IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF AMICUS CURIAE OHIO BUSINESS ROUNDTABLE IN SUPPORT OF APPELLANT WILLIAM W. WILKINS

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FILED
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TABLE OF CONTENTS

Page

Argument 1

Introduction 1

I. Sections 3 and 13 of Article XII of the Ohio Constitution do not prohibit a general excise tax on the privilege of doing business in this state from including gross receipts from sales of food, along with gross receipts from a wide array of other commercial activity, in the base by which the excise tax is measured 1

A. Sections 3 and 13 of Article XII prohibit only transactional excise taxes on sales or purchases of food for human consumption 1

1. The amendments expressly limit their prohibition to transactional excise taxes 2

2. The amendments include the language "or purchases" to assure that the use tax was covered by their prohibition 3

3. The amendments include the language "or other excise taxes" to assure that other transactional excise taxes, like the beverage tax, were covered by their prohibition 5

4. To accept the Grocers' argument, the Court would have to ignore the language used in the amendments or add language not used 6

B. The history of the adoption of Sections 3 and 13 of Article XII does not support the Grocers' argument that the intent was to prohibit excise taxes on the privilege of doing business from including receipts from sales of food for human consumption in the base by which the tax is measured. To the contrary, the history compels the conclusion that those amendments were intended to prohibit exactly what the language used plainly states – excise taxes upon retail and wholesale sales or purchases of food, i.e., transactional excise taxes. 8

II. The CAT is not an excise tax on sales or purchases; it is an excise tax on the privilege of doing business in Ohio 12

A. This Court's decisions distinguishing between excise taxes on an item and excise taxes on the privilege of doing business that include the item in the measurement of the privilege are directly on point 13

B. By its operation, the CAT is a tax on the privilege of doing business, not a transactional tax on sales or purchases 16

C. The economic incidence of the tax is irrelevant 19

Conclusion 20

Appendix

H.B. No. 590 (Use Tax) ..... Appx. 1

R.C. 5741.02 ..... Appx. 9

R.C. 5741.04 ..... Appx. 13

TABLE OF AUTHORITIES

Cases Page(s)

Bank One Dayton, N.A. v. Limbach (1990), 50 Ohio St.3d 163 ..... 15, 19

Bellemar Parts Industries, Inc. v. Tracy (2000), 88 Ohio St.3d 351 7

Cameron Coca-Cola Bottling Co. v. Tracy (July 28, 1993),
Franklin C.P. No. 93CVH02-729 12

Castleberry v. Evatt (1946), 147 Ohio St. 30 11

DirecTV, Inc. v. Tolson (E.D.N.C. 2007), 498 F.Supp.2d 784 18

East Ohio Gas Co. v. Limbach (1986), 26 Ohio St.3d 63 ..... 14, 15

Express Co. v. State (1896), 55 Ohio St. 69 ..... 8, 14

Ford Motor Company v. Seattle (2007), 160 Wn.2d 32, 156 P.3d 185 14

Gurley v. Rhoden (1975), 421 U.S. 200 19

Key Serv. Corp. v. Zaino (2002), 95 Ohio St.3d 11 7

Maine v. Grand Trunk Ry. Co. of Canada (1891), 142 U.S. 217 ..... 8, 14

Rocky River v. State Emp. Relations Bd. (1989), 43 Ohio St.3d 1 10

Short Brothers (USA), Inc. v. Arlington County (1992), 244 Va. 520,
423 S.E.2d 172 14

State ex rel. Colvin v. Brunner, 120 Ohio St.3d 110 6

United Air Lines v. Porterfield (1971), 28 Ohio St.2d 97 18

United States v. New Mexico (1982), 455 U.S. 720 ..... 18, 19

Werner Machine Co. v. Dir. of Div. of Taxation (1956), 350 U.S. 492 19

Western Union Telegraph Co. v. Mayer (1876), 28 Ohio St. 521 ..... 13, 14

Ohio Constitutional Provisions

Section 28, Article II 14

Section 3, Article XII ..... passim

Section 13, Article XII ..... passim

Statutes

Ohio

R.C. 5739.02 ..... 5, 18

R.C. 5739.025 5

R.C. 5739.025(A)(1) 5

R.C. 5739.025(E) 5

R.C. 5739.03(A) 4

R.C. 5741.02 5

R.C. 5741.02(C) 5

R.C. 5741.02(E) 5

R.C. 5741.02(E)(3) 5

R.C. 5741.02(F) 5

R.C. 5741.04 5

R.C. 5751.01(E)(1) 16

R.C. 5751.02 12

R.C. 5751.03(B) 17

R.C. 5753.02 6

G.C. 5546-2 3

G.C. 5546-25 4

G.C. 5546-26 4

G.C. 5546-28 4

G.C. 5546-29 4

Other Authorities

H.B. 134, 115 Ohio Laws, Part II, 306 3

H.B. 590, 116 Ohio Laws, Part II, 101 3

Argument

Introduction

The Ohio Grocers Association ("Grocers") and their amici base their attack against the application of the Commercial Activity Tax ("CAT") to food retailers and wholesalers on two premises. First, they argue that because the CAT is an excise tax, which no one disputes, Sections 3 and 13 of Article XII of the Ohio Constitution prohibit the inclusion of gross receipts from retail and wholesale sales of food in the base by which a person's CAT liability is measured. Second, they argue that even if Sections 3 and 13 of Article XII prohibit only transactional excise taxes, the CAT is a transactional tax. Both of these premises are false. They are based on a fundamental misreading of Sections 3 and 13, unfounded statements of the intent of the adopters, and a failure to heed this Court's and the United States Supreme Court's clear precedents recognizing the basic distinction between a tax imposed on receipts, sales, income, or property, on the one hand, and a business privilege tax measured by receipts, sales, income, or property, on the other. The argument that the CAT is a transactional tax is also based on a misunderstanding or mischaracterization of the operation of the sales and use tax and the CAT.

I. Sections 3 and 13 of Article XII of the Ohio Constitution do not prohibit a general excise tax on the privilege of doing business in this state from including gross receipts from sales of food in the base by which the excise tax is measured.

A. Sections 3 and 13 of Article XII prohibit only transactional excise taxes on sales or purchases of food for human consumption.

The Grocers and their amici assert that the prohibitions of Sections 3 and 13 of Article XII are not limited to sales taxes or transactional taxes. Grocers merit brief at 8; Ohio Restaurant Association ("ORA") amicus brief at 3. In fact, ORA's amicus brief (at 2) goes so far as to state that "[a]ll that matters is that the CAT is an excise tax." These assertions cannot withstand a reading of the amendments' clear and unambiguous language.

The Grocers and their amici first misstate the state's argument as asserting that Sections 3 and 13 of Article XII prohibit only a traditional sales tax on food, and nothing more, and then argue that if that was the intent the drafters would have restricted the language to prohibit only "sales taxes." Grocers merit brief at 8-9; ORA amicus brief at 2. The state's argument is that Sections 3 and 13 of Article XII prohibit only transactional excise taxes on sales or purchases of food, not business privilege excise taxes measured by gross receipts from commercial activity, including sales of food. When the language of the constitutional amendments is read as written, that is precisely what the drafters stated.

1. The amendments expressly limit their prohibition to transactional excise taxes.

Section 3(C), Article XII of the Ohio Constitution states that "no excise tax shall be levied or collected **upon the sale or purchase of food** for human consumption off the premises where sold." Section 13, Article XII of the Ohio Constitution provides in relevant part 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[.]" No clearer language could have been used to limit the proscription to transactional excise taxes. An excise tax upon a sale or purchase is the classic transactional excise tax.

The Grocers' reliance on the fact that Section 3 does not use the term "sales tax" – and includes the phrase "or purchases" – as indicating that the intent was not to restrict the prohibition to transactional taxes, like the sales tax and the use tax, does not advance their argument. Nor does the fact that Section 13 uses the phrase "sales or other excise taxes." When the language of these amendments is compared to the language of the sales and use tax statutes, and the former beverage tax, it is readily apparent that the intent was to prohibit the sales tax, the

use tax, and other transactional excise taxes on the sale or purchase of food for human consumption.

As the Grocers acknowledge, Section 3, Article XII was a reaction to the enactment of the sales tax in 1934, by H.B. 134, 115 Ohio Laws, Part II, 306, and its application to sales of food. Grocers merit brief at 1, 16. It was also a reaction to the application of the complementary use tax, which was enacted in 1935, by H.B. 590, 116 Ohio Laws, Part II, 101, to purchases of food. The sales tax was levied by G.C. 5546-2. That section stated that "an excise tax is hereby levied on each retail sale in this state of tangible personal property * * *." That is the language of the sales tax - and, that is the language that the drafters of Section 3 used. The language tracks almost exactly. The fact that Section 3 does not use "sales tax" is because that is not the language used in the sales tax statute.

2. The amendments include the language "or purchases" to assure that the use tax was covered by their prohibition.

The Grocers view the inclusion of the language "or purchase" in Sections 3 and 13 of Article XII as evidencing that the drafters intended to prohibit more than just transactional excise taxes. How the inclusion of this language supports the argument that the amendments were intended to prohibit not only transactional excise taxes, but also excise taxes on the privilege of doing business, is a mystery. A purchase is unquestionably a transaction; it is simply the other side of the sale transaction. The simple reason for the inclusion of the "or purchase" language in Sections 3 and 13 was to make clear that imposition of the use tax, a transactional excise tax enacted to complement the sales tax, on purchases of food was also prohibited.[1]

[1] ORA's reliance on the inclusion of "purchase" is based on an erroneous conception of the sales tax. ORA's statement that a tax on the purchase of food would be a sales tax while a tax on the sale of food would be a tax imposed on the seller based on gross receipts is simply wrong. The Ohio sales tax is levied on sales of goods and certain services. It is a tax on the consumer. R.C.

The language in the use tax sections in the former General Code and in R.C. Chapter 5741 establishes that the use tax is a transactional excise tax on the purchase of goods (and of services under the current law). At the time Section 3, Article XII was adopted, the use tax was levied by G.C. 5546-26. That code provision stated that "an excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property purchased * * *." The provision in that section setting the tax rate further shows that the use tax was levied on purchase transactions. The first paragraph of the rate provision stated that the tax was "[o]ne cent, if the price for which such property has been purchased is forty cents or less[.]" The section further provided that "[e]ach consumer, storing, using, or otherwise consuming in this state tangible personal property purchased for such purpose or purposes, shall be liable for the tax imposed by this act."

The definition section for the use tax, G.C. 5546-25, contained definitions for "seller," "consumer," "purchase" and "price," all of which are transactional excise tax terms. "Seller" was defined as "the person from whom a purchase is made," and "consumer" is "the person who shall have purchased tangible personal property for storage, use, or other consumption in this state." "Price" is defined as the aggregate value in money * * * paid * * * by a consumer to a seller in the consummation and complete performance of the transaction by which tangible personal property shall have been purchased * * *."

G.C. 5546-28 required the seller to collect and remit the use tax to the state. The seller was required to collect the tax at the time the price of the purchase was paid or "at or prior to the delivery of possession of the thing sold to the consumer." G.C. 5546-29 required the consumer,

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5739.03(A). The seller's obligation is to collect the tax from the consumer. A consumer who does not pay the sales tax to the seller must pay the Ohio use tax on the purchase of the item.

if the tax was not paid to the seller, to file returns "showing the price of each such purchase" and pay the tax due on "the purchases covered by the return."

R.C. 5741.02 is the current statute that levies the use tax. Division (A)(1) of that section provides that the tax shall be collected as provided in R.C. 5739.025, which is in the sales tax chapter. R.C. 5739.025(A)(1) provides that the taxes levied by R.C. 5739.02 and 5741.02 are to be collected in the same manner, i.e., on each transaction. R.C. 5739.025(E) requires the vendor to collect the tax (the sales tax or the use tax, whichever is applicable) on each sale.

R.C. 5741.02(E) provides that a consumer who claims that the transaction is exempt from the use tax must provide to the seller a certificate "specifying the reason that the transaction is not subject to the use tax[,]" and that the seller who obtains such a certificate is relieved of liability for collecting and remitting tax on any sale covered by the certificate. Pursuant to division (E)(3) of that section, the certificate is to be provided "within ninety days after the date on which the transaction is consummated." Division (F) of R.C. 5741.02 refers to the filing of a petition for reassessment contesting the assessment of use tax on transactions.

R.C. 5741.04 requires a seller to collect use tax at the time the price is paid or possession of the thing sold is delivered to the consumer. That section also requires the seller to report the transaction on the return for the period in which the transaction occurred and to remit "the amount of [use] tax applicable to the transaction."

3. The amendments include the language "or other excise taxes" to assure that other transactional excise taxes, like the beverage tax, were covered by their prohibition.

The Grocers' reliance on the use of the phrase "sales or other excise taxes" in Section 13, Article XII is similarly misplaced. The Grocers (and amicus Tyson Foods) point to that language as evidencing that Section 13 prohibits more than just transactional excise taxes. It does not. Initially, as they do throughout their merits briefs, the Grocers and their amici fail to

give effect to the words of the amendment. The language of Section 13 does not end after the above-quoted phrase. It continues by stating the type of excise taxes that are prohibited: "sales or other excise taxes" that are levied "**upon any wholesale sale or wholesale purchase** of food for human consumption." Thus, it is not all "other excise taxes" that are prohibited, only other excise taxes levied upon the wholesale sale or purchase of food for human consumption. An excise tax levied on sales and purchases is by definition a transactional excise tax.

The reason that Section 13, Article XII uses the phrase "sales or other excise taxes" should be apparent. The sales tax is one form of transactional tax. As detailed above, the use tax is also a transactional tax, as was the former beverage tax levied by former R.C. 5753.02 on the wholesale sale of containers of carbonated beverages and post-mix syrup. As the Grocers concede (Grocers merit brief at 1, 16), it was the enactment of this beverage tax that led to the adoption of Section 13. To assure that the prohibition applied to these and other potential transactional excise taxes, the language "or other excise taxes" was included.

4. To accept the Grocers' argument, the Court would have to ignore the language used in the amendments or add language not used.

The Grocers state that if the drafters of Sections 3 and 13 of Article XII had intended the prohibition to apply only to sales taxes they would have used language that so stated. While the drafters did not, for the reasons noted above, use language to limit the prohibition to sales taxes, they did use language that clearly limited the prohibition to transactional excise taxes, i.e., excise taxes upon sales or purchases. What they did not include in the amendments is any language stating that excise taxes on the privilege of doing business could not include receipts from sales of food for human consumption in the base by which the tax was measured. The Grocers are asking this Court to add that language to the constitutional provisions. This is not the province of the Court. *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, ¶ 45.

Ultimately, the Grocers' argument fails because of the explicit language in Sections 3 and 13 of Article XII that limits the prohibition to a particular type of excise tax, an excise tax on sales or purchases, i.e., a transactional excise tax. The Grocers and their amici recognize that there are many different types of excise taxes, including those imposed on the sale or purchase of goods and those imposed on the enjoyment of the privilege of doing business. See ORA amicus brief at 6. What the Grocers and their amici simply refuse to accept, however, is the fact that by their plain language Sections 3 and 13 prohibit only excise taxes on sales or purchases, and not excise taxes on the enjoyment of the privilege of doing business. The repeated statements by the Grocers that those amendments do not limit themselves to sales or other transactional excise taxes are based on nothing less than a complete failure to acknowledge the specific language that limits the prohibition to excise taxes "upon the sale or purchase of food" and "upon any wholesale sale or wholesale purchase of food." The Grocers fail to heed the very rule of construction they rely on in their brief (at 9) that words are not used in an enactment without some purpose.

The Grocers point to the fact that at the time the amendments were adopted it was understood that there were excise taxes on the privilege of doing business as well as excise taxes on sales and purchases as supporting their argument that the adopters did not intend that the prohibition be limited to excise taxes on sales or purchases. That fact establishes just the opposite. Being aware of these two different types of excise taxes, if the drafters had intended to prohibit not only excise taxes on sales or purchases of food for human consumption but also excises taxes on the privilege of doing business from considering receipts from such sales or purchases in the measurement, language so stating would have been included. *Bellemar Parts Industries, Inc. v. Tracy* (2000), 88 Ohio St. 3d 351, 355; *Key Serv. Corp. v. Zaino* (2002), 95 Ohio St.3d 11, 15. That is particularly true given the established precedent of both this Court

and the United States Supreme Court that an excise tax on the privilege of doing business that uses gross receipts as the measurement for the tax does not constitute a tax on those gross receipts. See, e.g., *Express Co. v. State* (1896), 55 Ohio St. 69; *Maine v. Grand Trunk Ry. Co. of Canada* (1891), 142 U.S. 217.

B. The history of the adoption of Sections 3 and 13 of Article XII does not support the Grocers' argument that the intent was to prohibit excise taxes on the privilege of doing business from including receipts from sales of food for human consumption in the base by which the tax is measured. To the contrary, the history compels the conclusion that those amendments were intended to prohibit exactly what the language used plainly states – excise taxes upon retail and wholesale sales or purchases of food, i.e., transactional excise taxes levied on such transactions.

The Grocers and their amici argue that the history of the adoption of Sections 3 and 13 of Article XII evidence that the adopters intended to prohibit not just transactional excise taxes on sales or purchases of food, but also all excise taxes on the privilege of doing business from considering receipts from sales or purchases of food for human consumption in their measurement base. A review of the historical material, however, directly rebuts their argument.

The Grocers concede that both of the constitutional amendments were in response to the enactment of transactional excise taxes that were levied upon the sale or purchase of food: the sales and use tax in the case of Section 3, and the beverage tax in the case of Section 13. (Grocers merit brief at 2, 16.) And the discussion in ORA's amicus brief regarding the history of the adoption of the amendments confirms that they were reactions to the enactments of these transactional excise taxes. (ORA amicus brief at 3-4.) However, ORA then proceeds to make statements that the adopters actually intended to prohibit not just transactional excise taxes, but also any other excise tax applicable to food sellers. (ORA amicus brief at 4-5.) These statements find no support in the history of the amendments.

ORA begins by overstating or misstating the historical evidence. ORA states that "time and again" Ohioans have agreed that food sales and purchases should not be taxed. (ORA amicus brief at 3.) It was actually two times. The implication by ORA that proposals to impose a sales tax on food were proposed and defeated by the voters five times between 1932 and 1934 (ORA amicus brief at 4) is misleading. As the newspaper article cited by ORA (attached to its brief at tab A) reveals, the proposals were legislative efforts to enact a general sales tax. The opposition was by retailers to a sales tax. The "proposals" were the introduction of legislation and the "defeats" were the failure of the passage of the legislation or a veto by the Governor, not by a ballot issue initiated by or submitted to the voters. It was after the enactment of the general sales tax and the complementary use tax that applied to most sales and purchases of food that the voters reacted by adopting Section 3 of Article XII to prohibit the levy of those taxes on sales or purchases of food for human consumption off the premises.

Unable to support its position that Section 3 was intended to prohibit more than what its plain language states, ORA relies on pure conjecture. Its statement that "Ohioans understood the unfairness of a food tax, in particular a 'gross-receipts tax' on food, similar to today's CAT" is not supported by the historical evidence. Nor is its statement that when the voters enacted Section 3 "they were prohibiting not just pure 'sales taxes,' but also a 'gross-receipts tax' and any other 'excise tax' applicable to food sellers" (ORA amicus brief at 4-5). ORA does not cite to any statements in the ballot language or any other historical material to support these statements. A review of the official ballot material reveals that there is no support.

ORA cites solely to one newspaper article in the New York Times (attached to its brief at tab B), and even that article does not support its statement. In fact, the article confirms that the proposed amendment was intended to prohibit the levy of the recently-enacted sales tax on sales of food. The entire article refers to the sales tax and the exemption of food sales from that tax.

As the language quoted from the article by ORA indicates, the amendment was directed at "[t]he unpopular if productive Ohio sales tax." There is no mention of "gross-receipts taxes" and certainly no reference to the inclusion of receipts from sales of food in the measurement of excise taxes on the privilege of doing business. Nor does it contain any language that even remotely supports ORA's statement that the voters understood that any food tax or tax on food sellers would be prohibited.

Even though the Grocers concede that the amendments were in direct response to the enactment of the sales and use tax and the beverage tax, they nevertheless insist that the historical context of their adoption supports a broader application of the amendments beyond the sales tax context. (Grocers merit brief at 16.) However, the Grocers cite to absolutely nothing in the historical material relating to Section 3 and only to snippets taken out of context from the ballot material regarding Section 13.

Instead, the Grocers simply reassert their reading of the amendments as not containing any limitation on the type of excise taxes that are prohibited, studiously ignoring the specific language in both amendments that explicitly limits their application to excise taxes upon sales or purchases of food. The language of the amendments could not be any clearer in stating that the prohibition was limited to transactional excise taxes, which by definition are excise taxes on transactions, i.e., sales and purchases. Because the provisions are clear and unambiguous, the history surrounding their adoptions is not even a relevant consideration. *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1, 15.

Even if the language was not clear, the history surrounding the two amendments' adoption rebuts rather than supports the construction advanced by the Grocers and their amici. As discussed in detail in The Ohio Business Roundtable's ("BRT") amicus merit brief (at 10-12), the official language that was on the ballot material presented to the voters conclusively

establishes that Section 3 was intended solely to prohibit the levy of the sales tax on sales of food. That material is replete with references to repealing or removing the sales tax on food. Absolutely nothing in that material even suggests that the proposed amendment was intended to impose a broad prohibition against excise taxes on food sellers or excise taxes on the privilege of doing business from including receipts from sales of food in their measurement.

The Grocers' reliance on *Castleberry v. Evatt* (1946), 147 Ohio St. 30, is misplaced. That case does not hold or even suggest that Section 3, Article XII was intended to prohibit anything other than excise taxes on sales or purchases of food, i.e., transactional taxes. The case involved the sales tax. The issue was the meaning of the language "premises where sold" in Section 3. Specifically, the issue was whether sales of milk from a vending machine in a plant – milk that was consumed in other parts of the plant – were sales of food for consumption off the premises where sold. The Tax Commissioner took the position that the "premises where sold" was the entire plant. The Court rejected that construction.

The language quoted from the opinion by the Grocers that the adopters of Section 3 "sought to broaden the freedom of sales of food from taxation," id. at 34, was not in response to any argument that the amendment prohibited more than just excise taxes on sales. To the contrary, the Court was concerned that the Tax Commissioner's construction of "premises where sold" would narrow the exemption for sales of milk and bread for consumption off the premises of the vendor that was in the sales tax law at the time of the adoption of Section 3. The concern was that under the Tax Commissioner's construction, sales of milk and bread delivered by the vendor to a purchaser's residence would be for consumption on the premises where sold and would therefore be taxable, even though under the prior statute those sales were treated as exempt. It was to this potential narrowing of the existing exemption for sales of milk and bread that the above-quoted language was directed. That is reflected in the remainder of the sentence

quoted by the Grocers, "and not in any respect to narrow any exemption then existing." Id. The broadening of the exemption referred to by the Court was simply the extension of the exemption from the sales and use tax for sales of milk and bread for consumption off the premises to all sales of food for consumption off the premises. Id. at 33-34.

As detailed in BRT's amicus merit brief (at 12-13), both the timing and the official language that was on the ballot material presented to the voters also conclusively establish that Section 13 was intended to extend the prohibition against transactional excise taxes on sales of food for human consumption to such sales at the wholesale level. The amendment was a reaction to the holding in the beverage tax case, *Cameron Coca-Cola Bottling Co. v. Tracy* (July 28, 1993), Franklin C.P. No. 93CVH02-729, that Section 3, Article XII only prohibited excise taxes on sales of food at the retail level. Section 13 was proposed to extend the prohibition to sales of food at the wholesale level. The official ballot material confirms this intent, expressly referring to the *Cameron* ruling, and stating that the amendment would expand the prohibition of Section 3 against excise taxes on retail sales of food to excise taxes on wholesale sales of food.

II. The CAT is not an excise tax on sales or purchases; it is an excise tax on the privilege of doing business in Ohio.

The CAT is levied by R.C. 5751.02 "on each person with taxable gross receipts for the privilege of doing business in this state." "Doing business" is defined in that section as "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." It is an annual privilege tax for the calendar year, and a taxpayer is subject to the CAT for doing business in the state during any portion of the calendar year.

As part of Ohio's major business tax reforms, the CAT was enacted to replace the corporation franchise tax as Ohio's excise tax on the privilege of doing business.[2] The purpose was to eliminate the franchise tax, which discouraged capital investment in Ohio, and replace it with the CAT, a broad-based, low-rate business privilege tax. It cannot be genuinely argued that the CAT was enacted to avoid the prohibitions of Sections 3 and 13 of Article XII. The CAT's enactment did not effect any change in sales and use tax law.

The Grocers argue that even though there are numerous distinctions between the CAT and a traditional sales tax, it is nevertheless an excise tax on the sale or purchase of food because gross receipts from sales of food, along with gross receipts from a broad range of other business activities, are included in the measure of the CAT. This argument ignores the fundamental difference between transactional excise taxes on sales or purchases and excise taxes on the privilege of doing business. The Grocers simply refuse to accept this Court's long line of decisions distinguishing between these two types of excise taxes and rejecting attempts to get the Court to construe an excise tax on the privilege of doing business measured by a base such as gross receipts, income, or property as a tax on the items used in the measure.

A. This Court's decisions distinguishing between excise taxes on an item and excise taxes on the privilege of doing business that include the item in the measurement of the privilege are directly on point.

As detailed in the BRT's amicus merit brief (at 17-25), in a line of decisions extending over 100 years this Court has uniformly held that an excise tax levied on the privilege of doing business measured by a standard, whether it be gross receipts, income, property, or some other measure, is not a tax levied on the items that comprise the measure. Several of those decisions involved business privilege taxes measured by gross receipts. *Western Union Telegraph Co. v.*

[2] Ohio's 2005 tax reforms also phased out the tangible personal property tax on property used in business and significantly reduced personal income tax rates.

Mayer (1876), 28 Ohio St. 521; *Express Co. v. State,* supra; *East Ohio Gas Co. v. Limbach* (1986), 26 Ohio St.3d 63. Attempts to characterize an excise tax on the privilege of doing business in the state measured by gross receipts as a tax on the sales that generated the gross receipts have also been rejected by the United States Supreme Court and other states' courts. *Maine v. Grand Trunk Ry. Co. of Canada,* supra; *Short Brothers (USA), Inc. v. Arlington County* (1992), 244 Va. 520, 423 S.E.2d 172; *Ford Motor Company v. Seattle* (2007), 160 Wn.2d 32, 156 P.3d 185, certiorari denied (2008), __ U.S. __, 128 S.Ct. 1224, 170 L.Ed.2d 61.

The Grocers attempt to avoid the uniform and unequivocal holdings in these cases on the basis that none of them involved Sections 3 or 13 of Article XII. This attempt to distinguish the cases is unavailing. In each of the cases, the characterization of the tax was critical to the determination of the ultimate issue in the case. For example, in *East Ohio Gas*, the issue was whether an amendment increasing the rate of the public utility excise tax was applied retroactively, in violation of Section 28, Article II of the Constitution. As the Court stated, the utility's claim that the excise tax, which was measured by gross receipts, was a transactional tax on the utility's gross receipts was the "linchpin" of its argument. 26 Ohio St.3d. at 66. If the tax was properly characterized as a transactional tax, application of the new rate to transactions that had already occurred would be unconstitutionally retroactive. If the tax was properly characterized as an excise tax on the privilege of doing business, the gross receipts from the entire annual measurement period could be included in the base to which the new rate applied as long as that period was still open when the amendment was enacted. The Court held that the tax was not a transactional tax on the utility's gross receipts, but rather those "[a]nnual gross receipts were merely the measure of the tax on the privilege." Id. at 67.

Under the Grocers' argument, that holding regarding the proper characterization of the tax would be relevant only to another case that involved the application of Section 28, Article II.

That is fundamentally unsound. The proper characterization of a tax does not change based on the ultimate issue involved. If a business privilege tax measured by gross receipts is not a tax on the gross receipts used as the measure, as *East Ohio* holds, such a tax is also not an excise tax on sales and purchases that generate the gross receipts for purposes of Sections 3 and 13.

The Grocers' attempt to distinguish *Bank One Dayton, N.A. v. Limbach* (1990), 50 Ohio St.3d 163, further demonstrates the unsoundness of their argument. Initially, the Grocers do not accurately identify the primary issue in the case. The nondiscriminatory franchise tax issue discussed by the Grocers was an alternate argument raised by the bank. Id. at 168. The primary issue in *Bank One* was whether the inclusion of federal obligations in the net worth base by which the bank's franchise tax liability was measured was prohibited by a federal statute and thus violated the Supremacy Clause of the Federal Constitution. The bank argued that by including the federal obligations in the base by which the tax was measured, the state was actually taxing the obligations. The Court rejected that characterization of the franchise tax, following its established precedent and that of the United States Supreme Court and other states. Notably, one of the cases relied on by the Court was *East Ohio.*

The Grocers assert that because *Bank One* involved a federal provision that prohibited the state from taxing the item (federal obligations), its holding regarding the proper characterization of the tax is not relevant to the proper characterization of the CAT because the prohibition against taxing the item (sales or purchases of food) is not a federal provision, but rather the Ohio Constitution. That assertion is untenable. The question is the same whether the prohibition against taxing an item is a state or a federal provision: is the challenged tax a tax on the item, or is it a tax on the privilege of doing business that merely considers the item in the base by which the value of the privilege is measured? There is absolutely no legal or logical justification for

characterizing the tax differently because the prohibition is a state constitutional prohibition rather than a federal constitutional provision.

B. By its operation, the CAT is a tax on the privilege of doing business, not a transactional tax on sales or purchases.

The Grocers' statement that the nature of a tax is to be determined by its operation is correct. Its conclusion that, operationally, the CAT is a transactional tax, is not. The Grocers' argument simply ignores the numerous features of the CAT that establish that it is not only stated by the General Assembly to be an excise tax on the privilege of doing business, but that it is such a tax in its operation. Those features are detailed in BRT's amicus merits brief (at 26-28).

The CAT is an annual privilege tax. The value of the privilege of doing business for that annual period is measured by the business's gross receipts for the entire period. The General Assembly, with significant input from the business community, determined that the amount of a business's gross receipts was a good measure of the extent to which the business exercised its privilege of doing business in this state. That is certainly a reasonable assumption. But using the total gross receipts for the annual period as the measure of the value of the exercise of the privilege for that period does not support the argument that the CAT is in its operation a transactional tax on the sales that generate the gross receipts.

An example demonstrates the fundamental distinction between the CAT and a transactional tax. If a business sells one widget to each of 1,000 different customers at $150 apiece, a sales or use tax would be due on each separate transaction. The tax would be required to be collected at the time of sale. That business, however, would not be subject to the CAT if those sales constituted the extent of its business in Ohio, because persons with no more than $150,000 of taxable gross receipts are not taxpayers for purposes of the CAT. R.C. 5751.01(E)(1). And even if that business had additional gross receipts in the annual period that

resulted in it being subject to the CAT, the gross receipts from those 1,000 sales would not be included in the measure of the CAT. Moreover, if the business had additional sales that generated between $1 and $850,000 in the annual period, its CAT liability would be a flat $150. The CAT levied on businesses with taxable gross receipts between $150,001 and $1 million is $150. R.C. 5751.03(B). Thus, the CAT on those businesses is the same regardless of the number or dollar volume of sales or other gross receipts during the annual period. That is not how a transactional tax operates.

Unlike a transactional tax, which is levied on individual transactions and thus can be calculated at the time the transaction is consummated, the CAT cannot be calculated until the end of the tax year. A business will not know at the time of any individual transaction whether it will exceed the $150,000 or the $1 million threshold. And even if a business has passed either threshold during the annual period, it could later in the annual period have returns that reduce its total taxable gross receipts below one of the thresholds. For example, a significant recall of a product sold by a business could greatly reduce its taxable gross receipts for the period.

Further distinguishing the CAT from a transactional tax is the fact that if a business made sales into Ohio but did not have nexus with the state, it would not be subject to the CAT. And because the CAT is an excise tax on the person's privilege of doing business in this state, no other person would incur any liability. Each of those purchases by consumers would, however, be subject to the Ohio use tax because the use tax is a transactional tax on the consumer.

The Grocers next assert that the existence of various credits available to CAT taxpayers is irrelevant to determining the nature of the CAT. (Grocers merit brief at 27.) While the Grocers are correct that credits and exemptions are not unique to a particular type of tax, the nature of the credits is indicative of the nature of the tax. The nature of the CAT credits directly evidences that the CAT is a business privilege tax. Unlike the exemptions from the sales tax

provided by R.C. 5739.02(B), CAT credits are not tied to transactions. They are credits based on business operations, such as creating jobs, conducting research and development, and incurring operating losses over an annual period. These are not the type of credits that could be applied to transactional taxes. They are uniquely business activity-type credits. The clearest example is the net operating loss deduction, which is based on the business's operations over an entire tax year. R.C. 5751.53.

United Air Lines v. Porterfield (1971), 28 Ohio St.2d 97, does not support the Grocers' argument. The issue in that case was whether the airline excise tax was a tax on the privilege of engaging in interstate commerce, which, under the jurisprudence at that time, states were prohibited from taxing. To avoid this later-discarded formalistic prohibition, the courts often saved state taxes by viewing them as being imposed on some local activity. For this reason alone, cases decided under the old Commerce Clause jurisprudence are of little help. Moreover, *UAL* did not state that the airline excise tax was not a tax on the privilege of doing business. The Court simply found that it was not a tax on the bare privilege of engaging in **interstate commerce.** Focusing on the fact that the tax was measured by gross receipts from instate activity, the Court upheld the tax as fairly attributable to the extent of business activity in this state. Id. at 101. That the Court viewed the tax as a tax on the privilege of doing business is confirmed by the repeated reference to the tax being "fairly apportioned" and "fairly-related" to the benefits and protections afforded by the state. These are concepts germane to excise taxes on the privilege of doing business.

The Grocers' statement that the gross receipts taxes at issue in *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, are functionally equivalent to the CAT is wrong. The New Mexico and North Carolina gross receipts taxes are the sales taxes levied by those states. They are levied on sales and are

complemented by a use tax. The transactions are subject to a local tax based on where the transaction occurs. A credit is provided for sales or use tax paid to another state with respect to the transaction. Those states, like a number of other states, simply style their sales taxes as gross receipts taxes.

C. The economic incidence of the tax is irrelevant.

The Grocers next attempt to support their characterization of the CAT as a transactional tax by asserting that the CAT's economic incidence falls on consumers. This assertion is legally irrelevant and logically flawed. Only legal, not economic, incidence matters in determining the nature of a tax. In *United States v. New Mexico*, 455 U.S. at 734, *Gurley v. Rhoden* (1975), 421 U.S. 200, 204, 207, and *Werner Machine Co. v. Dir. of Div. of Taxation* (1956), 350 U.S. 492, 494, for example, the Court rejected the argument that the challenged state taxes violated the Supremacy Clause because their economic incidence fell on the United States or its obligations. The Court properly looked to the legal incidence of the taxes. In *Gurley*, the Court distinguished tax schemes which required that the tax be passed on to the consumer from taxes that are imposed on a vendor who chooses to recover its cost in the prices it charges to the consumer. 421 U.S. at 204. This Court followed the *Werner Machine* holding in *Bank One*.

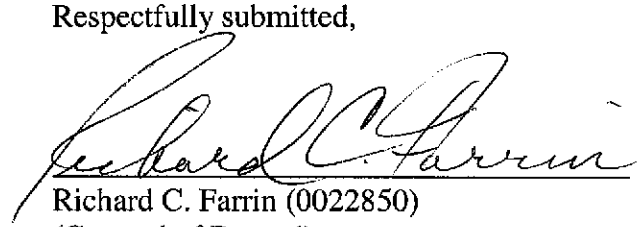
In any event, the economic incidence argument could be made regarding any tax, including direct taxes such as property taxes and corporate income taxes. Depending on the economic conditions, including the competition in the marketplace, a business is going to attempt to recover all of its tax costs, along with its other costs, in the prices it charges its customers. Even if it was relevant, the economic analysis of the Grocers' witness is clearly flawed. A tax cost will not necessarily be fully recoverable by a vendor in its prices. The current economic conditions will affect that ability. A tax imposed on the consumer and required to be collected by the vendor, however, will necessarily fall fully on the consumer. Thus, to say

that the CAT will have exactly the same economic effect on the consumer as the sales tax is not credible.

Conclusion

For the reasons discussed above, the Court should reverse the judgment of the court of appeals and hold that the inclusion of gross receipts from retail and wholesale sales of food for human consumption in the base by which the CAT is measured does not violate Sections 3(C) or 13 of Article XII of the Ohio Constitution.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the Reply Brief of Amicus Curiae Ohio Business Roundtable in Support of Appellant William W. Wilkins, Ohio Tax Commissioner, was served by U.S. mail this 6th day of July, 2009, upon the following counsel:

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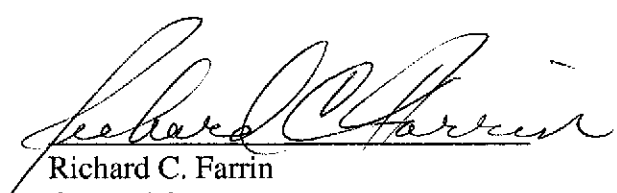

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THE STATE OF OHIO

LEGISLATIVE ACTS

PASSED

AND

JOINT RESOLUTIONS

ADOPTED

BY THE

NINETY-FIRST GENERAL ASSEMBLY OF OHIO

At the First Special Session

BEGUN AND HELD IN THE CITY OF COLUMBUS, OHIO,
SEPTEMBER 18, 1935, AND ENDING DECEMBER 28, 1936,

AND

TITLE AND TEXT OF CONSTITUTIONAL AMENDMENTS ADOPTED
BY VOTE OF THE ELECTORS OF OHIO AT THE GENERAL
ELECTION HELD NOVEMBER 3, 1936.

VOLUME CXVI—PART II

THE F. J. HEER PRINTING CO.
Columbus, Ohio
1935-36

of appeal to the tax commission and the filing of a transcript of the proceeding before the tax commission in the common pleas court. The tax commission shall furnish the transcript on demand of the permit holder.

Penalties; action may be brought, how and where.

Sec. 6212-60. The following penalties are hereby provided: *** A penalty of fifteen percent (15%) of the *total* amount of the tax *due* shall be assessed by the tax commission of Ohio for failure to file a *** *monthly report* as required by *** *this act*. A penalty of twenty-five percent (25%) of the amount of the tax shall be assessed by the tax commission of Ohio for the filing of a false or fraudulent *** *report*.

The taxes and/or penalties levied under the provisions of this act may be recovered in an action in the name of the state to be brought in the court of common pleas of Franklin county and such court of common pleas shall have jurisdiction of the person and of the action regardless of the amount involved. The attorney general on request of the tax commission shall institute such action in the court of common pleas of Franklin county; in such action it shall be sufficient to allege that the tax and/or penalty sought to be recovered stand charged against the permit holder on the records of the tax commission and that the same has been unpaid for a period of thirty (30) days beyond the time fixed by law for payment of such taxes and penalties. Sums recovered in any such action shall be paid to the treasurer of state *** *for credit to the general revenue fund*.

Repeal.

SECTION 2. That said existing sections 6064-18, 6064-41a, 6064-42, 6064-45, 6064-46, 6064-47, 6064-48, 6064-49, 6064-50, 6064-51, 6212-48, 6212-48a, 6212-49, 6212-49b, 6212-49i, 6212-50, 6212-53, 6212-58, 6212-59 and 6212-60 of the General Code are hereby repealed.

J. FREER BITTINGER,
Speaker of the House of Representatives.

HAROLD G. MOSIER,
President of the Senate.

Passed December 19, 1935.

Approved December 23, 1935.

MARTIN L. DAVEY,
Governor.

The sectional numbers herein are in conformity to the General Code.

JOHN W. BRICKER,
Attorney General.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 24th day of December, A. D. 1935.

GEORGE S. MYERS,
Secretary of State.

File No. 27.

(House Bill No. 590)

AN ACT

To provide for the levy and collection of an excise tax on the storage, use or other consumption in this state of tangible personal property for the purpose of providing revenue for the use of the state public school fund of the state, and for the purpose of reimbursing the state for the expense of administering this act, and to amend section 5546-17 of the General Code.

Be it enacted by the General Assembly of the State of Ohio:

Sec. 5546-25. Definitions.

SECTION 1. As used in this act:

"Person" includes individuals, firms, partnerships, associations, joint stock companies, corporations, and combinations of individuals of whatsoever form and character.

"Commission" means the tax commission of Ohio.

"Storage" means and includes any keeping or retention in this state for any purpose, excepting as hereinafter provided.

"Use" means and includes the exercise of any right or power incidental to the ownership of the thing used, excepting as hereinafter provided.

When the purpose of the consumer is (a) to resell the thing purchased in the form in which the same has been received by him; or (b) to incorporate the thing purchased as a material or a part, into tangible personal property to be produced for sale by manufacturing, assembling, processing or refining, or to use or consume the thing transferred directly in the production of tangible personal property by manufacturing, processing, refining, mining, farming or in horticulture, or directly in making retail sales or directly in the rendition of a public utility service; or (c) security for the performance of an obligation by the seller, the attainment of such a purpose shall not be considered to be a "storage", a "use", or a "consumption" of the thing purchased, within the meaning of this act. For the purpose of this act, farmers and horticulturists shall be considered manufacturers or processors.

"Purchase" means acquired for a consideration, whether the transaction by which such acquisition was effected by a transfer of title, or of possession, or of both, or a license to use or consume; whether such transfer shall have been absolute or conditional, and by whatsoever means the same shall have been effected; and whether such consideration be a price or rental in money, or by way of exchange or barter.

"Seller" means the person from whom a purchase is made and includes every person engaged in this state or elsewhere in the business of

selling tangible personal property for storage, use, or other consumption in this state; and when, in the opinion of the commission, it is necessary for the efficient administration of this act to regard any salesman, representative, peddler, or canvasser as the agent of a dealer, distributor, supervisor, or employer under whom he operates, or from whom he obtains tangible personal property, sold by him for storage, use or other consumption in this state, irrespective of whether or not he is making such sales on his own behalf, or on behalf of such dealer, distributor, supervisor, or employer, the commission may so regard him and may regard such dealer, distributor, supervisor, or employer as the "seller" for the purpose of this act.

"Consumer" means the person who shall have purchased tangible personal property for storage, use, or other consumption in this state.

"Price" means the aggregate value in money of anything, or things, paid or delivered, or promised to be paid or delivered by a consumer to a seller in the consummation and complete performance of the transaction by which tangible personal property shall have been purchased for storage, use, or other consumption in this state, without any deduction therefrom on account of the cost of the property sold, cost of materials used, labor or service cost, interest or discount paid, or any other expense whatsoever. The tax collected by the seller from the consumer under the provisions of this act shall not be considered as a part of the price, but shall be considered as a tax collection for the benefit of the state and, except for the discount authorized under section 9 of this act, no person other than the state shall derive any benefit from the collection or payment of such tax.

Sec. 5546-26. Tax levy on storage, use, etc.; purpose; rates; exceptions.

SECTION 2. For the purpose of securing a thorough and efficient system of common schools throughout the state, and for the purpose of reimbursing the state for the expense of administering this act, an excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property purchased during the period beginning on the first day of January, 1936, and ending on the 31st day of March, 1937, for storage, use, or other consumption in this state, with the exceptions hereinafter mentioned and described, as follows:

One cent, if the price for which such property has been purchased is forty cents or less;

Two cents, if such price is more than forty cents and not more than seventy cents;

Three cents, if such price is more than seventy cents and not more than one dollar;

If such price is in excess of one dollar, three cents on each full dollar thereof; and if, in such case, such price is not an even number of dollars, then, in addition to the said tax on each full dollar thereof, one cent, if such price exceeds an even number of dollars by more than eight cents but not more than forty cents; two cents, if such excess is more

than forty cents and not more than seventy cents; and three cents, if such excess is over seventy cents.

If such price is less than nine cents, no tax shall be imposed.

Each consumer, storing, using, or otherwise consuming in this state tangible personal property purchased for such purpose or purposes, shall be liable for the tax imposed by this act, and such liability shall not be extinguished until the tax has been paid to this state; provided, however, that a prepaid tax receipt or receipts, given to the consumer in accordance with the provisions of section 4, or the tax having been prepaid in accordance with the provisions of section 7 of this act, shall relieve the consumer from further liability for the tax to which such receipt or receipts may refer.

The tax hereby levied does not apply to the storage, use, or consumption in this state of the following described tangible personal property, nor to the storage, use, or consumption in this state of tangible personal property purchased under the following described circumstances:

1. Property the sale of which in this state is subject to the excise tax imposed by section 5546-1 and succeeding sections of the General Code; and property to the sale of which in this state said excise tax is expressly made inapplicable by the provisions of sub-paragraphs 1, 2, 2a, 2b, 3, 4, 5, 6, 9, 10 and 11 of section 5546-2 of the General Code.

2. Property, the storage, use, or other consumption of which this state is prohibited from taxing under the constitution, or laws of the United States, or under the constitution of this state. This exemption shall not exempt from the application of the tax herein imposed the storage, use, or consumption of tangible personal property which was purchased in interstate commerce, but which has come to rest in this state, provided that fuel to be used or transported in carrying on interstate commerce which is stopped within this state pending transfer from one conveyance to another shall be exempt from the excise tax imposed by this act and House Bill No. 572 of the 91st General Assembly—First Special Session.

3. Property purchased from a seller who is not engaged in the business of selling tangible personal property.

4. Property intended for incorporation and incorporated into a building, road, street, bridge or other structure; provided such property is so incorporated pursuant to a contract entered into prior to January 1, 1936, and provided, further, that the person so incorporating such property submit to the tax commission of Ohio proof of the facts in such form as the commission may require.

For the purpose of the proper administration of this act and to prevent the evasion of the tax hereby levied, it shall be presumed that tangible personal property purchased on or after January 1, 1936, by any person for delivery in this state is purchased for storage, use, or other consumption in this state.

Sec. 5546-27. Registration with commission; exception.

SECTION 3. Every seller of tangible personal property for storage, use, or other consumption in this state, engaged in the business of selling in this state, shall, within thirty days after the effective date of this act, register with the commission and give the name and address of each agent operating in this state, the location of any and all distribution or sales houses or offices, or other places of business in this state and such other information as the commission may require.

In no case, however, will it be necessary for a seller, holding a vendor's license obtained pursuant to the provisions of section 5546-10 of the General Code, to register with the commission as provided in this act.

If the commission, by rule or regulation, shall authorize any other seller or sellers to collect the tax imposed by this act, from the consumer as provided in section 4, or prepay the tax as provided in section 7 hereof, such rule or regulation shall require that each such seller so authorized shall register with the commission in such form as may be therein provided.

Sec. 5546-28. Collection and payment of tax.

SECTION 4. Every seller, engaged in the business of selling tangible personal property in this state, for storage, use, or other consumption in this state, to which the provisions of section 2 of this act apply, shall and any other seller who is authorized by rule or regulation of the commission to do so may collect from the consumer the full and exact amount of the tax payable in respect of each such storage, use, or consumption, and evidence the payment of such tax in each case by cancelling prepaid tax receipts equal in face value to the amount thereof, in the manner and at the times provided in this section, to-wit:

(a) If the price is, at or prior to the delivery of possession of the thing sold to the consumer, paid in currency passed from hand to hand by the consumer, or his agent, to the seller, or his agent, the seller or his agent shall:

1. Collect the tax with and at the same time as the price.

2. Immediately cancel in the presence of the consumer by tearing immediately into two parts a prepaid tax receipt, or receipts, of the proper face value, deliver one part of each such cancelled prepaid tax receipt to the consumer or his agent, and retain the other part thereof.

(b) If the price is otherwise paid or to be paid, the seller or his agent shall, at or prior to the delivery of possession of the thing sold to the consumer, cancel or cause to be cancelled, by tearing into two parts, prepaid tax receipts equal in face value to the amount of the tax imposed by this act. Thereupon and thereby the amount of the tax with respect to the storage, use, or other consumption in this state of the property purchased, payment of which to the state is evidenced by such cancellation, shall become a legal charge payable to the seller as against the consumer,

which shall in every case be collected by the seller as herein provided in addition to the price; and at or immediately after such collection, the seller shall deliver one part of each such cancelled prepaid tax receipt to the consumer and retain the other part thereof.

In case the tax does not apply to the storage, use, or other consumption of the tangible personal property purchased, the consumer must furnish to the seller and the seller must obtain from the consumer a certificate in proper form, indicating that the storage, use, or other consumption is not legally subject to the tax herein imposed. The certificate herein required shall be in such form as the commission shall by regulation prescribe, and in case no certificate is furnished or obtained prior to the time the tangible personal property is transferred, the tax shall apply.

Sec. 5546-29. Return filed with commission; duplicate and payment to treasurer.

SECTION 5. Every person storing, using, or consuming tangible personal property, the storage, use, or consumption of which is subject to the tax imposed by this act, when such tax was not paid to a seller, shall, on or before the 15th day of the month next succeeding each quarterly period, the first of such quarterly periods being the period commencing with the first day of January, 1936, and ending on the 31st day of March, 1936, and on or before the 15th day of the month following each subsequent quarterly period of three months, file with the commission a return for the preceding quarterly period in such form as may be prescribed by the commission, showing the price of each such purchase of tangible personal property by such person during such preceding quarterly period, the storage, use, or consumption of which is subject to said tax, and such other information as the commission may deem necessary for the proper administration of this act. At the time of filing each such return, each such person shall file with the treasurer of state an executed duplicate thereof and shall pay to the treasurer of state the amount of tax imposed by this act with respect to the purchases covered by the return. The commission, if it deems it necessary in order to insure payment to the state of the amount of such tax, may require returns and payment for other than quarterly periods. Returns shall be signed by the person liable for the tax, or his duly authorized agent, but need not be verified by oath.

The payment to the state of the tax, interest and penalty assessed by the commission under this section shall relieve the seller, who sold the property with regard to the storage, use, or other consumption on which the tax was paid to the state under this section, from the payment to the state of the amount of the tax which he is required by this act to collect from the purchaser.

Sec. 5546-30. Prepaid tax receipts; specifications.

SECTION 6. Prepaid tax receipts required by this act shall be issued by the commission in such denominations as the commission shall deem necessary. They shall be printed on durable paper, but of different design and of distinctly different color for each of such denominations and shall bear plainly on their face the denominations represented thereby.

Sec. 5546-31. Powers and duties of commission.

SECTION 7. The commission shall design and procure the prepaid tax receipts herein provided for; and until other prepaid tax receipts shall be so designed and procured, the commission may by general rule authorize the use, of, for the purposes of this act, prepaid tax receipts issued pursuant to sections 5546-4 to 5546-8, both inclusive, of the General Code. The commission shall enforce and administer the provisions of this act, which is hereby declared to be one of the laws which the commission is required to administer within the meaning of sections 1465-9, 1465-12 to 1465-32, inclusive, and 12924-3 of the General Code. It shall have power to adopt and promulgate such rules and regulations as it may deem necessary to carry out the provisions of this act, and without prejudice to the generality of the powers of the commission by virtue of the foregoing provisions, the commission may:

1. Prescribe the form and manner of cancelling prepaid tax receipts consistently with the provisions of this act.

2. Authorize a seller to prepay the tax levied by this act upon storage, use, or consumption of things produced or distributed by such seller, and waive the collection of the tax from the consumer by the seller in the manner otherwise provided in this act; but no such authority shall be granted or exercised, excepting upon application to the commission and unless the commission shall, after hearing, advance notice of which must be given by the commission to all sellers in the same general classification as the applicant, find that the conditions of the applicant's business are such as to render impracticable the collection of the tax by the seller in the manner otherwise provided by this act and upon the applicant furnishing bond payable to the state of Ohio in such amount as the commission may determine to be sufficient to secure the prepayment of the taxes levied by this act in the manner desired, with surety to the satisfaction of the treasurer of state, with whom such bond shall be filed; nor shall the authority so granted be exercised, nor the seller or sellers actually selling such products be exempted from the other provisions of this act by virtue thereof, unless the person to whom such authority is granted shall print plainly upon the product sold, or offered for sale, a statement to the effect that the tax levied by this act has been paid in advance.

Sec. 5546-32. Sellers reimbursed, when and how; redemption of unused or spoiled tax receipts.

SECTION 8. In the event prepaid purchases are returned to the seller by the consumer after the tax imposed by this act has been collected or charged to the account of the consumer, the seller shall be entitled to reimbursement of the amount of the tax so collected or charged by him, either through the cancellation of prepaid tax receipts paid for by the seller and charged to the account of the consumer, or through the cancelling of prepaid tax receipts paid for by the seller and charged to the account of the consumer, in the manner herein provided. Upon receipt of a sworn statement by the seller as to the gross amount of such re-

funds, during the period covered by such sworn statement, which period shall not be longer than sixty days, the commission shall issue to the seller an official credit memorandum equal to the net amount paid by the seller for such cancelled prepaid tax receipts. Such memorandum shall be accepted by the state treasurer, or his agents, at full face value, from the seller to whom it is issued, in the purchase of prepaid tax receipts under the provisions of section 9 of this act.

The treasurer of state shall redeem and pay for any unused or spoiled tax receipts at the net value thereof, and he shall refund to sellers the amount of tax paid on any illegal or erroneous assessment, where the seller has reimbursed the consumer. When such assessment was not paid to a seller, but was paid directly to the treasurer of state, or an agent of the treasurer of state, by the consumer, the treasurer of state shall make refund to the consumer. In all cases an application shall be filed with the commission on the form prescribed by it and must be filed within a period of ninety days from the date the tax stamps are spoiled, or from the date it is ascertained that the assessment was illegal or erroneous. On filing of such application, the commission shall determine the amount of refund due and shall certify such amount to the auditor of state. The auditor of state shall thereupon draw a warrant for such certified amount on the treasurer of state to the person claiming such refund. For the purpose of paying such refund, the treasurer of state shall place five thousand dollars, collected in a special fund to be known as the use tax rotary fund; and thereafter as required by the depletion thereof he shall place to the credit of said rotary fund an amount sufficient to make the total of said fund at the time of each such credit amount of five thousand dollars.

Sec. 5546-33. Powers and duties of treasurer of state and county treasurers.

SECTION 9. All prepaid tax receipts procured by the commission and issued pursuant to this act shall be delivered immediately to the treasurer of state. Excepting as herein provided, all the provisions of sections 5546-7 and 5546-8 of the General Code shall apply to and govern the treasurer of state, his agents, and the several county treasurers, in the custody and sale of such prepaid tax receipts, and accountability therefor, and the commission shall have the same power with respect to the fixing of the rate of discount applicable to the sale of prepaid tax receipts issued under this act as is granted to the commission by section 5546-8 of the General Code with respect to the sale of prepaid tax receipts therein provided for. Provided, however, that sales of prepaid tax receipts issued under this act may be made to any seller registered with the commission; and, until a list of such registered sellers is available, the commission by regulation may authorize the sale of prepaid tax receipts issued under this act, or issued under the provisions of section 5546-4 and succeeding sections of the General Code and available for use in paying and collecting the tax imposed by this act, to any seller

NOTE:—The word "of" in the last line of Sec. 5546-32 is as same appears in the enrolled bill. [Editor.]

upon furnishing proof, in such form as the commission shall by regulation prescribe, that such seller intends to use the same for the purpose of paying and collecting the tax imposed by this act.

Sec. 5546-34. List of sellers registered with commission certified to treasurer of state; supplemental lists.

SECTION 10. As soon as practicable after this act shall take effect, the commission shall make and certify to the treasurer of state a list showing the names of all sellers registered with the commission, pursuant to this act, and such other information as to each, available from the records in the office of the commission, as the commission may deem necessary. Thereafter, on the first business day of each week, the commission shall make and certify a like list, showing such information with respect to sellers registered during the preceding week. The commission shall keep an alphabetical index of registrants.

Sec. 5546-35. Liability of seller for failure to collect tax and cancel prepaid tax receipts; assessment against seller.

SECTION 11. In case any seller who is required or authorized to collect the tax imposed by this act fails to do so, or having collected the tax, fails to cancel the prepaid tax receipts in the manner prescribed by this act and by the regulations of the commission, he shall be liable personally for such amount as he failed to collect, or for the amount of the prepaid tax receipts which he failed to cancel. In such case, the commission shall have power to make an assessment against such seller, based upon any information within its possession or that shall come into its possession. The commission shall give to the seller written notice of such assessment. Such notice may be served upon the seller personally, or by registered mail.

Sec. 5546-36. Failure or refusal to make return.

SECTION 12. If any person required by this act to make a return to the commission neglects or refuses to make such return at the time required by or under authority of this act, the commission shall have power to make an assessment against such person, based upon any information within its possession, or that shall come into its possession. The commission shall give to such person written notice of such assessment. Such notice may be served upon such person personally, or by registered mail.

Sec. 5546-37. Assessment and penalty due and payable, when; petition for reassessment.

SECTION 13. Any amount assessed by the commission under the provisions of either of the two next preceding sections, together with a penalty of fifteen per centum thereof, shall be due and payable from the person against whom the assessment has been made to the treasurer of state fifteen days after the service upon such person of notice of such assessment, and when paid shall be considered as revenue arising from the tax imposed by this act.

Unless the person to whom said notice of assessment is directed shall within fifteen days after service thereof, either personally or by registered mail, file a petition in writing, verified under oath by said person, or his duly authorized agent, having knowledge of the facts, setting forth with definiteness and particularity the items of said assessment objected to, together with the reason for such objections, said assessment shall become and be deemed conclusive and the amount thereof shall be due and payable from the person so assessed to the treasurer of state. In every case where a petition for re-assessment as above described shall be filed, the commission shall assign a time and place for the hearing of same and shall notify the petitioner thereof by registered mail, but the commission shall have the power to continue the same from time to time as may be necessary.

Sec. 5546-38. Interest on unpaid assessment; levy and sale when assessment not paid; appeal.

SECTION 14. All amounts assessed under this act, which are not paid to the treasurer of state by the person against whom such assessment has been made on the date when the same become due and payable, shall bear interest at the rate of twelve per centum per annum from and after such date until paid.

After the amount of the assessment has become due and payable, the commission by its deputy or deputies authorized by it for such purpose. shall forthwith call at the place of business of such person and in case of refusal to pay such assessment and penalty on demand shall levy on the moneys, goods and chattels, or other personal property of such person wherever found in this state. Such levy shall take precedence of all liens, mortgages, conveyances, or encumbrances hereafter taken on such moneys, goods and chattels or other personal property. No property of any such person liable to pay the tax, penalty and costs shall be exempt from such levy.

The commission shall give like notice of the time and sale of the personal property to be sold under this act, as in the case of sale of personal property on execution. All provisions of law applicable to sales of personal property on execution shall be applicable to sales under this act, except as herein otherwise provided; all moneys collected by the commission shall be paid into the state treasury.

The person against whom such assessment has been made may appeal from an assessment by the commission to the court of common pleas in the same manner and form as that provided in section 5611-2 of the General Code of Ohio.

Sec. 5546-39. Records, etc., open to inspection of commission.

SECTION 15. Every seller and every person storing, using, or otherwise consuming in this state tangible personal property subject to the tax imposed by this act shall keep such records, receipts, invoices, bills-of-lading and such other pertinent documents in such form as the commission

(b) A seller that obtains a fully completed exemption certificate from a consumer is relieved of liability for collecting and remitting tax on any sale covered by that certificate. If it is determined the exemption was improperly claimed, the consumer shall be liable for any tax due on that sale under this chapter. Relief under this division from liability does not apply to any of the following:

(i) A seller that fraudulently fails to collect tax;

(ii) A seller that solicits consumers to participate in the unlawful claim of an exemption;

(iii) A seller that accepts an exemption certificate from a consumer that claims an exemption based on who purchases or who sells property or a service, when the subject of the transaction sought to be covered by the exemption certificate is actually received by the consumer at a location operated by the seller in this state, and this state has posted to its web site an exemption certificate form that clearly and affirmatively indicates that the claimed exemption is not available in this state;

(iv) A seller that accepts an exemption certificate from a consumer who claims a multiple points of use exemption under division (D) of section 5739.033 of the Revised Code, if the item purchased is tangible personal property, other than prewritten computer software.

(2) The seller shall maintain records, including exemption certificates, of all sales on which a consumer has claimed an exemption, and provide them to the tax commissioner on request.

(3) If no certificate is provided or obtained within ninety days after the date on which the transaction is consummated, it shall be presumed that the tax applies. Failure to have so provided or obtained a certificate shall not preclude a seller, within one hundred twenty days after the tax commissioner gives written notice of intent to levy an assessment, from either establishing that the transaction is not subject to the tax, or obtaining, in good faith, a fully completed exemption certificate.

(4) If a transaction is claimed to be exempt under division (B)(13) of section 5739.02 of the Revised Code, the contractor shall obtain certification of the claimed exemption from the contractee. This certification shall be in addition to an exemption certificate provided by the contractor to the seller. A contractee that provides a certification under this division shall be deemed to be the consumer of all items purchased by the contractor under the claim of exemption, if it is subsequently determined that the exemption is not properly claimed. The certification shall be in such form as the tax commissioner prescribes.

(F) A seller who files a petition for reassessment contesting the assessment of tax on transactions for which the seller obtained no valid exemption certificates, and for which the seller failed to establish that the transactions were not subject to the tax during the one-hundred-twenty-day period allowed under division (E) of this section, may present to the tax commissioner additional evidence to prove that the transactions were exempt. The seller shall file such evidence within ninety days of the receipt by the seller of the notice of assessment, except that, upon application and for reasonable cause, the tax commissioner may extend the period for submitting such evidence thirty days.

(G) For the purpose of the proper administration of sections 5741.01 to 5741.22 of the Revised Code, and to prevent the evasion of the tax hereby levied, it shall be presumed that any use, storage, or other consumption of tangible personal property in this state is subject to the tax until the contrary is established.

(H) The tax collected by the seller from the consumer under this chapter is not part of the price, but is a tax collection for the benefit of the state, and of counties levying an additional use tax pursuant to section 5741.021 or 5741.023 of the Revised Code and of transit authorities levying an additional use tax pursuant to section 5741.022 of the Revised Code. Except for the discount authorized under section 5741.12 of the Revised Code and the effects of any rounding pursuant to section 5703.055 of the Revised Code, no person other than the state or such a county or transit

authority shall derive any benefit from the collection of such tax.

Effective Date: 10-21-2003; 06-30-2005; 09-21-2006; 09-28-2006; 2007 HB119 06-30-2007

5741.04 Collection, reporting and remission of tax by seller.

Every seller required to register with the tax commissioner pursuant to section 5741.17 of the Revised Code who is engaged in the business of selling tangible personal property in this state for storage, use, or other consumption in this state, to which section 5741.02 of the Revised Code applies, or which is subject to a tax levied pursuant to section 5741.021, 5741.022, or 5741.023 of the Revised Code, shall, and any other seller who is authorized by rule of the tax commissioner to do so may, collect from the consumer the full and exact amount of the tax payable on each such storage, use, or consumption, in the manner and at the times provided as follows:

(A) If the price is, at or prior to the delivery of possession of the thing sold to the consumer, paid in currency passed from hand to hand by the consumer or the consumer's agent, to the seller or the seller's agent, the seller or the seller's agent shall collect the tax with and at the same time as the price.

(B) If the price is otherwise paid or to be paid, the seller or the seller's agent shall, at or prior to the delivery of possession of the thing sold to the consumer, charge the tax imposed by or pursuant to section 5741.02, 5741.021, 5741.022, or 5741.023 of the Revised Code to the account of the consumer, which amount shall be collected by the seller from the consumer in addition to the price. Such transaction shall be reported on the return for the period in which the transaction occurred, and the amount of tax applicable to the transaction shall be remitted with the return or, if the consumer is subject to section 5741.121 of the Revised Code, in the manner prescribed by that section. The amount of the tax shall become a legal charge in favor of the seller and against the consumer.

(C) It shall be the obligation of each consumer, as required by section 5741.12 of the Revised Code, to report and pay the taxes levied by sections 5741.021, 5741.022, and 5741.023 of the Revised Code, if applicable, on any storage, use, or other consumption of tangible personal property purchased in this state from a vendor required to be licensed pursuant to section 5739.17 of the Revised Code.

Effective Date: 03-19-1993; 2008 HB562 09-22-2008