

# In the Supreme Court of Ohio

BEAVER EXCAVATING COMPANY,  
ET AL.,

*Plaintiffs-Appellants,*

v.

RICHARD A. LEVIN  
[JOSEPH W. TESTA],  
TAX COMMISSIONER OF OHIO,

*Defendant-Appellee.*

Case No. 2011-1536

On Appeal from the  
Court of Appeals,  
Tenth Appellate District

Court of Appeals  
Case No. 10-AP-581

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**MERIT BRIEF OF AMICUS CURIAE OHIO EQUIPMENT DEALERS ASSOCIATION  
IN SUPPORT OF PLAINTIFFS-APPELLANTS  
BEAVER EXCAVATING COMPANY, ET AL.**

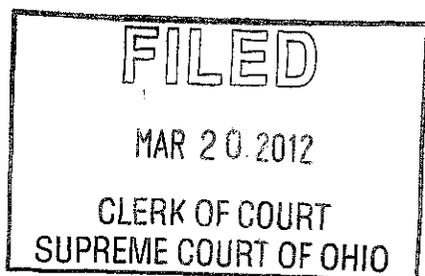
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## **INTEREST OF AMICUS CURIAE OHIO EQUIPMENT DEALERS ASSOCIATION**

The Ohio Equipment Dealers Association (OEDA) is an association of dealers that sell and service, among other items, construction equipment. OEDA members employ nearly 4,000 Ohio workers and provide equipment, parts and service expertise to help contractors maintain and improve Ohio's infrastructure, including over 116,000 miles of highways and streets and 42,000 bridges.

The central issue in this appeal concerns whether certain funds collected pursuant to the Commercial Activity Tax (CAT) should be spent exclusively for the cost of administering the funds and "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, §5a. Of course, an increase in State spending on highway construction and improvement can be expected to increase the business of the members of OEDA. More importantly though, all Ohio businesses, and indeed all citizens, are concerned about the state of Ohio's infrastructure and the pressing need to invest in building, roads, and maintaining Ohio's roads and bridges. Article XII, §5a, of the Ohio Constitution reflects Ohio's long standing commitment to investing in the economy of the State by expanding and maintaining the highway system.

The decision of the Tenth District Court of Appeals allows the General Assembly to avoid this clear infrastructure spending priority established by the people of Ohio. The Tenth District's decision, disregarding the clear meaning of the broad language of Article XII, §5a, is contrary to the express intent of the Constitution. OEDA urges this Court to reverse the decision of the Tenth District Court of Appeals and reestablish the will of Ohio citizens as reflected in Article VII, §5a of the Ohio Constitution.

## STATEMENT OF THE CASE AND FACTS

Amicus Curiae OEDA adopts the Statement of the Case and facts set forth in the merit brief of Plaintiffs-Appellants Beaver Excavating Company, et al.

### ARGUMENT.

#### 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. The CAT is a broad "measuring stick" excise tax.**

The CAT is a tax on the privilege of doing business in Ohio. It was adopted in part to replace the old corporate franchise tax and the personal property tax. *Beaver Excavating Co. v. Levin*, 2011-Ohio-3549, ¶6. The CAT, however, is a broader tax than the corporate franchise tax, not simply a tax on a particular form of business, but on all who avail themselves of the privilege of doing business in Ohio. R.C. §5751.02(A).

The CAT is an excise tax, which is defined as a tax imposed on the performance of an act, the engaging in an occupation or the enjoyment of a privilege. *Saviors v. Smith* (1920), 101 Ohio St. 132, 137-38. The amount of the tax is directly related to the level of commercial activity, as measured by total gross receipts, of the taxpayer. R.C. 5751.02(A). This means that as applied to sellers of motor vehicle fuel, the CAT is a tax on the sales of the fuel. This is in addition to the motor fuel tax that is general applicable to sales of motor fuel.

**B The Spending Restriction in Section 5a is intended to be broadly applies to all fees, excises, and license taxes relating to fuels.**

Article XII, §5a, provides:

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.

The plain language of §5a clearly intends a broad restriction on spending funds generated by taxing, among other things, the sale of motor fuel. The source of the funds to be restricted is broadly defined to include fees, excises, and license taxes relating to fuel. An excise tax on gross receipts from sales of motor fuel is clearly an excise related to fuel. A fact acknowledged by the General Assembly when they passed a temporary exclusion of receipts from the sale of motor fuel<sup>1</sup>.

**C. Section 5a is not ambiguous.**

The Commissioner argues, and the Court below accepted the argument, that the phrase "relating to" is broad and ambiguous, and therefore, the Court had to turn to the history of

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<sup>1</sup> **Section 557.09.06.** (A) Notwithstanding any provision of Chapter 5751. of the Ohio Revised Code as enacted by this act, "gross receipts," as defined in section 5751.01 of the Revised Code, excludes all of the following receipts if they are received prior to July 1, 2007:

- (1) Receipts from the sale of fuel by refinery to a terminal that is intended to be used as motor fuel;
- (2) Receipts from the sale of motor fuel from a terminal to a motor fuel dealer, excluding motor fuel that is not subject to taxation under Chapter 5735. of the Revised Code;
- (3) Receipts from the sale of motor fuel upon which the tax under Chapter 5735. of the Revised Code has been imposed.

For purposes of this division, "motor fuel," "motor fuel dealer, and "terminal" have the same meanings as used in section 5735.01 of the Revised Code.

*See Am. Sub. H.B. No. 66 .*

Section 5a in order to determine its meaning. This argument is flawed, and the exercise in legislative construction is unwarranted.

The phrase "relating to" is broad, but not ambiguous. It is a recognized phrase that indicates a broad or sweeping scope. In *Ferron v. RadioShack Corp.*, 175 Ohio App.3d 257, 264 (10th Dist. 2008) construed the phrase "with respect to" in harmony with the broad sweep of the analogous phrase "relating to", which expresses a broad purpose. It is a phrase that commonly appears in contracts and statutes. See, e.g., *Hocking Valley Cmty. Hosp. v. Cmty. Health Plan of Ohio*, 2003-Ohio-4243, at ¶ 22 (4th Dist. 2003); *U.S. Bank v. Wilkens*, 2012-Ohio-1038, ¶51 (8th Dist.).

In *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383, 112 Sup. Ct. 2031 (1992), the U.S. Supreme Court recognized the broad but unambiguous meaning of the phrase "relating to". The Court held that a general law related to a particular subject matter may indirectly impact a particular subject matter. *TWA*, 504 U.S. at 386. Here, "the relating to" phrase makes Section 5a is broad and general, and unambiguously applicable to a tax on receipts from the sales of motor fuel.

The contention that "relating to" must be narrowly construed in order to avoid "absurd results" is without merit. *Beaver Excavating Co. v. Levin*, 2011-Ohio-3549, ¶21. The Commissioner contends that a decision finding the proceeds of the CAT tax on sales of motor fuel are restricted would necessarily result in similar restrictions on revenues from auto manufacturers, dealers, repair shops, parts dealers, financing businesses, and insurers. *Beaver Excavating Co. v. Levin*, 2011-Ohio-3649, ¶21. Yet, the plain language of Section 5a limits the restriction on spending to "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". The risk of absurd results is so low as to be nonexistent.

Even if the history of Section 5a is used to interpret the language, it is manifest that the restriction applies to the CAT tax based on gross receipts from the sale of motor fuel. Since 1947, the language "relating to...fuel" has been understood to restrict the use of money generated by a tax on the sales of motor fuel. Clearly, the CAT tax, which is based on gross receipts from sales, is a tax on the sales of motor fuel. Whether that tax was specifically directed at sales transactions, or indirectly applied in taxing gross receipts, is irrelevant. It could not have been the intention of the drafters of Section 5a that it apply only to money raised by specifically and directly taxing sales of motor fuel. If that had been the intention of the drafters, then they would have used language similar to the Food Amendments, which were at issue in *Ohio Grocers*. The Food Amendments provide that no excise tax shall be levied on or collected upon the sale or purchase of food. Ohio Const. Art. XII, §§3, 13.

Moreover, that Section 5a applies to an indirect privilege-of-doing-business tax is apparent from the fact that General Assembly repealed the liquid fuels tax after Section 5a was adopted. This Court stated that the liquid fuel tax was a tax "levied against the [liquid fuel] dealer for the privilege of doing business as a dealer and [was] measured by the amount of business done," in the form of cents-per-gallon. *Hickok Oil Corp. v. Evatt*, 141 Ohio St. 644, 653, 49 N.E. 2d 937 (1943). In repealing the liquid fuel tax, the General Assembly acknowledged that the Section 5a was applicable to privilege-of-doing-business, measuring-stick excise taxes. The General Assembly stated that repealing the liquid fuel tax was necessary "to avoid conflict between the sections herein repealed and section 5a." 122 Ohio Laws 807.

It was erroneous for the Court of Appeals to read "relating to" restrictively so as to defeat the broad scope of Section 5a. In *TWA*, the U.S. Supreme Court discussed that the point of using terms that mandate a broad scope is to cover both direct and indirect applications of the statute at issue. *TWA*, 504 U.S. at 386. Here, the drafters of Section 5a clearly intended a scope broader than simply direct taxes on sales of motor fuel.

**D. *Ohio Grocers Association* is distinguishable.**

Both the Court below and the Commissioner rely on this Court's decision in *Ohio Grocers Association v. Levin* (2009), 123 Ohio St. 303, 2009-Ohio-4872, 916 N.E. 2d 446. *Ohio Grocers*, however, is a different case.

Ohio Grocers addressed the question of whether the CAT violated either of the Food Amendments, Ohio Constitution Article XII, §§3(C) and 13. Section 3(C) prohibits any excise tax collected or levied on the sale or purchase of food. Section 13 prohibits sales tax on wholesale food transactions. As the Court recognized, these provisions plainly prohibit a tax that is triggered by and imposed upon each sale of food. *Ohio Grocers* 2009-Ohio-4872, at ¶22. Section 5a, however, more broadly applies to all excises, fees, and license taxes relating to fuel. Ohio Const. Art. XII, §5a. The scope is beyond simply each fuel sales transaction.

In addition, the Food Amendments are a flat prohibition on taxing the sale or purchase of food. Section 5a does not flatly prohibit taxing fuel sales and purchases; rather Section 5a directs how funds raised by such taxes should be spent.

These differences are important because they militate against application of the three principles applied to the Food Amendments in *Ohio Grocers*, 2009-Ohio-4872 at ¶¶ 15-21.

Nothing in Section 5a prohibits the State from levying a tax on the privilege of doing business

and valuing that tax based upon gross receipts, including receipts from the sale of fuel. Instead, Section 5a simply restricts how funds raised by the specified taxes may be spent.

The measuring stick principle, which states that there is a distinction between a tax upon a particular factor and a tax measured by that factor, has no application here. Cases applying this principle have been cases involved a prohibition on taxing sales or particular items. Here, there is no prohibition on taxing; rather a restriction on spending the proceeds of the tax.

In addition, the restriction is broadly stated to apply not simply to taxes on fuel sales, but to fees, excises, and registration taxes relating to fuel. The broad scope of Section 5a, when contrasted with the specific language of the Food Amendments addressing taxes directly on the sale or purchase of food, indicates that Section 5a is intended to apply not only to taxes specifically directed to sales of fuel, but also to taxes indirectly derived from the sales of fuel.

Finally, the third principle, that a franchise tax that considers tax exempt factors is not a tax on tax-exempt factors in disguise, *Ohio Grocers*, 2009-Ohio-4872 at ¶¶ 20-21, is not applicable where the defining scope is broadly stated as anything relating to the factor, as opposed to the more limited sale or purchase, and where, as here, there is no tax exemption at issue. There is no issue that this is a tax on a tax exempt factor; rather the issue is that Section 5a is clearly intended to direct spending of funds raised by taxes relating to the operation, use, and registration of motor vehicles and motor vehicle fuel and the CAT does not accommodate this restriction.

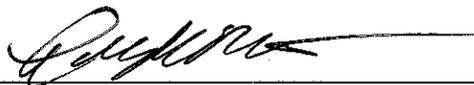
Unlike the Food Amendments at issue in *Ohio Grocers*, it cannot be argued that Section 5a is not concerned with a privilege of doing business tax. The legislative history and plain language of the Constitutional provision directed to all taxes relating to fuel establish that

Section 5a addresses a privilege-of-doing-business tax that is based on receipts from the sale of motor fuel.

### CONCLUSION

The Court cannot permit the General Assembly and the Tax Commissioner to avoid the will of the people as reflected in the Constitution. OEDA urges the Court to reverse the Tenth District Court of Appeals and hold that funds generated by the CAT tax, based upon gross receipts from the sale of motor fuel, be spent only for purposes permitted under Article XII, §5a, of the Ohio Constitution.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Merit Brief of Amicus Curiae Ohio Equipment Dealers Association in Support of Plaintiff-Appellants Beaver Excavating Company, et al. was served by U.S. Mail, postage prepaid, this 20<sup>th</sup> day of March, 2012, on the following Counsel of Record:

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