

In the Supreme Court of Ohio

11-1536

BEAVER EXCAVATING COMPANY,
et al.,

Plaintiffs-Appellants,

v.

RICHARD A. LEVIN,
TAX COMMISSIONER OF OHIO,

Defendant-Appellee.

Case No. _____

On Appeal from the
Court of Appeals,
Tenth Appellate District

Court of Appeals Case
No. 10-AP-581

**MEMORANDUM IN SUPPORT OF JURISDICTION OF PLAINTIFFS-APPELLANTS
BEAVER EXCAVATING COMPANY, ET AL.**

Michael DeWine (0009181)
Ohio Attorney General
Barton A. Hubbard (0023141)
Julie E. Brigner (0066367)
Assistant Attorneys General
30 E. Broad Street, 25th Floor
Columbus, Ohio 43215
Telephone: (614) 464-5967
Facsimile: (614) 466-8226
barton.hubbard@ohioattorneygeneral.gov
julie.brigner@ohioattorneygeneral.gov

Counsel for Defendant-Appellee
Richard A. Levin, Ohio Tax Commissioner

Thomas B. Ridgley* (0000910)
**Counsel of Record*
Anthony L. Ehler (0039304)
Jeffrey Allen Miller (0072072)
Robert J. Krummen (0076996)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
Telephone: (614) 464-6400
Facsimile: (614) 464-6350
tbridgley@vorys.com
alehler@vorys.com
jamiller2@vorys.com
rjkrummen@vorys.com

Counsel for Plaintiffs-Appellants
Beaver Excavating Company, et al.

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INTRODUCTION

This case affects virtually every driver in Ohio and every business operating in the State that, in order to offer its goods or services, utilizes the State's public roadways. It involves the meaning and scope of an amendment to the Ohio Constitution passed by the voters of this State that has served as a respected check on the power of the General Assembly. The decision by the Tenth District below has undermined the people's intent, ignored the plain language of the Ohio Constitution and the interpretative decisions of this Court, and opened an entire revenue stream previously reserved solely to public roadway construction and repair by Article XII, Section 5a to general revenue taxes, including a host of taxes that the voters of 1947 plainly intended to restrict – to wit: privilege-of-doing-business excise taxes and the Ohio sales tax.

Article XII, Section 5a (“Section 5a” or the “Highway Investment Amendment”) of the Ohio Constitution was plainly written and is easily understood. Adopted in 1947 by the people of Ohio, Section 5a mandates that moneys derived from all “fees, excises, and license taxes” relating to the registration, operation, or use of vehicles on public highways or relating to the fuels used for propelling such vehicles (“Motor Vehicle Fuel”) be appropriated solely for the limited purposes enumerated in the Amendment, including “the payment of highway obligations, costs of construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes.” The Highway Investment Amendment was purposefully drafted as a Constitutional Amendment with an expansive scope not only to impact the Ohio motor fuel and liquid fuel taxes that were in effect in 1947, but also to require permanently the allocation of necessary State revenue to public highways and protect that investment in infrastructure from future encroachment or diversion by the General Assembly.

Ohio's Commercial Activity Tax (the “CAT”), R.C. 5751, et seq., is a privilege-of-doing-business excise tax that is measured by gross receipts from, among other things, Motor Vehicle

Fuel sales. However, the moneys derived from the CAT relating to Motor Vehicle Fuel sales are appropriated pursuant to R.C. 5751.21 for purposes contrary to Section 5a mandates.

In its decision below, the Tenth District undermined the intent of the Ohio voters who passed Section 5a.¹ The court of appeals made the undisputed point that the CAT “is not a tax upon motor vehicle fuel.” *Beaver Excavating Co. v. Levin* (10th Dist.), 2011-Ohio-3649, at ¶ 34. However, the court crucially erred when it determined that although “the CAT as applied to these appellants has some relation to motor vehicle fuel, the relationship is too attenuated to find that the statutory allocation of the CAT moneys violates Section 5a.” *Id.* The court of appeals wrongfully determined that the moneys derived from the CAT do not “relate to” Motor Vehicle Fuel sufficiently and therefore the expenditure restrictions of Section 5a do not apply to the moneys derived from the CAT measured by gross receipts from Motor Vehicle Fuel sales. *Id.* at ¶¶ 34, 36.

It is well understood that a tax “upon” or “imposed upon” does not have the same meaning as a tax “relating to” – particularly in the context of a constitutional amendment passed by initiative petition. *See State ex rel. Keller v. Forney*, 108 Ohio St. 463, 466 (““This is the simple language of the plain people and it is to receive such meaning as they give to it in political discussions and arguments.’ . . . Where the language is plain there is neither room nor right to construe. The court’s sole duty is to apply it to the facts found.”) (citation omitted). Indeed, in light of this Court’s controlling decisions in *Forney*, *supra* at 467 (discussing the breadth of the language “relating to”) and *Ohio Grocers Ass’n v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, ¶ 29 (“*Ohio Grocers*”) (discussing the narrow applicability of the language “imposed upon”), the Tenth District fundamentally erred in concluding that the 1947

¹ The court of appeals’ Entry and Decision are attached as Exhibits A and B, respectively.

Amendment's "relating to" language carried the same meaning as the terms "upon" or "imposed upon."

Beyond the court of appeals' straightforward legal errors, the decision blesses the CAT's diversion of at least \$100,000,000 annually in constitutionally-mandated highway expenditures. The people of Ohio say those moneys should be an investment in the State's highway safety and economic development. Although the voters in 1947 determined the issue was so important as to pass an amendment to the Ohio Constitution requiring such investment, the Tenth District's decision removes any barrier to the General Assembly's diversion of such moneys derived from measuring-stick excise taxes on Motor Vehicle Fuel to general revenue and other purposes.

The Court should take this case to reverse the Tenth District's decision.

STATEMENT OF THE CASE AND FACTS

A. The Ohio Constitution requires that each tax state a purpose (or object) for which the revenue will be spent.

Since 1851, taxes in the State of Ohio must set forth an object to which its proceeds shall be applied. Article XII, Section 5 ("Section 5") of the Ohio Constitution states:

No tax shall be levied, except in pursuance of law, and every law imposing a tax, shall state, distinctly, the object of the same, to which only it shall be applied.

(Emphasis added). Thus, a tax must state the particular purpose or object for which the revenue will be spent, and the purpose or object expressed must be lawful.

B. The Ohio Constitution restricts the appropriation of moneys derived from fees, excise taxes, and license taxes relating to Motor Vehicle Fuel.

Article XII, Section 5a of the Ohio Constitution provides that:

No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles of public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of

public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on public highways.

(Emphasis added). Section 5a expressly requires that moneys derived from all fees, excise taxes, and license taxes relating to Motor Vehicle Fuel be expended exclusively in the constitutionally mandated ways set forth above – namely, construction and repair of public highways and bridges, among other things.

Article XII, Section 5a was adopted by initiative petition by the people of Ohio on November 4, 1947. Initiative petition is the method by which Ohio citizens propose an amendment to the Ohio Constitution by petition of registered voters. If the referendum secures a majority of votes, the proposal becomes an amendment to the Ohio Constitution. No statutory action by the General Assembly may rescind or amend it.

C. Ohio’s Commercial Activity Tax is a privilege-of-doing-business tax measured by gross receipts.

Effective July 1, 2005, Ohio first imposed the CAT for the privilege of conducting business in Ohio. R.C. 5751.02(A) (“[T]here is hereby levied a commercial activity tax on each person with taxable gross receipts for the privilege of doing business in this state.”) (emphasis added). The CAT is measured by gross receipts derived from commercial activities conducted by persons or entities with a “substantial nexus” to the state. *Id.* “Gross receipts” is broadly defined by the CAT statute and means the “total amount realized by a person, without deduction for the costs of goods sold or other expenses incurred, that contributes to the production of gross income of the person” R.C. 5751.01(F).

Notwithstanding the broad definition of “gross receipts,” the CAT statute excludes from “gross receipts” “any receipts for which the tax imposed by this chapter is prohibited by . . . the Constitution of Ohio.” R.C. 5751.01(F)(2)(ff). In fact, the General Assembly (and the Tax

Commissioner by rule) initially excluded gross receipts from Motor Vehicle Fuel sales from taxation under the CAT because of questions concerning the constitutionality of applying the CAT to gross receipts from Motor Vehicle Fuel (the very question at issue here). The General Assembly excluded gross receipts from Motor Vehicle Fuel sales for a period of two years – from July 1, 2005 (the inception of the CAT) to June 30, 2007. *See* Am. Sub. H.B. No. 66.

On July 1, 2007, the two-year legislative exclusion and the Tax Commissioner's rule expired without resolution of the CAT's constitutionality as applied to gross receipts from Motor Vehicle Fuel. As a result, since July 1, 2007, the CAT has been statutorily applied to gross receipts from Motor Vehicle Fuel sales.

D. Moneys derived from the CAT are appropriated for non-Section 5a objects.

Pursuant to the CAT, the moneys derived from the CAT relating to Motor Vehicle Fuel are treated the same way as all other moneys derived from the CAT – they are deposited into the “commercial activities tax receipts fund” and then divided equally and forwarded to the following three treasury funds: (1) the General Revenue Fund; (2) the School District Tangible Property Tax Fund; and (3) the Local Government Tangible Property Tax Replacement Fund (“Local Government Fund”). *See* R.C. 5751.20. Thus, the CAT appropriates and diverts all moneys derived from the CAT away from Section 5a mandates.

E. The Plaintiffs-Appellants

Plaintiffs-Appellants consist of two groups: (1) Taxpayer-Appellants who have been subject to and have paid the CAT measured by gross receipts from Motor Vehicle Fuel sales; and (2) County Engineer Appellants who have been deprived of funds they would receive if moneys derived from the CAT relating to Motor Vehicle Fuel were collected and distributed in the manner mandated by Section 5a.

F. Plaintiffs-Appellants filed this lawsuit to protect their own rights and vindicate the interests of the Ohio citizenry in Article XII, Section 5a.

Plaintiffs-Appellants filed this lawsuit with the trial court on March 14, 2008. Plaintiffs-Appellants and Defendant-Appellee Richard A. Levin, Tax Commissioner of Ohio, filed Cross-Motions for Summary Judgment. The trial court granted the Tax Commissioner's motion, misconstruing this Court's *Ohio Grocers* decision to conclude:

[T]he dispositive holding of the Supreme Court is that it found it was "plausible to read Sections 3(C) and 13 as permitting the imposition of a privilege-of-doing-business tax on a food seller and measuring that tax by gross receipts including proceeds from the sale of food." [*Ohio Grocers*, 2009-Ohio-4872, ¶ 22.] Substitution of fuels used for propelling vehicles on public highways would not significantly alter the above holding.

(Trial Court MSJ Order attached as Exhibit C, emphasis added.) Plaintiffs-Appellants appealed to the Tenth District Court of Appeals.

The Court of Appeals similarly erred. Although the court properly determined that the CAT "is not a tax upon motor vehicle fuel," 2011-Ohio-3649, at ¶ 34, it ignored the plain language of Section 5a and the direction of this Court in *Forney* and *Ohio Grocers* by concluding that the CAT did not "relate to" Motor Vehicle Fuel because the CAT is not a direct tax imposed "upon" Motor Vehicle Fuel. *Id.* at ¶¶ 34, 36. Plaintiffs-Appellants now appeal that judgment.

**THIS CASE RAISES A SUBSTANTIAL CONSTITUTIONAL QUESTION
AND IS OF PUBLIC AND GREAT GENERAL INTEREST**

This case is of public and great general interest for two fundamental reasons. First, this case allows the Court to restore meaning and substance to the citizen-passed constitutional amendment – Article XII, Section 5a – which has been eviscerated by the court of appeals decision below. Second, the case presents the Court with an opportunity to protect the Ohio voters' constitutionally mandated investment in their public highway infrastructure.

This case involves the application of Article XII, Section 5a of the Ohio Constitution to the CAT, R.C. 5751.01, et seq. At the time Section 5a was passed, the electorate considered, debated, voted, and passed Section 5a over objections from the Governor and leaders in the General Assembly who sought unfettered administrative and legislative freedom in spending tax moneys for whatever purpose they deemed appropriate. The citizens were upset that certain Motor Vehicle Fuel revenues, including moneys derived from Ohio's liquid fuel tax (a privilege-of-doing business excise tax measured by business done (just as the CAT)), were being appropriated to Ohio's General Revenue Fund instead of being dedicated to roadway construction and repair. Article XII, Section 5a was the response of the citizens to two decades of failed promises from politicians who assured them that moneys raised from such sources would be dedicated to roads. When the promises were broken again after the needs of the Great Depression and World War II had ended, the citizens took action to alter and amend their Constitution to restrict the powers of state government. To ensure that all moneys derived from certain related sources would be spent on the roads, Ohio voters proposed and passed a broadly worded amendment – mandating that the General Assembly appropriate all moneys derived from fees, excises, and license taxes relating to Motor Vehicle Fuel solely to those purposes.

The Highway Investment Amendment represented just that – protection of investment by the people of Ohio in the safety and integrity of its public infrastructure. Not only do individuals utilize the state's roads, highways, and bridges for travel, but nearly every business in the State relies on our public roadways to offer their goods and services. The voters in 1947 recognized that without safe, reliable, modern infrastructure the State would fall behind its economic competitors. As such, the people's decision to mandate that certain public revenues exclusively

be appropriated to infrastructure construction and repair protected an investment in the State's economic future.

The Court of Appeals' decision below threatens that mandate. The decision undermines the voter's obvious purpose of ensuring that moneys derived from taxes relating to Motor Vehicle Fuel be reinvested in public roadways and infrastructure. However, the court of appeals' decision is even more dangerous than simply diverting CAT revenues from the public highways to general revenue purposes. The court of appeals' decision emasculates any restriction the voters in 1947 put on the General Assembly. Whereas the voting public understood Section 5a affected all fees, excises, and license taxes relating to Motor Vehicle Fuel, the court of appeals' decision in 2011 removes the Section 5a barrier to the General Assembly's diversion of such moneys derived from measuring-stick excise taxes to general revenue and other purposes, including moneys from other measuring-stick excise taxes and even the Ohio sales tax.

For these reasons, the court of appeal's erroneous decision is of public and great general interest to the voting public, to the motoring public, and to all businesses that utilize the roads – in other words, to all Ohioans.

ARGUMENT

Plaintiffs-Appellants' Proposition of Law No. 1:

The Commercial Activity Tax, R.C. Chapter 5751, is a privilege-of-doing-business excise tax and the moneys derived therefrom relate in part to Motor Vehicle Fuel. Thus, the moneys derived from the CAT relating to Motor Vehicle Fuel must be appropriated solely for the purposes enumerated in Article XII, Section 5a of the Ohio Constitution.

A. This Court's *Ohio Grocers* decision provides a road map for applying Section 5a.

The Ohio Supreme Court's decision in *Ohio Grocers Ass'n v. Levin*, 2009-Ohio-4872, helps clarify the case at hand and demonstrates the errors of the court of appeals' decision. In *Ohio Grocers*, the plaintiffs challenged the application of the CAT to gross receipts from food

sales based on Article XII, Sections 3(C) and 13 (the “Food Amendments”) and sought a CAT exemption for gross receipts from food sales. The Ohio Tax Commissioner argued that the language of the Food Amendments (restricting excise taxes imposed upon the purchase or sale of food) indicates the plain intent of the voters to narrowly prohibit only transactional excise taxes imposed directly upon the purchase or sale of food. This Court properly sided with the Tax Commissioner, finding that the plain text of the Food Amendments and history of their enactment supported a narrow interpretation.

Following the *Ohio Grocers’* analysis, the court of appeals should have adhered to the plain text of Article XII, Section 5a and the history of its enactment to determine that the moneys derived from the CAT relating to Motor Vehicle Fuel must be appropriated according to Section 5a, or the CAT is unconstitutional as applied.

B. The CAT is a privilege-of-doing-business excise tax that is covered by Section 5a.

The 1947 Amendment provides in pertinent part:

No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of

Article XII, Section 5a (emphasis added). It sets out three broad categories of assessments covered – “fees,” “excises,” and “license taxes.” This plain language of Section 5a could not have cast a wider net. It covers all taxes and fees based on the grant or exercise of a privilege.

The definition of an excise tax is well-settled in Ohio. “An excise tax is a tax imposed on the performance of an act, the engaging in an occupation or the enjoyment of a privilege.” *Saviers v. Smith* (1920), 101 Ohio St. 132, syl. at ¶ 4. The CAT in R.C. 5751.02(A) explicitly states that “there is hereby levied a commercial activity tax on each person with taxable gross receipts for the privilege of doing business in this state.” The CAT is levied for the privilege of

doing business in Ohio. The CAT, therefore, is an excise tax.²

The plain language of the 1947 Amendment reveals that it is broadly framed to include all excises, including the CAT. This necessary conclusion is buttressed by the Court's reasoning in *Ohio Grocers*. There, the Court noted that the specific and narrow language of the Food Amendments reflected the drafters intent to prohibit a singular type of excise tax (i.e., only the type of excise tax imposed upon the sale or purchase of food – a transactional sales tax). The Court reasoned, “[i]f the drafters had desired to outlaw excise taxes of every stripe, they simply could have prohibited ‘excise taxes.’” *Id.* at ¶ 29 (emphasis added). This is precisely what the drafters of Section 5a did in 1947. Section 5a uses just that sort of broad, inclusive language the Supreme Court found lacking in the Food Amendments: “[n]o moneys derived from . . . excises . . . shall be expended” Article XII, Section 5a (emphasis added). Moreover, there is no modifying language (“imposed upon purchases and sales”) in Section 5a that limits the prohibited excises to transactional sales taxes. To the contrary, the drafters of Section 5a selected the expansive language the Supreme Court said it expected to see if the drafters intended to include all types of excise taxes.

C. The term “relating to” as used in Article XII, Section 5a is broad in scope and expansive in reach. Moneys derived from the CAT are measured in part by gross receipts from Motor Vehicle Fuel, and to that extent relate to Motor Vehicle Fuel.

Section 5a is differentiated from the Food Amendments analyzed in *Ohio Grocers* because it does not require that the covered taxes be levied upon or collected on a specific purchase or sale in order to be covered by the Amendment. In its interpretation of the Food Amendments, this Court examined the plain language of the limiting phrases contained in each

² In *Ohio Grocers*, the Supreme Court specifically determined that the CAT is an excise tax. *Ohio Grocers*, 2009-Ohio-4872, ¶ 30.

section, and noted that both constitutional provisions prohibited excise taxes imposed or levied “upon sales of food or certain food-related items.” *Id.* at ¶ 30 (emphasis added). The Court rightly interpreted these modifying and limiting phrases to narrow the type of excise tax to which the Food Amendments apply, namely a sales or transactional excise tax. Section 5a is, by contrast, more broadly worded and applies to any excise or license tax to the extent moneys derived therefrom “relat[e] to” Motor Vehicle Fuel.

There is no support for the proposition that “relating to” means “imposed upon” as the court of appeals determined below. 2011-Ohio-3649, at ¶ 34. Instead, the plain meaning of the phrase “relating to” has been extensively reviewed by the United States Supreme Court and by Ohio courts, which follow the Supreme Court’s plain meaning interpretation.

In *Morales v. Trans World Airlines, Inc.* (1992), 504 U.S. 374, 383 (“*TWA*”), the United States Supreme Court considered the preemptive breadth of the Airline Deregulation Act of 1978 (U.S.C. App. § 1301), which prohibits any state law “relating to rates, routes or services of any air carrier.” *Id.* at 383. The Court identified the “key phrase” of the statute as “relating to.” There, the United States Supreme Court held that the plain and ordinary meaning of the words “relating to” “is a broad one – ‘to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,’ Black’s Law Dictionary 1158 (5th ed. 1979) – and the words thus express a broad pre-emptive purpose.” *Id.* The Court stated that, where drafters have employed the phrase “relating to,” indirect effect on the specified subject matter is sufficient to establish the triggering relationship. *Id.* at 386-88 (emphasis added). Thus, the Court determined that a law of general applicability indeed “relates to” a particular

subject matter by virtue of its indirect impact on the subject matter.³

Ohio courts have followed *TWA*'s decision, determining that the plain meaning of the phrase "relating to" is "conspicuous for its breadth." *See, e.g., Ferron v. RadioShack Corp.* (10th Dist. 2008), 175 Ohio App.3d 257, 264 (construing the phrase "with respect to" in harmony with the "sweep" of the analogous phrase "relating to," which expresses a broad purpose); *City of Columbus v. Garrett* (10th Dist. 2001), 2001 WL 289980, at *2 (rejecting an argument that a general city safety regulation avoided federal preemption because of its general application rather than being restricted to a specific prohibited subject matter and reasoning that such an argument was contrary to the "sweeping" "relating to" language of the statute); *see also Schumacher v. Amalgamated Leasing Inc.* (3d Dist. 2004), 156 Ohio App.3d 393, 398, 2004-Ohio-1203, at ¶ 17; *Hocking Valley Cmty. Hosp. v. Cmty. Health Plan of Ohio* (4th Dist. 2003), 2003-Ohio-4243, at ¶ 22; *Kagy v. Toledo-Lucas Cty. Port Auth.* (6th Dist. 1998), 126 Ohio App.3d 675, 680-81.⁴

Even predating *TWA*, this Court has made clear that under Ohio law the phrase "relating to" has an expansive meaning. In *State ex rel. Keller v. Forney* (1923), 108 Ohio St. 463, the Supreme Court of Ohio considered whether certain legislation constituted laws "providing for" tax levies. In its analysis, the Court considered and rejected the argument that "providing for" should be interpreted as synonymous with much more expansive phrases, such as "relating to" or

³ By contrast, the court of appeals below rejected the United States Supreme Court's reasoning and concluded that "relating to" requires a direct relation to the specified subject to establish the triggering relationship. 2011-Ohio-3649, at ¶ 34.

⁴ On August 30, 2011, the Tenth District issued its decision in a related case, *Ohio Trucking Association v. Stickrath* (10th Dist.), 2011-Ohio-4361, determining that a fee charged by the Bureau of Motor Vehicles pursuant to R.C. 4509.05 is unconstitutional under Section 5a. The State will undoubtedly seek this Court's review of that decision. Thus, the Court likely will be asked to accept both cases to resolve the Tenth District's interpretations of the term "relating to," with the Ohio Attorney General likely arguing for and against acceptance.

“concerning.” The Supreme Court explained:

[I]t is self evidence that the word “relating,” and its synonyms, “pertaining to” or “concerning,” are much broader, much more comprehensive, than the word “provide,” and are so used in common conversation.

108 Ohio St. at 467. As early as 1923 – and thus known by the drafters of the Highway Investment Amendment – this Court determined that the plain meaning of the phrase “relating to” is broad and comprehensive in scope.

Simply put, the court of appeals was wrong when it determined that the phrase “relating to” is ambiguous. To the contrary, it is clear and has sweeping breadth in its application. The phrase is not synonymous with “directly applicable to” or “upon.” It has never been interpreted that way. Its use in Section 5a only can mean that Ohio citizens voted for its adoption intending to prevent legislative end runs around its constitutionally imposed appropriation mandates. Per *TWA* and numerous Ohio authorities, moneys derived from the CAT relate to Motor Vehicle Fuel to the extent the tax is measured by gross receipts from the sale of Motor Vehicle Fuel.

D. The history of the 1947 Amendment supports its plain meaning as a broad and expansive amendment intended to affect such privilege-of-doing-business excise taxes as the CAT.

This Court in *Ohio Grocers*, 2009-Ohio-4872, at ¶¶ 33-40, and the court of appeals below, 2011-Ohio-3649, at ¶¶ 26-31, recognized that a review of the historical context of a constitutional amendment may assist in interpreting its meaning and scope. The historical context of Article XII, Section 5a is enlightening because it demonstrates how the voters could have adopted a narrow transactional tax amendment (similar to the Food amendments in *Ohio Grocers*), but chose not to. In that regard, the history confirms the breadth, purpose, and scope of an otherwise clear amendment.

In 1934, voters rejected the following proposed amendment to the Ohio Constitution:

Sec. 5b. Excise taxes imposed upon the receipt, storage, use, disposition or purchase of fuel suitable for use in propelling motor vehicles or upon any two or more of same, shall be measured by a specific sum for each unit or quantity, which shall not exceed three cents per gallon, shall be applied only for public thoroughfare purposes, including the control and protection of traffic thereon, and shall not be diverted by transfer of funds or otherwise, to any object.

(Emphasis added.) The 1934 proposed amendment contained the sort of narrow, transaction-based-direct tax language contemplated by the Tenth District – the CAT “is not a tax upon motor vehicle fuel.” 2011-Ohio-3649, at ¶ 34. Indeed, the 1934 amendment was expressly targeted at direct taxes “imposed upon” the use, transfer, or purchase of Motor Vehicle Fuel. In contrast, however, the drafters of the 1947 amendment chose to eliminate the “imposed upon” restrictive language and broaden the allocation mandates of Section 5a to include moneys derived from all fees, excises, and license taxes “relating to” Motor Vehicle Fuel.⁵

The Tenth District erred in substituting the narrow language of the rejected 1934 amendment, which contained the direct “imposed upon” language, for the broad language of the 1947 Amendment, which simply requires “relating to.” Similarly, Section 5a is different from the Food Amendments in its scope and application to the CAT. It is up to this Court to uphold the plain intent of Ohio voters when they adopted Article XII, Section 5a.

Plaintiffs-Appellants’ Proposition of Law No. 2:

The CAT is unconstitutional as applied to gross receipts from Motor Vehicle Fuel sales because the object of the CAT and appropriation of those moneys derived from the CAT are inconsistent with the mandates of Article XII, Section 5a.

Article XII, Section 5a is unique – it is the only Ohio constitutional provision that

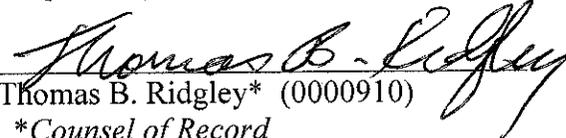
⁵ Here, we must apply the rule *expressio unius est exclusio alterius*. See *Bd. of Elections v. State ex rel Schneider* (1934), 128 Ohio St. 273, 283; *State ex rel. Robertson Realty Co. v. Guilbert* (1906), 75 Ohio St. 1 (When interpreting the Ohio Constitution, “[i]f the maxim ‘expressio unius est exclusio alterius’ is involved, [courts] must consider it.”) Having included “relating to” in the 1947 amendment, the drafters plainly intended to reject the term “imposed upon.”

mandates how monies derived from certain taxes must be appropriated. Specifically, Section 5a requires that all moneys derived from fees, excises, and license taxes relating to Motor Vehicle Fuel must be directed toward a distinct object – namely, the administration, construction, and repair of public highways and bridges (among the other purposes enumerated in Section 5a) – or that portion of the tax is unconstitutional. Simply stated, the General Assembly may not lawfully enact an excise tax relating to Motor Vehicle Fuel that has an object that is other than the objects set forth in Section 5a. The CAT violates this principle in that the CAT relates to Motor Vehicle Fuel and the stated objects (the three funds enumerated) are inconsistent with Section 5a’s constitutionally-mandated object.

CONCLUSION

For the reasons set forth above, Plaintiffs-Appellants request that the Court accept this case for review and reverse the decision of the Tenth District. The CAT is unconstitutional as applied to gross receipts from Motor Vehicle Fuel sales, and under R.C. 5751.01(F)(2)(ff) receipts from the sale of Motor Vehicle Fuel must be excluded from the CAT’s definition of gross receipts.

Respectfully submitted,


Thomas B. Ridgley* (0000910)

**Counsel of Record*

Anthony L. Ehler (0039304)

Jeffrey Allen Miller (0072072)

Robert J. Krummen (0076996)

Vorys, Sater, Seymour and Pease LLP

52 East Gay Street, P.O. Box 1008

Columbus, Ohio 43216-1008

Telephone: (614) 464-6400

Facsimile: (614) 464-6350

tbridgley@vorys.com; alehler@vorys.com;

jamiller2@vorys.com; rjkrummen@vorys.com

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Memorandum in Support of Jurisdiction of Plaintiffs-Appellants Beaver Excavating Company, et al.* was served by U.S. mail this 9th day of September, 2011, on the following:

Michael DeWine
Ohio Attorney General
Barton A. Hubbard
Julie E. Brigner
Assistant Attorneys General
30 E. Broad Street, 25th Floor
Columbus, Ohio 43215

Counsel for Defendant-Appellee
Richard A. Levin, Ohio Tax Commissioner


Thomas B. Coffey
An Attorney for Plaintiffs-Appellants

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Beaver Excavating Company et al.,

Plaintiffs-Appellants,

v.

Richard A. Levin,
Tax Commissioner of Ohio,

Defendant-Appellee.

No. 10AP-581
(C P C No 08CVH-03-3921)

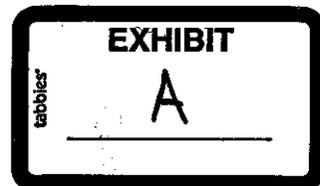
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on July 26, 2011, appellant's assignments of error are overruled. Therefore, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellants.

TYACK, CONNOR & DORRIAN, JJ.

By Mary Tyack
Judge G. Gary Tyack



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(REGULAR CALENDAR)

D E C I S I O N

Rendered on July 26, 2011

Vorys, Sater, Seymour and Pease LLP, Thomas B. Ridgley, Anthony L. Ehler, Jeffrey Allen Miller and Robert J. Krummen, for appellants.

Michael DeWine, Attorney General, Barton A. Hubbard and Julie E. Brigner, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} This case is a challenge to the constitutionality of R.C. 5751 et seq., the Ohio Commercial Activity Tax (the "CAT"). The appellants have sought to prove that the CAT is unconstitutional to the extent that moneys derived from the CAT that relate to sales of motor vehicle fuel are not being expended for the purposes enumerated in

EXHIBIT
B

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Section 5(a), Article XII, Ohio Constitution ("Section 5a"). For the reasons that follow, we affirm the judgment of the Franklin County Court of Common Pleas.

Background of Section 5a and the CAT

{¶2} The relevant constitutional provisions are Article XII, Sections 5 and 5a that provide as follows:

LEVYING OF TAXES.

§5 No tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied. (1851).

Use of Motor Vehicle License and Fuel Taxes Restricted.

§5a No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways. (1947)

(Emphasis sic.)

{¶3} Section 5a is an amendment to the Ohio Constitution passed in 1947 by the citizens of Ohio by means of an initiative petition. The history of Section 5a shows that prior to the amendment, moneys from motor vehicle related taxes had been used to meet general needs, such as help for the poor during the Great Depression. Citizens and highway interest groups wanted moneys obtained through taxes, fees, and licenses relating to motor vehicle operation and fuel to be expended exclusively for road projects

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and highway improvement. Doing so would allow state road money to tie in with the federal highway program and would include many city streets and rural roads. See Ohio Atty.Gen.Ops. No. 82-084 (citing Ohio Secretary of State's officially prepared and published pamphlet setting forth pro and con arguments for Section 5a). Opponents contended that the amendment was unnecessary and handicapped the legislature's ability to apply revenue where it was needed by the state. *Id.*

{¶4} After the amendment passed, the General Assembly repealed the 1¢/gal. liquid fuel tax. The revenue from the liquid fuel tax had been used to pay general obligations of the state. The General Assembly then raised the motor vehicle fuel tax by 1¢ as its revenues were allocated to highway purposes. The tax burden remained the same, but all the funds were now allocated to highway purposes in accordance with Section 5a.

{¶5} Even after the passage of Section 5a, motor fuel dealers were still subject to Ohio's Corporate Franchise Tax for the privilege of doing business in Ohio. However, at that time, the tax was measured by the value of corporate stock, not gross receipts as is done under the CAT.

{¶6} Beginning in 2005, Ohio's General Assembly imposed the Commercial Activity Tax as one of a series of tax revisions designed to lessen the burden of taxation on Ohio businesses. *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, ¶6. The CAT was designed to be phased in over five years beginning in 2005. *Id.* Meanwhile, the corporate franchise tax was to be phased out, along with the tangible

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personal property tax. Motor fuel was temporarily exempt from the CAT until July 1, 2007. Ohio Adm.Code 5703-29-12 (effective March 5, 2006).

{¶7} The CAT is levied "on each person with taxable gross receipts for the privilege of doing business in this state." R.C. 5751.02(A). The value of that privilege is measured differently from the corporate franchise tax. The CAT uses gross receipts to measure the tax. Id. at ¶1. Gross receipts means the "total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person, including the fair market value of any property and any services received, and any debt transferred or forgiven as consideration." R.C. 5751.01(F).

{¶8} The CAT proceeds are allocated to the general revenue fund, the school district tangible property tax fund, and the local government tangible personal property tax repayment fund. R.C. 5751.20.

THE PARTIES

{¶9} Appellants fall into two main groups: contractors and county engineers. Beaver Excavating Company is one of a group of companies who, in the course of their business, generate gross receipts derived from motor vehicle fuel. Since July 1, 2007, these businesses have been subject to the CAT and have paid the CAT, measured in part, by gross receipts from motor vehicle fuel sales. The county engineers for Ashland and Highland Counties have alleged that their county budgets for infrastructure projects depend, in part, on money derived from taxes relating to motor vehicle fuel. They claim that because the CAT does not appropriate the moneys derived from the gross receipts of

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motor vehicle fuel to highway purposes as set forth in Section 5a, the engineers are deprived of funds they should receive for road projects.

{¶10} Appellee, Richard A. Levin, is the Tax Commissioner of Ohio, and has argued that the imposition of the CAT does not violate the Ohio Constitution and is therefore valid.

TRIAL COURT ACTION

{¶11} On July 6, 2010, appellants filed an action in the Franklin County Court of Common Pleas seeking a declaratory judgment that the CAT violated Section 5a. They also asked for an injunction preventing the tax commissioner from levying, enforcing, or collecting the CAT as it relates to motor vehicle fuel.

{¶12} Both parties filed motions for summary judgment. The trial court ruled in favor of the tax commissioner, granting summary judgment on May 19, 2010. The trial court based its analysis on a case that had been recently decided by the Ohio Supreme Court in *Ohio Grocers Assn. v. Ohio Grocers Assn.* *Ohio Grocers Assn.* involved the question of whether the CAT violated the Ohio Constitution's prohibition of sales or other excise taxes on food. Sections 3(C) and 13, Article XII, Ohio Constitution. The Ohio Supreme Court held that the CAT was not a tax on the sale or purchase of food as contemplated by the constitution, and therefore did not violate the constitutional prohibitions against sales or excise taxes on food. *Id.*

{¶13} In this case, the trial court acknowledged the history and genesis of Section 5a. It also recognized the argument that the motor vehicle fuel language in Section 5a may be broader in scope than the constitutional provisions regarding excise taxes on the

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sale of food. Nevertheless, the trial court came to the conclusion that if one were to substitute excises on fuels (used for propelling vehicles on public highways) for excises on food, the Ohio Supreme Court would hold, as it did in *Ohio Grocers Assn.*, that the CAT tax was constitutional.

ASSIGNMENTS OF ERROR

{¶14} On appeal, appellants raise the following three assignments of error:

[I.] The trial court erred in failing to hold that the moneys derived from the Ohio Commercial Activity Tax (the "CAT"), Ohio Revised Code Chapter 5751.01 et seq., to the extent that the CAT is applied to gross receipts from sales of "fuels used for propelling [vehicles on public highways]" ("Motor Vehicle Fuel"), relate to Motor Vehicle Fuel under Article XII, Section 5a ("Section 5a") of the Ohio Constitution.

[II.] The trial court erred in failing to conclude that moneys derived from the CAT relating to Motor Vehicle Fuel are not appropriated as mandated by Section 5a.

[III.] The trial court erred in failing to declare the CAT is unconstitutional under Article XII, Sections 5 and 5a to the extent that moneys derived from the CAT relating to Motor Vehicle Fuel are not appropriated for the specific objects permitted under Section 5a.

STANDARD OF REVIEW

{¶15} This court applies a de novo standard of review on an appeal from summary judgment. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, ¶8; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's

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determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown* at 711. Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶16} In assignment of error one, appellants argue first that the CAT is an excise tax, and second, that moneys derived from the CAT relate, in part, to motor vehicle fuel. The pertinent language of Section 5a, Article XII, reads as follows:

No moneys derived from * * * excises * * * relating to * * *
fuels used for propelling * * * vehicles [on public highways],
shall be expended for other than costs of * * * construction,
reconstruction, maintenance and repair of public highways
* * *

{¶17} The Ohio Supreme Court has declared that a franchise tax is a kind of excise tax. *Ohio Grocers Assn.* at ¶30. Appellants contend that, unlike the constitutional amendments at issue in *Ohio Grocers Assn.*, Section 5a's broadly worded language includes all excise taxes including a tax on the privilege of doing business in Ohio. In support of their argument, they cite to *Ohio Grocers Assn.* in which the court stated that if

drafters had intended to affect excises of "every stripe," they would simply use the term "excise taxes." *Id.* at ¶29. Here, Section 5a reads "excises." Thus, appellants argue that the plain language of Section 5a requires a determination that the CAT moneys derived from gross sales of motor vehicle fuel must be expended solely for Section 5a purposes.

{¶18} The tax commissioner argues that whether revenue generated by the CAT is subject to Section 5a's expenditure restriction turns on whether the CAT is a general tax or a special tax. The commissioner looks to the taxes in effect at the time Section 5a was adopted, such as the liquid fuel tax, and the motor vehicle fuel tax. The commissioner suggests that highway user taxes imposed on the users of public highways for the privilege of using the highways and earmarked for maintaining highways are special taxes, unlike the corporate franchise tax which is a general tax.

{¶19} The commissioner further notes that diversion of these special taxes took place around the country for relief for the poor during the Great Depression. He contends that Ohio and many states enacted anti-diversion amendments like Section 5a to enable states to receive federal highway funds under the Hayden-Cartwright Act, as states could not receive federal funds unless their highway-related taxes were applied to highway purposes.

{¶20} The commissioner argues that we must narrowly construe the "relating to" language of the amendment, for to do otherwise, would lead to absurd results. The commissioner states that it is untenable to think corporate tax revenues received from auto manufacturers, dealers, repair shops, parts dealers, financing businesses, and insurers must be dedicated to highway purposes because those taxes relate to the use

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and operation of motor vehicles. The commissioner urges that this court interpret the amendment to apply only to special taxes imposed on those who use the public highways for the express purpose of maintaining the highways and not general taxes such as the CAT.

{¶21} Any constitutional analysis must begin with the presumption of constitutionality enjoyed by all legislation. *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶25. Before a court may declare unconstitutional an enactment of the legislative branch, "it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *Id.*, quoting *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus. When a statute is challenged on the ground that it is unconstitutional as applied to a particular set of facts, the party making the challenge bears the burden of presenting clear and convincing evidence of a presently existing set of facts that make the statute unconstitutional and void when applied to those facts. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶38.

{¶22} When the courts construe a statute or constitutional provision, "the object of the people in adopting it should be given effect; 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, paragraph one of the syllabus. The Ohio Supreme Court has described how to construe a constitutional amendment adopted by initiative petition as follows: "This is the simple language of the plain people and it is to receive such meaning as they usually give to it in political discussions and

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arguments.' " *State ex rel. Keller v. Forney* (1923), 108 Ohio St. 463, 466, quoting *State ex rel. Greenlund v. Fulton* (1919), 99 Ohio St. 168, 200. Technical hair-splitting distinctions are not favored when applying the common words of the people. *Id.* at 201.

{¶23} "The first step in determining the meaning of a constitutional provision is to look at the language of the provision itself." *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513, 520, 1994-Ohio-496. "Words used in the Constitution that are not defined therein must be taken in their usual, normal, or customary meaning." *State ex rel. Taft v. Franklin Cty. Court of Common Pleas*, 81 Ohio St.3d 480, 481, 1998-Ohio-333.

{¶24} "If the meaning of the constitutional provision is clear on its face, courts will not look beyond the provision in an attempt to divine what the drafters intended it to mean." *Gough v. Triner*, 7th Dist. No. 05 CO 33, 2006-Ohio-3522, ¶15, citing *Sheward* at 520. However, if the meaning of the constitutional provision cannot be ascertained by its plain language, courts may look to the purpose of the amendment to determine its meaning. *Id.* Courts can look to the history of the time when it was passed, the circumstances at the time of its adoption, the need for the provision, the mischief sought to be avoided, and the remedy intended to be afforded. *Id.*, citing *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, ¶14; *Cleveland v. Bd. of Tax Appeals* (1950), 153 Ohio St. 97, 103.

{¶25} Here, the plain language of Section 5a states that fees, excise taxes, and license taxes relating to motor vehicle fuel, must be expended exclusively for specific purposes contained in the amendment.

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{¶26} The "related to" language of Section 5a can only be described as ambiguous. Taken to the broadest possible extent, everything is related in some way to everything else. See *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.* (1997), 519 U.S. 316, 335-36, 117 S.Ct. 832 (Justice Scalia concurring). An extremely broad construction of the "related to" language could lead to absurd results such as those posited by the tax commissioner. However, a narrow rendering could thwart the intention of the citizens of Ohio when they voted for Section 5a. In the Employee Retirement Income Security Act ("ERISA") preemption context the United States Supreme Court has stated: "[w]e simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* (1995), 514 U.S. 645, 656, 115 S.Ct. 1671.

{¶27} As touched on briefly above, at the time Section 5a was submitted to the voters for their approval, the Ohio Secretary of State prepared and published, in accordance with Section 1g, Article II, Ohio Constitution and G.C. 4785-180b, an official publicity pamphlet, setting forth the arguments in favor of, and the arguments in opposition to, the proposed amendment. Ohio Atty.Gen.Ops. No. 82-084.

{¶28} The argument in favor stated, in pertinent part:

This Amendment simply says you want your automobile license and gas tax money to go for better roads and streets
Many Ohio highways are behind the times, and must be improved for post-war traffic.
Many streets are dangerous traffic bottle-necks.

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We are disgusted with slow moving traffic in congested areas, dusty, winter mired-in roads in rural districts, and alarmed at the traffic toll on narrow roads and bridges with death inviting curves.

.....

Ohio originally promised that automobile license and gas tax funds would go for roads, streets, and related purposes. But temptation was too great and millions of these special tax dollars have been and are being spent for other purposes. This is your chance to correct these conditions.

The same thing happened in other states, but nineteen states, including Michigan, Pennsylvania, Texas, Iowa, California, Minnesota, Oregon and Kentucky, have acted to protect their road funds by amending their constitutions. Ohio now has this opportunity.

.....

Road and street improvement costs have increased. Ohio needs road money to tie-in with the promised federal highway program which will include many city streets and rural roads. It is imperative that motor vehicle taxes be used exclusively for roads and streets.

Remember, this Amendment does not increase the rate of any tax nor place restrictions on the allocation of revenues by the Legislature. It is your insurance for better roads and streets.

Vote "YES" for the "Better Roads and Streets Amendment" and put Ohio on the honor roll of progressive states."

{¶29} The opponents argued as follows:

NO TAX REDUCTION. This amendment holds no promise of a tax reduction. If revenues thus provided for road purposes without specific appropriations exceed the actual needs for the roads, unnecessary expenditures and misuse of the excess funds will be encouraged.

.....

BAD POLICY. This amendment places the Legislature in a strait-jacket and severely handicaps it in applying the revenue of the state to the needs of the state. The Legislature could not use highway revenues for emergency purposes and the revenues from such taxes will have to be spent for roads and streets and for no other purpose.

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NOT NEEDED. Taxes levied upon automobile owners allocated by law for the construction and maintenance of roads and streets are the 3¢ motor vehicle fuel tax and motor vehicle license fees. The 1¢ per gallon liquid fuel tax is used to pay general governmental obligations. Liquid fuel tax revenues add approximately \$15,000,000 annually to the state general revenue fund. Appropriations are now made by the Legislature from this fund to the Department of Highways and political sub-divisions. Since the Legislature can and has appropriated this money for highway purposes, there is no need for this amendment.

{¶30} In 1972, the Ohio Constitutional Revision Committee Finance and Taxation Committee created a report containing information about the history and background of Section 5a, and how those types of "good roads" amendments have been interpreted in other states. The report summarized the purpose of Section 5a as requiring "that all of the revenues derived from the registration of motor vehicles and from the taxes imposed on the purchase of fuels for motor vehicles be expended on the requirements of the state's highway system." Ohio Constitutional Revision Commission Finance and Taxation Committee, 1755 (Vol. 4, Sept. 22, 1972). The report summarized three major earmarked taxes on the operation of motor vehicles and the use of the highways in the state. The taxes were the gasoline or motor vehicle fuel tax, the highway use tax, and the motor vehicle license or registration tax. A fourth tax, the transportation tax, was levied upon common and contract carriers. Id. at 1758.

{¶31} A review of this background and history shows that the objective of Section 5a was and is to prevent taxes collected from the motoring public from being diverted to non-highway purposes. Without the constitutional amendment, the legislature was free to divert moneys for emergencies or other priorities. The question thus becomes whether

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the CAT, as applied to appellants, is related to motor vehicle fuel in such a way that Section 5a's prohibition on where such moneys may be spent is triggered.

{¶32} The Ohio Supreme Court in *Ohio Grocers Assn.* has determined that the CAT is a privilege of doing business tax, sometimes known as a franchise tax. A franchise tax "is a kind of excise tax." *Id.* at ¶30. We recognize that *Ohio Grocers Assn.* focused on an alleged unconstitutional imposition of a tax on food, while the present case involves an alleged unconstitutional expenditure of revenue derived from the CAT. Nevertheless, the following principles that are relevant to the instant case may be gleaned from the *Ohio Grocers Assn.* decision.

{¶33} A franchise tax, or a tax upon the privilege of doing business, is a kind of excise tax. *Id.* at ¶30. It is permissible to tax the privilege of doing business, and to do so, the privilege must be valued. *Id.* at ¶16. The value of the privilege of doing business, may be determined by using various factors, including gross receipts. *Id.* There is a distinction between a tax upon a certain factor and a tax upon a privilege measured by that factor. *Id.* at ¶17, 23. The only purpose of the franchise tax formula is to determine by uniform rules the value of the corporate franchise in the state, and the employment of various factors is not an indication that the subjects of such factors are being taxed. Rather, the factors are used to compose a measuring stick. *Id.* In the same way Ohio's corporate franchise tax operates, the CAT is levied on the exercise of a privilege and not on receipts. See *Bank One Dayton, N.A. v. Limbach* (1990), 50 Ohio St.3d 163, 167 (discussing the nature and operation of the corporate franchise tax).

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{¶34} Applying these principles, as the Ohio Supreme Court did in *Ohio Grocers Assn.*, we must conclude that Ohio's CAT measured by gross receipts, including receipts from the sale of motor vehicle fuel, is not a tax upon motor vehicle fuel. Whether the CAT relates to the sale of motor vehicle fuel is not supported by the background and history of Section 5a which historically has been interpreted to apply to the specific taxes set forth above and not to general taxes. While in a sense one could say that the CAT as applied to these appellants has some relation to motor vehicle fuel, the relationship is too attenuated to find that the statutory allocation of the CAT moneys violates Section 5a. Appellants have not been able to show beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.

{¶35} Assignment of error one is overruled.

{¶36} Having overruled assignment of error number one, appellants' second and third assignments of error must fail also. Having found CAT's mechanism of valuing a privilege based in part on gross sales of motor vehicle fuel bears little to no relationship to a tax upon motor vehicle fuel, the remaining assignments of error are overruled as well.

{¶37} Based on the foregoing, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

CONNOR, J., concurs.
DORRIAN, J., concurs separately.

DORRIAN, J., concurring separately.

{¶38} I concur with the majority's affirmation of the trial court's judgment, but conclude that Section 5a, Article XII, of the Ohio Constitution ("Section 5a") was intended

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to restrict the use of revenues from taxes and fees *targeted at* users of the public roads, irrespective of whether they were classified as general or specific taxes. The Ohio Commercial Activity Tax (the "CAT") is a tax on the privilege of doing business, not a tax on the privilege of using the public roads or a tax targeted at users of the public roads, and, therefore, applying the CAT to businesses engaged in the sale of motor vehicle fuel (hereinafter "gasoline") does not violate Section 5a.

{¶39} As the majority explains, a constitutional amendment adopted by initiative petition must be given " 'such meaning as [the people] usually give to it in political discussions and arguments.' " *State ex rel. Keller v. Fomey* (1923), 108 Ohio St. 463, 466, quoting *State ex rel. Greenlund v. Fulton* (1919), 99 Ohio St. 168, 200. Thus, the phrase "fees, excises, or license taxes relating to * * * fuels used for propelling such vehicles" in Section 5a must be understood in the context of the time it was enacted.

{¶40} Two types of taxes were specifically mentioned in the parties' discussion of the history of Section 5a: the motor vehicle fuel tax and the liquid fuel tax.¹ A review of the history and circumstances of each of these taxes demonstrates that they were targeted at users of the public roads. Thus, it is appropriate to view Section 5a as a restriction on the use of revenues from such targeted fees or taxes.

{¶41} The liquid fuel tax, which appellant suggests was a general tax, was enacted in 1933 and imposed a one-cent-per-gallon tax on liquid fuel used, distributed, or sold in the state. G.C. 5542-2, Am.Sub.S.B. No. 354, 115 Ohio Laws 631, 632-33. The

¹ Ohio also imposed a motor vehicle license tax at the time Section 5a was adopted and continues to impose this tax. The motor vehicle license tax was and is clearly targeted at users of the public roads, as it is "levied upon the operation of motor vehicles on the public roads or highways," and must be paid when the owner registers a motor vehicle. R.C. 4503.02, 4503.11.

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law defined "liquid fuel" as "any volatile or inflammable liquid * * *, which is used or usable, either alone or when mixed or compounded, for the purposes of generating light, heat or power, or for any purpose whatsoever; * * * includ[ing] gasoline, kerosene and all other like substances." G.C. 5542-1, Am.Sub.S.B. No. 354, 115 Ohio Laws 631. A portion of the revenue from the liquid fuel tax was placed into a rotary fund to be used for paying refunds of the tax, and the remainder of the revenue was placed into a state public school fund. G.C. 5542-18, Am.Sub.S.B. No. 354, 115 Ohio Laws 631, 641. Subsequently, in 1939, the General Assembly amended the law to provide that revenue from the liquid fuel tax beyond the amount needed to fund the rotary fund was to be placed in the state's general revenue fund. G.C. 5542-18, Sub.H.B. No. 1, 118 Ohio Laws 7, 9.

{¶42} The liquid fuel tax was imposed on dealers of liquid fuel. G.C. 5542-2, Am.Sub.S.B. No. 354, 115 Ohio Laws 631, 632-33. However, as discussed below, gasoline dealers adopted the practice of passing the motor vehicle fuel tax on to customers in the price of gasoline, and there is no reason to believe that liquid fuel dealers did not adopt the same approach. Although the statutory definition of liquid fuel encompassed more than gasoline for use in propelling vehicles on the public roads, the history of the enactment of the liquid fuel tax indicates it was primarily targeted at users of the public roads. At the beginning of 1933, the motor vehicle fuel tax was imposed at a

rate of four cents per gallon.² On June 30, 1933, the General Assembly passed a bill reducing the existing motor vehicle fuel tax to three cents per gallon. H.B. No. 62, 115 Ohio Laws 629, 631. The very next day, July 1, 1933, the General Assembly passed the measure creating the one-cent-per-gallon liquid fuel tax. Am.Sub.S.B. No. 354, 115 Ohio Laws 631, 642. The effect of this change was to re-appropriate a portion of the revenue from the motor vehicle fuel tax, which by statute was required to be used for maintaining and improving public roads, to other uses. This intent is further demonstrated by the fact that, after Section 5a was adopted, the General Assembly repealed the liquid fuel tax and restored the motor vehicle fuel tax rate to four cents per gallon on the same day. Am.S.B. No. 358, 122 Ohio Laws 807 (repealing the liquid fuel tax); H.B. No. 500, 122 Ohio Laws 809, 809-11 (increasing rate of motor vehicle fuel tax).

{¶43} Moreover, historical revenue data establish that the liquid fuel tax essentially replaced the one-cent reduction in the motor vehicle fuel tax. In 1930, the state received gross revenue of \$39 million from the four-cents-per-gallon motor vehicle fuel tax. The following year, the tax brought in \$41.2 million in gross revenue. In 1932, the state received \$36.1 million in gross revenue from the motor vehicle fuel tax. In 1933, the year that the General Assembly reduced the motor vehicle fuel tax and enacted the liquid fuel tax, the state received combined gross revenue from both taxes of \$35.7 million. In 1934 and 1935, the two taxes brought in combined gross revenue of \$38.9 million and \$41.2 million, respectively. Ohio Department of Taxation Annual Report for

² The four-cents-per-gallon tax on motor vehicle fuel in effect at the beginning of 1933 was composed of a two-cents-per-gallon tax under G.C. 5527 and an additional two-cents-per-gallon tax under G.C. 5541-1 G.C. 5527, H.B. No. 44, 111 Ohio Laws 294, 295, G.C. 5541-1, H.B. No. 335, 113 Ohio Laws 70, 71. The additional tax was originally levied as a one-cent-per-gallon tax in 1927 and was increased to two cents

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the Year Ending December 31, 1947, at 9-10 (appellant's reply brief, Exhibit B). The fact that the state's revenues were essentially unchanged when the motor vehicle fuel tax was reduced and the liquid fuel tax was implemented demonstrates that the burden of the liquid fuel tax largely fell on the same individuals who bore the burden of the motor vehicle fuel tax; i.e., those using gasoline to propel vehicles on public roads

{¶44} Appellants concede that the motor vehicle fuel tax, also known as the gasoline tax, is a "special tax" because revenue from the tax is directed to a specific purpose. The gasoline tax is collected from gasoline dealers, rather than purchasers of gasoline. R.C. 5735.05; 5735.25; 5735.29; 5735.30; *Cincinnati v. Cincinnati Oil Works Co.* (1931), 123 Ohio St. 448, 450 ("The state gasoline tax is imposed by the state upon the business of the owner of the filling station, and not upon the consumer of the gasoline.") However, since the earliest days of the gasoline tax, dealers have added the cost of the tax to the price of gasoline; as a result, purchasers of gasoline ultimately bear the burden of the tax as a cost for the privilege of using public roads. *State ex rel. Janes v. Brown* (1925), 112 Ohio St. 590, 596 ("The [gasoline] tax is upon the enjoyment of the privilege of using motor vehicle fuel in traveling upon the highways and streets of the state."); *State ex rel. Bettman v. Canfield Oil Co.* (1929), 34 Ohio App. 267, 273 ("A dealer is charged with the collection of the [gasoline] tax for administrative purposes only. The tax is upon the enjoyment of the privilege of using motor vehicle fuel. The various gasoline dealers of Ohio adopted a system whereby the amount of the tax was added to the cost and normal of the tax gasoline, and was paid by the consumer with the understanding that the amount added to the cost and normal profit for tax was collected

by the dealer for the state of Ohio.") (internal citation omitted); *Hickok Oil Corp. v. Evatt* (1943), 141 Ohio St. 644, 653 ("As the ultimate consumer pays a price enhanced by the tax, the burden is spread upon those who use the privilege of driving motor vehicles on the highways and streets of the state."). This "pass through" structure means that the gasoline tax is effectively a tax targeted at drivers, notwithstanding the fact that the tax is collected from dealers.

{¶45} The General Assembly ensured that the gasoline tax would be targeted at automobile drivers by providing a refund of the tax for users of gasoline engaged in activities that do not involve driving on the public roads. R.C. 5735.14(A) provides that "[a]ny person who uses any motor fuel, on which the [gasoline tax] * * * has been paid" for various specified purposes that do not involve propelling a vehicle on the public roads, "shall be reimbursed in the amount of the tax so paid on such motor fuel." See also *Shafer v. Glander* (1950), 153 Ohio St. 483, paragraph one of syllabus ("The use of motor vehicle fuel is taxable only where such fuel is used for the purpose of generating power for the propulsion of motor vehicles on the public highways."). The refund provision was included as part of the original enactment of the gasoline tax law. G.C. 5534; H.B. No. 44, 111 Ohio Laws 294, 298. Granting a refund to the *user* of the gas, rather than the dealer from whom the gasoline tax is collected, effectively recognizes that the user bears the burden of the tax. Refunding the gasoline tax to those who use gasoline for purposes other than driving on the public roads ensures that the gasoline tax burden will fall on drivers.

{¶46} Moreover, the language used by proponents and opponents of Section 5a when it was on the ballot in 1947 demonstrates that people at that time understood the gasoline tax to be targeted at drivers. The official ballot argument in favor of Section 5a stated that the amendment "simply says you want *your* automobile license and gas tax money to go for better roads and streets." (Emphasis added.) (Appellee's brief, Exhibit 2.) Likewise, the ballot argument in opposition to Section 5a referred to both the gasoline tax and motor vehicle license fees as "[t]axes levied upon automobile owners." (Appellee's brief, Exhibit 2.) Viewed in this light, the logic behind the amendment is clear—revenues from taxes and fees paid as a cost of using the public roads should accrue to the benefit of those taxpayers by financing maintenance and improvement of the public roads.

{¶47} The General Assembly also recognized that the burden of the gasoline tax falls on drivers by exempting most gasoline sales from the sales tax. R.C. 5739.02(B)(6). The Supreme Court of Ohio has recognized that this exemption exists because the gasoline tax is analogous to the sales tax. In *Haefner v. Youngstown* (1946), 147 Ohio St. 58, the Supreme Court stated that "the exemptions provided for in [the sales tax law] are in keeping with a legislative policy of excepting from the sales tax proper sales already taxed in the same or a similar way, namely, sales of motor vehicle fuel." *Id.* at 64, overruled on other grounds by *Cincinnati Bell Tel. Co. v. Cincinnati* (1998), 81 Ohio St.3d 599, 607-08. As with the gasoline tax, the burden of the sales tax ultimately falls on the consumer. See *Buddies Lunch System, Inc. v. Bowers* (1960), 170 Ohio St. 410, 413 ("The primary intent of the Sales Tax Act is, of course, to collect the tax from the

consumer [sic.]); *ERB Lumber Co. v. L&J Hardwood Flooring, Inc.* (1997), 118 Ohio App.3d 421, 424 ("The Ohio statutory scheme puts the burden of collecting the sales tax on the vendor and the burden of paying the sales tax on the consumer."). Thus, applying the sales tax to gasoline would effectively be double taxation on drivers.³

{¶48} The ballot language advocating passage of Section 5a also referred to the fact that 19 states that had passed anti-diversion amendments. It is instructive to consider the experience of one state, Maine, which passed an anti-diversion amendment containing language similar to Section 5a only a few years before Ohio. In 1944, the voters of Maine adopted an amendment to that state's constitution providing that "[a]ll revenues derived from fees, excises and license taxes *relating to* registration, operation and use of vehicles on public highways, *and to fuels used for propulsion of such vehicles*" must be expended for highway purposes. (Emphasis added.) Section 19, Article IX, Maine Constitution. This provision closely mirrors Ohio's anti-diversion amendment, which restricts the use of "moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles." Section 5a, Article XII, Ohio Constitution. Both of these provisions restrict the use of revenues from fees and taxes "relating to" gasoline.

{¶49} In 1973, the Supreme Judicial Court of Maine decided a case involving the scope of that state's anti-diversion amendment. *Portland Pipe Line Corp. v.*

³ Appellants argue that, under appellee's reasoning, the General Assembly could levy a sales tax on gasoline and direct the revenues from that tax into the general fund. Appellants argue that this would be a clear violation of Section 5a. That is not the case before this court and addressing that argument would result in an advisory opinion, which we lack the constitutional or statutory authorization to issue. *Siders v Reynoldsburg School Dist* (1994), 99 Ohio App.3d 173, 193. Nevertheless, I note that a change to the longstanding exemption from the sales tax for gasoline sales would likely present a different case from the circumstances surrounding the application of the CAT to businesses involved in the sale of gasoline.

Environmental Improvement Comm. (Me.1973), 307 A.2d 1. The plaintiffs in the *Portland Pipe Line* case challenged the legislature's imposition of a fee of one-half cent per barrel of petroleum products transported over water during a specified period. *Id.* at 9. The fee was imposed against "oil terminal facilities." *Id.* at 9-10. The proceeds of the fee were used to fund the state's Coastal Protection Fund. *Id.* The plaintiffs argued that revenues from the licensing fee constituted " 'revenues derived from fees, excises, and license taxes relating * * * to fuels used for the propulsion' of vehicles on public highways," and that the anti-diversion amendment required those revenues to be used for highway purposes. *Id.* at 12. The court traced the history of the Maine motor gasoline tax, finding that "[t]he plan of the 'gasoline tax' was to focus on those who derived benefits as users of the highway system as the class subject to the tax." *Id.* at 13. The court then considered the history of the anti-diversion amendment, concluding that "[t]he Legislature and the people had been accustomed since 1923 to the 'gasoline tax,' a tax imposed on highway users. It was this revenue that was protected from diversion to non-highway uses." *Id.* Because the challenged license fee was not imposed on highway users but, rather, on "those engaged in over-water transfers of petroleum products," the court concluded that revenues from that fee were not " 'derived from fees, excises and license taxes relating to fuels used for the propulsion of * * * motor vehicles'" and therefore not within the scope of the constitutional restriction. *Id.* at 14.

{¶50} I find the Maine court's reasoning persuasive, particularly in light of the historical similarities between Maine and Ohio's gasoline taxes and anti-diversion amendments. In both states, at the time the motor vehicle fuel tax was enacted, there

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was no state sales tax. Ohio first enacted a motor vehicle fuel tax in 1925. H.B. No. 44, 111 Ohio Laws 294; *Caldwell v. State* (1926), 115 Ohio St. 458, syllabus. The Ohio sales tax was not enacted until 1934 and the use tax until 1935. *Gen. Motors Corp. v. Wilkins*, 102 Ohio St.3d 33, 2004-Ohio-1869, ¶37 (citing H.B. No. 134, 115 Ohio Laws, Part II, 306, and H.B. No. 590, 116 Ohio Laws, Part II, 101). Maine enacted its first motor vehicle fuel tax in 1923 but did not enact a sales and use tax until 1951. *Portland Pipe Line* at 13; *Harold MacQuinn, Inc. v. Halperin* (Me.1980), 415 A.2d 818, 821. Thus, in both states, at the time the gasoline tax was enacted, there was no method for directly collecting motor vehicle fuel taxes from the consumer. Imposing the gasoline tax on dealers or distributors was a method of streamlining the tax collection process, but the ultimate burden of the tax fell on drivers. *Bettman* at 273; *Portland Pipe Line* at 13.

{¶51} Finally, appellants cite to the *Hickok Oil* decision and argue that both the liquid fuel tax and the gasoline tax are or were taxes on the privilege of doing business and that, because Section 5a was intended to limit those taxes, it also limits the CAT because the CAT is a tax on the privilege of doing business. Admittedly, in *Hickok Oil*, the Supreme Court of Ohio referred to the motor vehicle fuel tax as a "tax levied against the dealer for the privilege of doing business as a dealer * * * measured by the amount of business done." *Id.* at 653. However, in following sentence, the Supreme Court acknowledged that the cost of the tax was passed along to the consumer and, thus, the burden fell on those who used gasoline for driving on the highways and streets. *Id.* As set forth above, I believe it is more appropriate to view the liquid fuel tax and the motor vehicle fuel tax as measures targeted at users of the public roads. The CAT, by contrast,



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is a broad-based tax applicable to most businesses in the state. Furthermore, there is no indication that the cost of the CAT paid by appellants is passed along to users of public roads or even to the subcontractors to whom appellants sell gasoline.

{¶52} For all of these reasons, it is clear that the voters who adopted Section 5a would have understood the gasoline tax as a tax targeted at purchasers of gasoline who use that gasoline to drive on the public roads. Section 5a was designed to ensure that the revenues from this tax and other fees and taxes paid by drivers were used for roadway improvements and were not diverted into the general fund. Thus, the phrase "fees, excises, or license taxes relating to * * * fuels used for propelling such vehicles" should be understood as taxes targeted at users of the public roads.

{¶53} Construed in this manner, I believe the Supreme Court of Ohio's decision in *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, determines the outcome of this appeal. The Supreme Court found that it was "far from clear * * * that [the CAT] falls upon the sale or purchase of food." *Id.* at ¶56. Likewise, here, it is far from clear that the CAT falls upon drivers using the public roads. It is clear, however, that the CAT is not targeted at drivers using the public roads. Therefore, I agree with the majority's conclusion that appellants have not proven by clear and convincing evidence that the CAT, as applied to appellants, is unconstitutional and void.

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

BEAVER EXCAVATING CO. ET AL,

CASE NO. 08CV-3921

PLAINTIFF,

JUDGE HOLBROOK

VS.

RICHARD A. LEVIN,

TAX COMMISSIONER OF OHIO,

DEFENDANTS.

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

FILED COURT
COMMON PLEAS CO., OHIO
FRANKLIN CO., OHIO
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CLERK OF COURTS

Entered this 18th day of May, 2010.

The Court has for consideration the Motion for Summary Judgment filed by Plaintiffs Beaver Excavating Company, Broshear Contractors, Inc., Gerken Paving, Inc., Independence Excavating Inc., Koksosing Construction Company, Inc., Lykins Companies, Inc., Ohio Machinery Co., Inc. Prus Construction Company, The Ruhlin Company, J.D. Williamson Construction, Co., Inc., Ashland County Engineer Edward J. Meixner, and Highland County Engineer Dean Otworth ("Plaintiffs"). Plaintiffs' motion was filed September 5, 2008. Defendant Richard A. Levin, Tax Commissioner of Ohio has also filed Motions for Summary Judgment, the first filed September 5, 2008 and the second was filed February 5, 2010. The International Union of Operating Engineers, Local 18 has filed an Amicus Curie Brief in support of Plaintiffs' Motion.

Plaintiffs' motion for summary judgment asks this Court to declare the application of Ohio's Commercial Activity Tax ("CAT") to gross receipts relating to motor vehicle fuel used for propelling vehicles on public highways ("motor fuels") violates Article XII, Section 5a of the Ohio Constitution. Plaintiffs seek to enjoin the collection of CAT levies upon gross receipts from



such motor vehicle fuel. Defendant's motions request that the Court determine as a matter of law that the CAT is valid.

Plaintiffs and Defendant have both offered their views of the historical underpinnings of the corporate franchise tax, the motor vehicle fuel tax, the liquid fuel tax and the background for enactment of the CAT. The instant action was filed in March 2008 and the original arguments of Plaintiffs and Defendant were offered in part with consideration of the Tenth District's decision in *Ohio Grocers Ass'n v. Wilkins*, 178 Ohio App. 3d 145, 2008 Ohio 4420, 897 N.E.2d 188 (*Ohio Grocers I*). The subsequent reversal of that decision by *Ohio Grocers Ass'n v. Wilkins*, 123 Ohio St.3d 303, 2009-Ohio-4872, (*Ohio Grocers II*) has disposed of some of those arguments. The Court will address the remaining substantive arguments below.

Summary judgment, pursuant to Civ.R. 56(C), is proper when there are no genuine issue of material fact, the movant is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, that conclusion being adverse to non-movant. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 375 N.E.2d 46. The movant must offer evidence that affirmatively demonstrates that the nonmoving party has no evidence to support his or her claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 1996 Ohio 107, 662 N.E.2d 264. In addition to the normal scrutiny given to motions for summary judgment, a heightened burden exists when dealing with the constitutionality of statutes. As remarked in *Ohio Grocers II*, parties who challenge the constitutionality of an Ohio statute, bear a heavy burden of persuasion. Duly enacted legislation must be judged by a beyond reasonable doubt standard. (*Ohio Grocers II*, citing *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008 Ohio 511, 882 N.E.2d 400.) The enactments under consideration must be upheld if they can plausibly be interpreted as

permissible. *Ohio Grocers II*, P11. The Court will consider the offered motions using the above considerations.

The specific sections of the Ohio Constitution are set forth as follows:

Ohio Const. Art. XII,

§3. Imposition of taxes

Laws may be passed providing for:

(A) The taxation of decedents' estates or of the right to receive or succeed to such estates, and the rates of such taxation may be uniform or may be graduated based on the value of the estate, inheritance, or succession. Such tax may also be levied at different rates upon collateral and direct inheritances, and a portion of each estate may be exempt from such taxation as provided by law.

(B) The taxation of incomes, and the rates of such taxation may be either uniform or graduated, and may be applied to such incomes and with such exemptions as may be provided by law.

(C) Excise and franchise taxes and for the imposition of taxes upon the production of coal, oil, gas, and other minerals; except that no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold.

§ 5. Levying of taxes

No tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied.

§ 5a. Use of motor vehicle license and fuel taxes restricted

No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided

therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways. (“§ 5a”)

Plaintiffs’ position is that § 5a invalidates the CAT as applied to their businesses and governmental entities. The Court stated in *Ohio Grocers II*, supra, that “The CAT is levied "on each person with taxable gross receipts for the privilege of doing business in this state." R.C. 5751.02(A) [P7] “For many businesses, the CAT replaces the tax on personal property located and used in business in Ohio, see R.C. Chapter 5719, and it replaces the tax on the privilege of exercising the corporate franchise in this state.” Id P6

The Court further stated in its analysis that three fundamental principles governed the analysis of constitutionality. First, it is permissible to tax the privilege of doing business. P16 Second, there is a distinction between a tax *upon* a certain factor and a tax upon a privilege *measured by* that factor. P17 Third, the measuring stick of a privilege-of-doing-business tax may include tax-exempt factors. P20 The Court noted that while the Grocers offered a competing plausible reading, the contrary position was also plausible and given the high standard required for finding unconstitutionality, the Grocers could not prevail.

The decision further elaborated that in examining the language of the statute, R.C. 5751, the legislature denominated the CAT as a tax on the privilege of doing business in the state. It is imposed on the person exercising the privilege. R.C. 5751.02(A) It is imposed upon the entity holding the privilege and on no one else. 5751.02(B) The privilege is assessed if exercised for any portion of the calendar year. 5751.02(B) It is not levied transaction by transaction, but over

a quarterly or annual period. The tax is the product of "taxpayer's taxable gross receipts." R.C. 5751.03(A) ["after subtracting the exclusion amount in R.C. 5751.03(C)"]

The Court's ultimate opinion was that when "the CAT's practical operation is considered, it becomes evident that it is what it purports to be: a permissible tax on the privilege of doing business, not a proscribed tax upon the sale or purchase of food." P14 The Court's holding was that the CAT was not an excise tax "upon the sale or purchase of food" and did not violate the Ohio constitution. In examining the instant matter, this Court must come to the same conclusion as to the impact of the CAT upon gross receipts from the sales of motor vehicle fuels as contemplated by § 5a.

Plaintiffs maintain that the CAT is an excise tax and under R.C. 5751.01(F)(2)(ff) "Any receipts for which the tax imposed by this chapter is prohibited by the Constitution or laws of the United States or the Constitution of Ohio." The Commissioner has responded that it is the expenditure of the tax collected that is affected by § 5a, not the collection. Plaintiffs have offered that the General Assembly, in its passage of Chapter 5751, has exempted some areas from the CAT. Plaintiffs do not posit that such exemptions have rendered the tax unconstitutional. Plaintiffs have also pointed out that the Commissioner granted a two-year exclusion of gross receipts on motor vehicle fuel. This obviously benefited Plaintiffs and like situated businesses and governmental departments but does not generate unconstitutionality.

Plaintiffs urge that the Court apply the simple and common language of the constitutional section to find that it prohibits application of the CAT. *State Ex Rel Greenland v. Fulton* (1919), 99 Ohio St. 168 The Court accepts that duty, but is required to find the legislative promulgation valid unless shown that it is not by beyond a reasonable doubt. *Ohio Grocers II*, supra, and

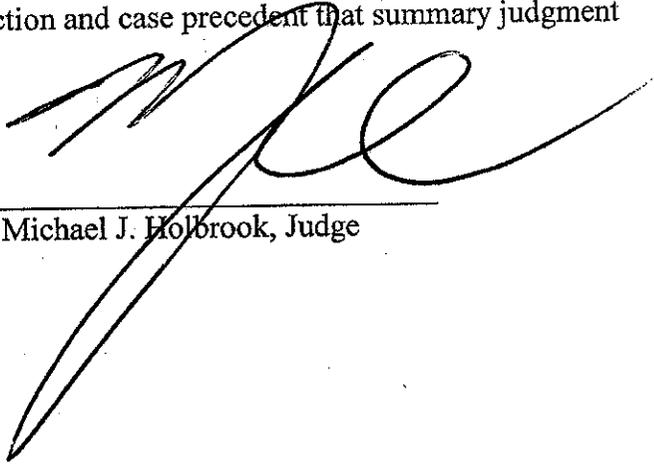
Plaintiffs contend that as the CAT is measured by gross receipts it is an excise tax relating to motor vehicle fuel and prohibited by § 5a. The Supreme Court in *Ohio Grocers II* disagreed with the appellate court's determination in *Ohio Grocers I* that the "CAT when applied to gross receipts from the wholesale sale of food and from the retail sale of food for human consumption off premises where sold, operates as, and is, an excise tax levied or collected upon the sale or purchase of food, which is prohibited by Sections 3 and 13 of Article XII of the Ohio Constitution." P27 While Plaintiffs advance that the relating to motor vehicle fuel language in § 5a is broader in scope than taxes on the sale of food, the dispositive holding of the Supreme Court is that it found it was "plausible to read Sections 3(C) and 13 as permitting the imposition of a privilege-of-doing-business tax on a food seller and measuring that tax by gross receipts including proceeds from the sale of food." P22 Substitution of fuels used for propelling vehicles on public highways would not significantly alter the above holding.

Plaintiffs have asserted that the operation of the CAT will place collected taxes into the general revenue fund, the school district tangible property tax fund, and the local government tangible property tax repayment fund pursuant to R.C. 5751.20. This appears to be a correct assertion. The Commissioner contends that it does not violate the constitution because the ultimate disposition is not dictated by such placement but rather it is the expenditure of funds for non § 5a purposes that would be at issue. Plaintiffs have responded that placing a burden upon them to delay until expenditures were authorized would emasculate the section. Plaintiffs state that the general revenue fund, the school district fund and the local government fund are unconstitutional objects of the collected monies. Plaintiffs offer R.C. 5751.31 in support of their

right to contest the application of the CAT. That section provides a right of review in the Supreme Court of final determinations under R.C. 5751.60 of the Commissioner. Had the *Ohio Grocers II* opinion been different, then the above arguments would require resolution. In light of that holding, they do not.

While both sides have offered lengthy recitations of the genesis of § 5a, the same rationale applies as above stated. Established law is that the CAT is a permissible revenue collection statute focused on the privilege of doing business in the state. The fact that it is measured by gross receipts on sales or uses that would not be directly taxable or that require earmarking of the collected funds does not invalidate the collection.

It is concluded that summary judgment is proper for the Defendant, Richard A. Levin, Tax Commissioner of Ohio and is not supported in favor of Plaintiffs. The Court finds upon both application of the rules of statutory construction and case precedent that summary judgment in favor of Defendant should be granted.



Michael J. Holbrook, Judge

Appearances:

Thomas B. Ridgley
Anthony L. Ehler
52 East Gay Street
PO Box 1008
Columbus, OH 43215
Attorneys for Plaintiffs

Lawrence D. Pratt
Barton A. Hubbard
Julie E. Brigner
Damion M. Clifford
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-5967
Attorneys for Defendant