasons above, the Court should reverse the appeals court's decision and hold that the common pleas court properly granted summary judgment to the Tax Commissioner, because applying the CAT to grocers or any food sellers does not violate Article XII, Sections 3(C) and 13 of the Ohio Constitution.

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