

IN THE SUPREME COURT OF OHIO

ORIGINAL

OHIO GROCERS ASSOCIATION, et al.

Plaintiffs-Appellees,

v.

WILLIAM WILKINS [RICHARD A. LEVIN], in his official capacity as Ohio Tax Commissioner

Defendant-Appellant.

CASE NO. 08-2018

On Appeal from the Franklin County Court of Appeals Tenth Appellate District

Court of Appeals Case No. 07AP-813

REPLY BRIEF OF AMICI CURIAE OHIO SCHOOL BOARDS ASSOCIATION, BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS, AND THE OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS IN SUPPORT OF DEFENDANT – APPELLANT WILLIAM WILKINS, RICHARD A. LEVIN, SUCCESSOR TO WILLIAM W. WILKINS, OHIO TAX COMMISSIONER

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INTRODUCTION

The Ohio Grocers Association, *et al.* (“Grocers”) fail to sufficiently rebut, and in some cases fail to address entirely, fundamental issues raised in the Ohio Tax Commissioner’s (“Commissioner”) and *Amici Curiae’s* Merit Briefs. Indeed, the Commercial Activity Tax (“CAT”) should be found constitutional and the Tenth District Court of Appeals should be reversed for the following reasons: (1) the Grocers have failed to prove beyond a reasonable doubt that the CAT is unconstitutional; (2) the language of Section 3(C) permits right-to-do-business taxes such as the CAT; (3) the historical record indicates that Sections 3(C) and 13 of the Ohio Constitution were meant to only prohibit transactional sales taxes as opposed to a tax on a privilege such as the CAT; and (4) the Grocers’ argument related to the CAT’s economic effect is insufficient to declare it unconstitutional.

LAW AND ARGUMENT

I. The Grocers have failed to meet the standard necessary to declare an enactment of the General Assembly unconstitutional.

“An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional *it must appear beyond a reasonable doubt* that the legislation and constitutional provisions are clearly incompatible.” *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59, paragraph one of the syllabus (Emphasis added). Not only do the Grocers fail to produce a reasonable doubt that the legislation and constitutional provisions are clearly incompatible, they fail to even recognize the standard imposed by this Court in analyzing whether an enactment of the General Assembly is constitutional.

The Grocers bear the considerable burden of proving beyond a reasonable doubt that the CAT is clearly incompatible with the constitution. The Commissioner and

Amici in this matter submitted merit briefs that not only create a reasonable doubt as to the Grocers' argument, they convincingly refute it. Indeed, the CAT is clearly compatible with the constitution. The plain language of the of the constitution itself only prohibits taxes on *transactions*, whereas the CAT taxes a privilege. Moreover, the historical record—which the Grocers completely ignore—overwhelmingly suggests that Sections 3(C) and 13 address a transactional tax, not a right-to-do-business tax.

Because the Grocers have failed to demonstrate *beyond a reasonable doubt* that the CAT is clearly incompatible with the constitution, the CAT is entitled to the presumption of constitutionality and should, therefore, remain intact.

II. The language of Section 3(C) permits right-to-do-business taxes such as the CAT.

The Grocers argue that the prohibiting clause in Section 3(C) should not be read so as to qualify the authorizing clause because Section 3(C) arose out of a consolidation of two different sections (Sections 10 and 12), and the consolidation of these sections—which occurred in 1976—did not have a substantive legal effect. This argument mischaracterizes the Commissioner's argument and misapprehends the constitution.

The fact that there was no substantive legal effect to the *consolidation* of Sections 10 and 12 in 1976 does not mean the two sections did not have a substantive relationship *prior* to 1976. Section 10 referred to excise taxes *and* franchise taxes. This clearly evidences the fact excise taxes and franchise taxes were treated differently under Article XII of the Ohio Constitution prior to the passage of Section 12.

It is well established that the general rule as to the interpretation of constitutional amendments is “that the body enacting the amendment will be presumed to have had in mind existing constitutional or statutory provisions and their judicial

construction touching the subject dealt with.” *State ex rel. Engle v. Indus. Comm.* (1944), 142 Ohio St. 425, 432, 52 N.E.2d 743.

With full understanding, therefore, that Article XII of the Ohio Constitution treated excise and franchise taxes differently, Section 12’s prohibition was expressly limited only to excise taxes—not excise taxes and franchise taxes. Indeed, the Commissioner’s argument is not based on an interpretation of the 1976 consolidation as the Grocers contend. Rather, the Commissioner demonstrated that Article XII of the Ohio Constitution referred to excise taxes and franchise taxes separately prior to 1936, and that the prohibiting clause drafted in Section 12 contemplated that distinction and, therefore, only prohibited excise taxes on the sale or purchase of food off the premises where sold. Consequently, the constitution has never prohibited a franchise tax from being levied on corporations that sell food.

III. The Grocers ignored the historical record, which overwhelmingly indicates that Sections 3(C) and 13 were intended to prohibit a sales tax.

The Grocers claim that the intent of the people in adopting an amendment to the Constitution needs to be determined and cite to the relevant law, but they do not apply it. They quote from the applicable case, “It is well settled that in the interpretation of an amendment to the Constitution the object of the people in adopting it should be ascertained and given effect and that the polestar in the construction of constitutional, as well as legislative, provisions is the intention of the makers and adopters thereof.” *Castleberry v. Evatt* (1946), 147 Ohio St. 30, 33. Indeed, the object of the people adopting Sections 3(C) and 13 is evidenced by the historical record, but the Grocers fail to address it or refute any of the appendices attached to our Merit Brief. These appendices show that the intent of the framers of the amendments, which the people

adopted, was to prohibit sales or other transactional excise taxes on food for consumption off of the premises.

The very name of the organization that spearheaded the constitutional amendment that would later become Section 3(C) was the Ohio Association For Repeal of *Sales Tax* on Foods (the “Association”) (Emphasis added). Moreover, campaign materials disseminated by the Association in support of Section 3(C) clearly identified the intent of Section 3(C) as repealing a sales tax, stating, “Repeal the Sales Tax on Food.” Ohio Association For Repeal of Sales Tax on Foods, *Repeal the Sales Tax on Food, Re-elect Your Friend, Governor Davey* (1936).¹ These campaign materials further state, “You can vote * * * to repeal the *sales tax* on food. It’s a constitutional amendment, appearing separately from the party ballot. To take the *sales tax* off food, vote ‘Yes’ by use of an X as shown on the accompanying sample ballot.” *Id.* (Emphasis added).

The constitutional amendment to repeal the sales tax on food was a common issue in periodicals at the time and it is clear that the issue was understood by all to pertain only to a transactional sales tax. A notice that was published in the Cleveland Press prior to the 1936 election and subtitled “Sales Tax on Food * * * Proposal[] on Ballot,” stated that “[e]limination of the sales tax on food [would] be submitted to voters * * *.” *Constitutional Amendments Await Voters*, CLEVELAND PRESS, Oct. 27, 1936, at Section 1 p. 5.² The Cleveland Chamber of Commerce also weighed in on the issue, stating “Vote AGAINST the Proposed Amendment to Repeal the Sales Tax on Food for

¹ Attached to *Amici Curiae’s* Merit Brief as Exhibit C.

² Attached to *Amici Curiae’s* Merit Brief as Exhibit D.

Human Consumption Off the Premises Where Sold.” *Cleveland Chamber of Commerce Public Notice*, CLEVELAND PRESS, Nov. 2, 1936, at Section 1 p. 17 (Emphasis *sic*).³

These references indicating that the 1936 Amendment only contemplated a sales tax are, by no means, isolated. See, *e.g.*, *600,000 Sign Petitions to End Food Tax*, CLEVELAND PLAIN DEALER, Aug. 5, 1936 (stating that “Gov. Martin L. Davey * * * listed with the Secretary of State 600,000 petitioners for repeal of the *sales tax* on foodstuffs”) (Emphasis added);⁴ *Unsound Method*, CLEVELAND PLAIN DEALER, Oct. 27, 1936, at 8:2 (referring to “a constitutional amendment to prohibit a *sales tax* on food”) (Emphasis added);⁵ *Yoder Backs Move to Kill Tax on Food*, CLEVELAND PLAIN DEALER, Oct. 27, 1936, at 9:2 (stating that “the *sales tax on food* should and probably will be repealed”) (Emphasis added).⁶ No mention is ever made by implication or otherwise that indicates that a franchise tax was also contemplated by the 1936 Amendment.

The Grocers also claim that the use of the phrase “sales or other excise taxes” indicates an intention to include all excise taxes including franchise taxes. However, their own citations to the statutes of other states refute that claim. Each of those statutes in California, Louisiana and Michigan specifically includes a “use tax” as well as a “sales tax”. Use taxes are transactional excise taxes imposed on purchases made out of state. In Sections 3(C) and 13, the use of the phrase “excise taxes” was meant to include both the sales and use type of transactional tax on the sale or purchase of food, at the wholesale or retail level, for human consumption off the premises where sold.

The historical record is irrefutable that Sections 3(C) and 13 were meant to only apply to transactional sales and use taxes. Indeed, neither the Grocers nor any *amicus*

³ Attached to *Amici Curiae’s* Merit Brief as Exhibit E.

⁴ Attached to *Amici Curiae’s* Merit Brief as Exhibit F.

⁵ Attached to *Amici Curiae’s* Merit Brief as Exhibit G.

⁶ Attached to *Amici Curiae’s* Merit Brief as Exhibit H.

in support of the Grocers even addressed the overwhelming evidence against their position. Consequently, the CAT should be upheld.

IV. The Grocers' economic effect argument goes beyond what their expert opined in his report and is insufficient to declare the CAT unconstitutional.

The Grocers argue that the economic effect of the CAT amounts to a sales tax on consumers. Not only is this argument flawed because it posited economic rather than legal incidence as the relevant factor as detailed in our Merit Brief, but also the Grocers' economic effect argument goes beyond what their expert opined in his report. The expert stated that a tax such as the CAT may ultimately be paid by one or more of the following four categories of persons: (1) consumers in the form of higher prices, (2) employees in the form of lower wages, (3) suppliers in the form of lower prices for their goods and services, or (4) owners in the form of lower profits. (Affidavit of Robert A. Lawson dated September 6, 2006, Exhibit 2, p. 2.) The exact sharing among these four groups was a function of supply and demand but that sharing was not determined. *Id.* at fn. 4.

Only one of these categories—consumers—impacts the price of food. Drawing the same conclusions, the Supreme Court of the United States in considering the constitutionality of a franchise tax based on gross receipts, stated, “The contractor, taking into consideration the state of the competitive market for the service, may be willing to bear the tax and absorb it in his estimated profit rather than lose the contract.” *Tax Commissioner of West Virginia v. Dravo Contracting Co.* (1937), 302 U.S. 134, 159. Yet, the Grocers assume that, even though the United States Supreme Court as well as their own expert have stated that there are other ways in which the economic effect of a tax may be borne besides increasing the price to consumers, the

Grocers go on to assume that consumers will, necessarily, pay for the CAT. Such an assumption stretches the facts. The actual fact is that the Grocers do not know what the economic effect of the CAT will be. It could burden any one or more of the four groups listed above, three of whom are not involved in sales or purchases.

As discussed fully above, the CAT is entitled to a presumption of constitutionality unless it is shown beyond a reasonable doubt that it is clearly incompatible with the constitution. Under the Grocers' economic effect argument, three out of the four potential economic effects of the CAT do not implicate the constitution whatsoever. To strike down the CAT based on the economic effect argument, therefore, would not only belie the Grocers' own expert report, it would—more significantly—disregard the lofty standard of proof the Grocers' are required to reach since three out of the four possible economic effects do not implicate the constitution in any degree.

CONCLUSION

An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional *it must appear beyond a reasonable doubt* that the legislation and constitutional provisions are clearly incompatible. The Grocers have failed to meet this high standard. Furthermore, the plain language of the constitution permits taxes such as the CAT. Additionally, even if the constitution were ambiguous with respect to the CAT, the historical record overwhelmingly demonstrates that the constitution does not prohibit right-to-do-business taxes such as the CAT. Finally, the Grocers' argument as to the economic effect of the CAT is simply insufficient to declare the CAT unconstitutional. The CAT, therefore, should be upheld and the Tenth District Court of Appeals should be reversed.

Respectfully submitted,

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