

In the
Supreme Court of Ohio

BEAVER EXCAVATING COMPANY, et al.,	:	Case No. 2011-1536
	:	
Plaintiffs-Appellant,	:	
	:	On Appeal from the
v.	:	Franklin County
	:	Court of Appeals,
JOSEPH W. TESTA [RICHARD A. LEVIN],	:	Tenth Appellate District
TAX COMMISSIONER OF OHIO,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. 10-AP-581
	:	

**MEMORANDUM OPPOSING JURISDICTION OF APPELLEE
JOSEPH W. TESTA [RICHARD A. LEVIN], TAX COMMISSIONER OF OHIO**

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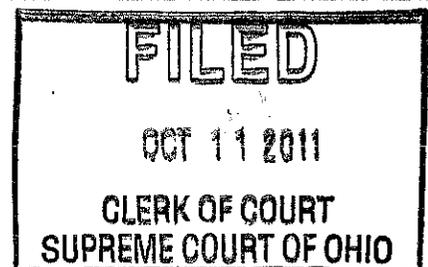


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The Highway Spending Amendment, Section 5a, governs taxes and fees that are targeted at motorists, such as gas taxes and driver’s license fees. The general commercial activity tax is not “related to” motor fuels, and Section 5a is not triggered when a company’s CAT liability is measured by gross receipts including receipts generated by motor fuel sales. 13

Appellee Tax Commissioner's Proposition of Law No. 2:

Section 5a, on its own terms, restricts only improper spending of the relevant revenues. Therefore, the proper remedy for a Section 5a violation is enforcement of the spending restraint, not an injunction against collecting the tax or fee. (State ex rel. Donahey v. Edmondson (1913), 89 Ohio St. 93, and Friedlander v. Gorman (1933), 126 Ohio St. 163, followed and applied.) 14

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INTRODUCTION

This case does not warrant the Court's review, and it does not implicate the broad interests that Plaintiffs-Appellants allege. Instead, it involves the application of settled law to untenable claims. Equally important, the claimed need for review collapses because of an undeniable mismatch between the cause that Plaintiffs now seek to champion—preserving highway funding on behalf of every Ohio driver—and the actual claim they filed—which seeks to avoid paying taxes, *not* to have the revenues spent on highways. That mismatch, and the related internal inconsistencies in Plaintiffs' positions, also means that this case would be a poor vehicle for any issues that might otherwise justify review. If review is needed, another case, with the right litigants and the right claims, would better serve the Court and Ohio.

To be sure, the issues raised by Plaintiffs-Appellants Beaver Excavating et al. (“Beaver”) might seem interesting at first blush—but a careful review of their claims shows that no further review is needed. Beaver bases its claim on an Ohio constitutional provision that, whatever its precise scope, is plainly a limit on how certain revenues can be *spent*; it does not limit taxation in any way. Section 5a of Article XII says that “[n]o moneys derived from” certain taxes and fees on motorists “shall be expended for other than” highway purposes such as road construction and repair. The amendment applies to “fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles.” Beaver claims that Ohio's commercial activity tax, or CAT—which is imposed on the privilege of doing business and is measured by a business's gross receipts—is a tax “relating to . . . [motor] fuels,” because some of Beaver's gross receipts were derived from motor fuel sales. That, Beaver says, triggers Section 5a, and somehow renders the *tax* invalid: Beaver seeks to enjoin the Tax Commissioner from “levying, collecting, or enforcing the CAT as it relates to motor fuel.” Complaint at 6. This claim is both wrong on the merits and unworthy of review.

First, the appeals court properly rejected Beaver’s claim that the CAT is a tax “relating to” motor fuels, and nothing about that straightforward holding warrants review. The appeals court explained that the CAT is imposed on the privilege of doing business, with the value of the privilege measured by gross receipts, and it held that including receipts derived from fuel sales does not convert the CAT into a tax on motor fuel or a tax “relating to” motor fuel. *Beaver Excavating Co. v. Levin* (10th Dist.), 2011-Ohio-3649 (“App. Op.”), ¶¶ 33-34 (citing *Ohio Grocers Assn. v. Levin*, 123 Ohio St. 303, 2009-Ohio-4872). The appeals court was right, based not only on this Court’s recent decision in *Ohio Grocers*, but also for other reasons detailed below regarding the meaning of Section 5a. That correctness alone is a reason to deny review.

Second, review cannot be justified by a purported need to “protect . . . investment in” Ohio’s “public highway infrastructure,” Beaver Jur. Mem. at 6, because Beaver seeks to *have its taxes lowered, not to have the revenue spent on highways*. Notably, Beaver’s entire case for review is based on that claim of protecting highway investment for the good of all drivers and all Ohioans, as Beaver does not assert that it and other taxpayers have a great public interest in cutting their taxes. But Beaver did *not* seek injunctive relief to restrict the use of the revenue, or any sort of “reallocation remedy;” it sought *only* to enjoin tax collection—and it still does so. In short, its appeal to this Court is a bait-and-switch, basing the need for review on preserving funding, while advancing a case on the merits that would do no such thing.

Third, the internal inconsistencies in Beaver’s litigating positions make this a poor case for review, even if the issues otherwise justify review, and even if Beaver could somehow reframe its case as protecting funding rather than cutting its tax bill. That is, even if Beaver could get around its self-imposed limit in the Complaint and pursue reallocation as well as tax avoidance, it makes a poor litigant. If the Court wishes to hear a true funding-protection case, it should take

a case from someone seeking solely that remedy, such as the contractors or the county engineers, not someone still trying to leverage that concern into a tax cut. Or, conversely, the Court should hear from an unabashed tax objector, if there is a case to be made for enjoining the tax (though there is not). This case, by trying to have it both ways, is too flawed to join either issue properly.

For these and other reasons below, the Court should deny review of this case.

STATEMENT OF THE CASE AND FACTS

Beaver claims that Ohio cannot impose the CAT on it, to the extent that its CAT liability is assessed by calculating all gross receipts, including revenue generated by selling motor fuel. It claims that such taxation violates Section 5a's earmarking of certain tax revenues for highway purposes. Thus, the relevant background includes the constitutional provision, the CAT that they wish to invalidate in part, and the precise claims that Beaver raises.

- A. Ohio's Highway Spending Amendment, Section 5a, provides that revenues generated by certain taxes and fees, such as gasoline taxes and driver's license fees, are spent only on building highways and on other specified purposes.**

In 1947, Ohio's voters adopted a constitutional amendment to ensure that revenue generated by certain taxes and fees imposed on motorists, such as gasoline taxes and driver's license fees, would be spent only for certain purposes, such as building highways. Specifically, that "Highway Spending Amendment," which became the Ohio Constitution's Article XII, Section 5a, provides as follows:

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.

Ohio Const., art. XII, sec. 5a (emphasis added). Initially, when Ohio imposed its first automobile driver's license tax in 1906 and a special gasoline tax in 1925, the General Assembly earmarked the resulting funds for use in building and maintaining highways. But that changed by the 1930s, and "moneys from motor vehicle related taxes [were] used to meet general needs, such as help for the poor during the Great Depression." App. Op. at ¶ 3.

The amendment restored the principle that money raised from motorists would be spent on highways. It also "allow[ed] state road money to tie in with the federal highway program," *id.*, as a federal law required States, as a condition on receiving federal highway funding, to dedicate gas taxes and motorist fees to highway purposes, see *id.* at ¶ 19. That federal law led many States to adopt similar amendments, often called "anti-diversion amendments." See App. Op. at ¶¶ 48-50 (Dorrian, J., concurring) (discussing other States' amendments and noting that Ohio's ballot language regarding Section 5a cited those States' amendments).

B. Ohio replaced its old corporate franchise tax with the commercial activity tax or CAT, which taxes the privilege of doing business in Ohio and uses gross receipts as a measuring stick for assessing the value of the privilege and thus the amount of tax.

For about a century, Ohio imposed a corporate franchise tax on most Ohio businesses. That tax was imposed "on the privilege of doing business." See *Ohio Grocers*, 2009-Ohio-4872, ¶ 37. Whenever the privilege of doing business is taxed, "the privilege must be valued" by some method. *Id.* at ¶ 16. For decades, Ohio's valuation method had centered on the value of a company's outstanding stock, and beginning "in 1971, the net-income method for measuring [the privilege] was introduced." *Id.* at ¶ 37. The full formula, not relevant here, reviewed a company's income and other factors, ultimately leading to the amount of tax owed.

As part of a comprehensive tax reform, Ohio replaced the corporate franchise tax with a commercial activity tax, or CAT. *Id.* at ¶ 1. The CAT, like the corporate franchise tax, is imposed on the privilege of doing business. *Id.* However, it measures the value of that privilege

by a business's "gross receipts," not net income or other factors. *Id.* Further, under a tiered system, no CAT liability is triggered by the first \$150,000 in gross receipts, and a flat \$150 applies to those with receipts between \$150,000 and \$1 million. Gross receipts over \$1 million trigger CAT liability at the applicable rate, now \$.0026 per dollar. *Id.* at ¶¶ 7, 52-53.

C. Beaver--with other fuel sellers and road-construction contractors and two county engineers--sued the Tax Commissioner, seeking to enjoin collection of the CAT to the extent it is based on gross receipts that are allegedly related to sales of motor fuel.

Beaver is one of twelve Plaintiffs here. Ten, including Beaver, are companies that the Complaint identified as the "Motor Fuel Seller Plaintiffs," who "generate gross receipts relating to fuel used to propel vehicles." Complaint at 2-3, ¶ 1. The Tax Commissioner does not dispute that Beaver and the other companies sell motor fuel, and thus pay the tax that they challenge. However, most of the "Motor Fuel Seller Plaintiffs," such as Beaver, Kokosing Construction Company, Gerken Paving Co., and others, sell very little fuel, and much of their business is devoted to highway construction projects. At least one Plaintiff, Lykins Companies, is primarily a fuel-selling company. The remaining two plaintiffs are the County Engineers of Ashland and Highland Counties. They alleged that their "budgets for county infrastructure projects depend, in part, on proceeds from taxes relating to motor fuel." Complaint at 3, ¶ 2. They alleged that they are being "deprived of certain funds that they would receive" if the disputed CAT revenues were earmarked for highway purposes.

The Complaint challenges the application of the CAT to these companies/taxpayers, to the extent their CAT liability is based on gross receipts, and those receipts include amounts generated by the sale of motor fuel. Count I seeks a declaration that the "application of the CAT to motor fuel violates" Section 5a. *Id.* at 5, ¶ 17. Count II, the "Claim for Injunctive Relief," says the "collection of the CAT relating to motor fuel should be enjoined." *Id.* at 6, ¶ 19. The prayer for relief seeks three declarations, culminating in a declaration that the "CAT as it relates

to motor fuel is unconstitutional,” because the money raised is “not expended” for the limited purposes of Section 5a. *Id.* at 6. It seeks one injunctive remedy: “an order enjoining the Defendant . . . from levying, collecting, or enforcing the CAT as it relates to motor fuel.” *Id.* It also seeks “such other relief” as “appropriate.”

The Complaint does not, in any Count or in the prayer for relief, specify any alternative remedy that would restrain allegedly improper spending, order reallocation of the disputed money to allowable purposes; it seeks nothing other than invalidation of the tax.

D. The trial court and the appeals court both rejected Beaver’s claim that the CAT triggered Section 5a, and neither court addressed any issues regarding the appropriate remedy if a violation occurred.

Both courts below rejected Beaver’s claim on the merits. The trial court relied heavily on *Ohio Grocers*, focusing on the Court’s explanation of the CAT as a tax on the privilege of doing business, measured by gross receipts. Com. Pl. Op at 2, 4-6, 7. Noting this Court’s reasoning that the CAT is not imposed on any particular item or transaction that helped generate the taxpayer’s gross receipts, the trial court concluded that the CAT did not trigger Section 5a here.

The appeals court likewise concluded that the CAT, and its measurement of gross receipts including those derived from motor fuel sales, did not trigger Section 5a. App. Op. at ¶ 34. The appeals court also relied on *Ohio Grocers*, and it also reviewed Section 5a’s text and the history surrounding its adoption. The court explained that the “related to” language had to be read in light of Section 5a’s purpose, because without a limiting principle, “[t]aken to the broadest possible extent, everything is related in some way to everything else.” *Id.* at ¶ 26. A concurring opinion added that Section 5a applied only “to restrict the use of revenues from taxes and fees targeted at users of the public roads.” *Id.* at ¶ 38 (Dorrian, J., concurring). The CAT, as a broad tax, is not “targeted at users of the public roads.” *Id.*

Because the appeals court concluded that Section 5a was not implicated here, it did not reach the issue of what remedy would apply if Section 5a were violated. The Commissioner had argued that any violation could be remedied only by restricting the expenditure of funds to the allowable purposes, not by invalidating collection of the tax.

Beaver now seeks this Court's review.

THIS CASE IS NOT OF PUBLIC AND GREAT GENERAL INTEREST AND DOES NOT RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION

The Court should not grant review for several reasons. The issue was properly resolved below, and nothing about the appeals court's reasoning merits review. Further, Beaver's claim for a tax-cancellation remedy is at odds with its claim that it seeks to protect highway funding, and that undermines its claim of great public interest. Moreover, that same mismatch has led to so many inconsistencies in Beaver's interests and claims that it renders this case a poor vehicle for resolving any issues that might otherwise warrant review in another case.

A. The appeals court properly held that the CAT does not trigger Section 5a, and that holding is certain enough on the merits that no further review is needed.

The appeals court's holding was correct, and nothing about its legal reasoning or its conclusion warrants another review. As the appeals court noted, this Court just recently reviewed the CAT's nature in *Ohio Grocers*, and that recent guidance means no second look is needed. This Court explained that the CAT is indeed a tax on the privilege of doing business, with the value of the privilege measured by gross receipts—but that does not mean that the CAT is imposed on the items or transactions that generated the gross receipts. *Ohio Grocers*, 2009-Ohio4872, ¶¶ 51-56. As the appeals court noted here, *Ohio Grocers* involved “an alleged unconstitutional imposition of a tax on food,” while this case “involves an alleged unconstitutional expenditure of revenue derived from the CAT.” App. Op. at ¶ 32. Nevertheless, the core principles of *Grocers* go a long way in resolving this case. *Id.*

The appeals court did not rely solely on *Grocers*, but also examined Section 5a's text and purpose to determine what counted as a tax "related to" motor fuel sales. The court reviewed the context of the amendment's adoption, including the ballot language put before Ohioans in adopting it, and the history of business taxation since its adoption. App. Op. at ¶¶ 27-31. It noted that the term "related" must have some limit, because, after all, "everything is related to everything" at some point. *Id.* at ¶ 26.

All of that analysis is straightforward. In addition, *Ohio Grocers* includes further support for the conclusion below. For example, the Court in *Grocers* noted that the CAT's predecessor, the corporate franchise tax, had never been challenged as an invalid tax on food sales, even though the formula used for that tax had, for decades, included revenue derived from food sales in calculating the net-income factor used to calculate that predecessor tax. *Ohio Grocers*, 2009-Ohio4872, ¶¶ 36-39. Likewise, the corporate-franchise-tax formula had always included income derived from motor fuel sales, but no one suggested that such inclusion triggered Section 5a.

Beaver's claim suffers other flaws on the merits, too, that the appeals court did not even reach, and further review would not help Beaver to clear those hurdles. Most important, this Court has repeatedly held that challenges to the *expenditure* of tax revenue, based on "earmarking" or dedicated-use provisions, do not implicate the validity of *collecting* the tax at issue. *State ex rel. Donahey v. Edmondson* (1913), 89 Ohio St. 93, 114; *Friedlander v. Gorman* (1933), 126 Ohio St. 163, 168. In *Edmondson*, the Court explained, in precisely on-point language, that "[i]f perchance other laws in relation to the disbursement of the fund so raised, for the purpose for which it was levied, are unconstitutional, nevertheless the levy must stand, leaving it to the legislature to provide constitutional ways and means by which the fund may be applied to the object named in the statutes." *Id.* Notably, this point is distinct from the

Commissioner's explanation below of how the mismatch between Beaver's tax claim and the spending-restraint amendment undercuts its claim to great public interest. Here, the *Edmondson* holding means that Beaver cannot succeed on the *merits* of the tax challenge it brought, aside from the implications for the lack of general interest here.

In sum, Beaver cannot win here on its tax claim, both for the reasons in the decision below and for additional reasons, and that alone is a reason to deny further review.

B. This case does not involve any great public interest in protecting highway funds, because Beaver seeks to eliminate that revenue, not redirect it to highway spending.

Beaver's mismatch here undercuts not just its merits claim, but also eviscerates its claim to great public interest. Beaver's jurisdictional memorandum leaves no doubt that its argument for great interest is based *solely* on the idea of protecting highway funds. Nowhere does it claim that the allegedly unfair taxation itself is a cause for review. Instead, Beaver refers repeatedly to the need to "protect" highway funds, and to stop the "diversion" of revenue to improper use. See, e.g., Jur. Mem. at 3 (attacking "diversion of at least \$100,000,000 annually in constitutionally-mandated highway expenditures"), *id.* at 6 ("the case presents the Court with the opportunity to protect the voters' constitutionally mandated investment in their public highway infrastructure").

But all of Beaver's rhetoric about "protecting" highway funds rings hollow, because Beaver carefully confined its requested relief in the Complaint to *invalidating the tax, without asking for the revenue to be set aside for highway purposes*. See above at 4 (detailing claims and relief sought in Complaint). Thus, the driving public does not have a great interest in seeing Beaver's claims succeed, as that would not add a single dime to highway funding. To the contrary, it would simply reduce the revenue available to the general revenue fund, the local government fund, and the school district fund—some of which might even go to roads, and with a definite harm to other public goods—with no countervailing benefit to drivers.

In addition to confining its requested relief in the trial court, Beaver's Proposition of Law No. 2 in this Court asks to invalidate the tax. Beaver's first Proposition seems to suggest that the problem is the allegedly improper diversion of revenue, as opposed to its initial collection, but that Proposition does not affirmatively seek any sort of funding-reallocation remedy. Instead, it serves only as a baseline to lead to Proposition 2's invalidation of the tax collection, apparently on the two-step theory that "because the money is slated to be spent wrongly, it ought not be collected to begin with." But that theory—aside from being incorrect under *Edmondson* and other cases—would, even if viable on the merits, undercut any claim that the motoring public has an interest in Beaver's success.

Three of Beaver's amici, notably, build their entire need for review on the unspoken premise that the remedy here would be reallocation of the funds to "proper" uses, but none of them addresses the mismatch with the relief Beaver seeks. See Amici of County Engineers, Ohio Contractors Assn., Union of Operating Engineers. Those groups all have a strong interest in reallocating the funds, but no interest in eliminating the taxation.

In sharp contrast, the fourth amicus, who have an interest as taxpayers as opposed to an interest in roadbuilding contracts, assumes the opposite, namely, that the taxation is the sole issue. See Petroleum Marketers Amicus at 3. Even so, that amicus expressly disclaims any support for Beaver's position on the merits, showing the mixed motives at issue here.

The Petroleum Marketers also mistakenly suggest that review is justified because the issue will come to the Court anyway through tax challenges and through the Board of Tax Appeals, so the Court might as well address the issue now. That is not a concern, because the case for tax-invalidation is so weak that there is no uncertainty. But if a strong tax-objection claim does exist, the BTA route to this Court is the better one to address pure tax issues. Conversely, if the

real concern is the spending restraint, no such claim could be brought through the refund claim/Tax Commissioner/BTA route, because that process is available *only* to challenge illegal or erroneous *taxes*, not to restrain spending.

Nor could Beaver cure this problem by re-reading its “other appropriate relief” request to encompass a new-found desire for a reallocation remedy. That is so not only because it is an implausible reading of the Complaint, but also because adding a backup plan would not eliminate their ongoing efforts to have the tax invalidated. That, as explained below, means that the public interest is not served by Beaver’s efforts, and equally important, Beaver’s mixed-motive approach causes inconsistencies that render this a poor case for review.

C. Even if the issues here justify review in general, the inconsistencies in Beaver’s positions render this case a flawed vehicle for resolving those issues.

Beaver’s mismatched approach—namely, basing a tax challenge on the allegedly improper spending of that revenue—also means that this case is a poor vehicle for review, even if Beaver could clear the hurdles identified above. That is, even if Beaver could somehow revive a claim for seeking a reallocation remedy, its maintenance of the tax-cancellation challenge renders it so tied in knots that it is not a good advocate for that cause.

Even if Beaver could seek both remedies now, this would not be a typical case in which litigants merely seek alternate relief. Litigants routinely, and legitimately, seek alternate remedies: Often, they seek a “whole loaf,” with “half a loaf” as backup; other times, parties seek two mutually exclusive remedies on different paths, such as an injunction or damages. But here, these two remedies are *opposed to each other*, in result and in terms of the various groups’ interests in achieving reallocation versus tax cancellation.

Notably, these mismatched motives are not just a matter of the amici and the public interest, which favors preserving the funds for use—it is a problem within the Beaver plaintiff

group. The two County Engineer Plaintiffs (as opposed to the County Engineers Association as an amicus) are parties, and their interest is undoubtedly in preserving the funds for reallocation, not in invalidating taxes (including the CAT's allocation to local government). Indeed, Beaver and the other roadbuilding contractors may have as strong an economic interest in highway funds as they do in cutting their taxes, despite their self-identification as Fuel Seller Plaintiffs and their commitment to the tax-cancellation remedy. While they are of course free to shape their case as they wish, the mix of interests here has led this coalition of plaintiffs to litigating positions that veer between stressing one or the other approach, as shown by the two competing Propositions of Law and the mismatch between the Complaint and the Jurisdictional Memorandum.

If Section 5a does somehow provide a basis for restraining a "diversion of funds" here, then any public interest in that cause should be championed by a party fully committed to *that* result, not a party that raises that interest as a way station to achieving a tax break instead. Beaver's approach is certainly understandable from its perspective, but it does not provide this Court with the best framework for resolving either the Section 5a issue or the resulting issue of what remedy *would be appropriate* for a violation.

Nor should the mismatch itself be a reason for review, that is, the Court should not hear this case if it sees a need to clarify the distinction between tax objections and spending objections. Any such issues can best be clarified by review in another Section 5a case coming to this Court, *Ohio Trucking Assn. v. Stickrath* (10th Dist.), 2011-Ohio-4361, which provides a much better vehicle to resolve these issues. See Jur. Mem. at 12 n.4. In that case, the plaintiffs undoubtedly wish to invalidate a disputed fee, and they have no residual economic interest in a reallocation remedy instead. Further, in that case, the parties fully fought, and the appeals court resolved, the issue of whether the remedy was to strike a fee (there, a relative fee increase) rather than restrict

the use of the funds. See *id.* at ¶¶ 41-45. That makes the issue fully ripe for review, as opposed to lurking in the shadows, as here. Finally, if the Court is inclined to review both cases, or to review one and hold the other—although, again, this case does not warrant review—it ought to review only *Ohio Truckers*, as only that case raises, and has properly preserved in a comprehensive manner, all the issues regarding Section 5a’s reach and the appropriate remedy.

ARGUMENT

Appellee Tax Commissioner’s Proposition of Law No. 1:

The Highway Spending Amendment, Section 5a, governs taxes and fees that are targeted at motorists, such as gas taxes and driver’s license fees. The general commercial activity tax is not “related to” motor fuels, and Section 5a is not triggered when a company’s CAT liability is measured by gross receipts including receipts generated by motor fuel sales.

The Commissioner’s merits argument is largely explained above in Part A, regarding the decision’s correctness as a reason to decline review. Thus, he summarizes it here only briefly.

“[T]he objective of Section 5a was and is to prevent taxes collected from the motoring public from being diverted to non-highway-purposes,” App. Op. at ¶ 31; Section 5a does not extend to general taxes that have an indirect connection to cars or motor fuel. Only taxes targeted at the motoring public are covered, and such targeting is what the “related to” language means. See *id.*; see also *id.* at ¶¶ 38-48 (Dorrian, J., concurring). Beaver’s contrary reading has no limit. It would mean that a gas station’s property taxes trigger Section 5a, because the land is used in a way “related to” motor fuel sales. So, too, would the sales taxes on all auto parts, and on repair services, be subject to Section 5a, because paying to have a car in working order is “related to” the “operation[] or use of vehicles on public highways.”

Not only is that view absurd in its implications, but it runs contrary to the settled practice for generations. No one has ever suggested that such “related” purchases and taxes trigger Section 5a. Most important, no one ever suggested that the former corporate franchise tax was

invalid, or triggered Section 5a, to the extent that the net-income calculation included motor fuel sales. And this Court explained in *Ohio Grocers* that the prior understanding regarding the corporate franchise tax is relevant to the CAT, and the Court rejected the Grocers' attempt to set aside all comparisons to the corporate franchise tax.

Further, the merits result here is further confirmed by several other analyses. For example, the history of Ohio's gas tax and similar taxes before the amendment, and after the amendment, confirms this view. In addition, further support comes from the federal Hayden-Cartwright Act, which required such anti-diversion amendments to obtain federal highway funds, and by a comparison of Ohio's amendment to the similar constitutional amendments in 28 other states, especially Maine's identical "related to" phrasing. See App. Op. at ¶¶ 48-52 (Dorrian, J., concurring) (detailing Maine language and case law applying it).

For these and other reasons, Beaver's claim fails on the merits.

Appellee Tax Commissioner's Proposition of Law No. 2:

Section 5a, on its own terms, restricts only improper spending of the relevant revenues. Therefore, the proper remedy for a Section 5a violation is enforcement of the spending restraint, not an injunction against collecting the tax or fee. (State ex rel. Donahey v. Edmondson (1913), 89 Ohio St. 93, and Friedlander v. Gorman (1933), 126 Ohio St. 163, followed and applied.)

Because Beaver fails to show a violation of Section 5a on the merits, the Court need not reach the remedy issue. Nevertheless, the Commissioner notes that Beaver cannot achieve the relief it seeks merely by showing a violation; it would need to show why it deserves invalidation of the tax's *collection* as a remedy. It cannot do so, as that remedy runs against well-settled law, and Beaver offers no reason, let alone a sound one, for departing from that precedent.

As noted above, this Court addressed this issue in both *Edmondson* and *Friedlander*, and in both cases it held that an *expenditure* violation, under an earmarking or dedicated-use provision, does not implicate the validity of a tax's collection. *Edmondson*, 89 Ohio St. at 114;

Friedlander, 126 Ohio St. at 168; see also *Fisher Bros. Co. v. Brown* (1924), 111 Ohio St. 602, and *State ex rel. Lampson v. Cook* (1932), 44 Ohio App. 501.

Indeed, *Ohio Truckers* offers a sharp contrast. There, the appeals court held that the General Assembly intended the challenged fee hike and the spending of the revenue to be “nonseverable,” so that the “improper spending” doomed the fee increase, too. While the State disagrees with that analysis, and is appealing that case for the agency in that case, the Commissioner notes that the plaintiff and court there at least addressed the issue, and offered a theory to leap from a spending challenge to a revenue-collection challenge. Here, Beaver offers no reason to jump the tracks in that way; it merely asserts that the improper spending leads to a tax challenge. Nor could it construct a nonseverability argument as in *Truckers*, as the CAT here was not enacted in connection with such a specific spending distribution as in *Truckers*.

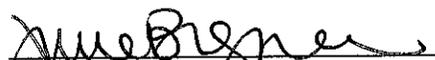
Thus, Beaver fails to reach the remedy it seeks, as well as failing on the merits.

CONCLUSION

For the above reasons, the Tax Commissioner urges the Court to deny jurisdiction.

Respectfully submitted,

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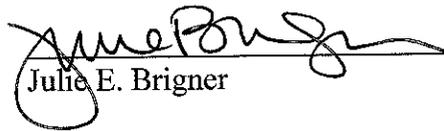
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[Richard A. Levin], Tax Commissioner of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum Opposing Jurisdiction of Appellee Tax Commissioner, was served by U.S. mail this 11th day of October, 2011, upon the following counsel:

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