

IN THE SUPREME COURT OF OHIO

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

**AMICUS BRIEF OF COUNTY COMMISSIONERS  
ASSOCIATION OF OHIO, OHIO MUNICIPAL LEAGUE  
AND OHIO SCHOOL BOARDS ASSOCIATION  
IN SUPPORT OF APPELLEE**

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## INTRODUCTION

The County Commissioners Association of Ohio (“CCAO”) is a private, not-for-profit statewide association of county commissioners founded in 1880 to promote the best practices and policies in the administration of county government for the benefit of Ohio residents. CCAO’s membership consists of the county commissioners of 86 of Ohio’s 88 counties and the members of the Summit and Cuyahoga County councils.

The Ohio Municipal League (“OML”) was founded in 1952 by City and Village officials as a statewide association to serve the interests of Ohio municipal government and it has a membership of more than 625 Ohio cities and villages.

Ohio School Boards Association (“OSBA”) is the largest statewide organization representing the concerns of public elementary and secondary schools leaders in Ohio. OSBA is a nonprofit 501(c)(4) corporation dedicated to assisting its members to more effectively serve the needs of students and the larger society they are preparing to enter. Nearly 100% of the 719 district boards in all of the city, local, exempted village, career technical school districts and educational service center governing boards throughout the State of Ohio are members of the Ohio School Boards Association, whose activities include extensive informational support, advocacy and consulting activities such as board development and training, legal information, labor relations representation, and policy service and analysis.

CCAO, OML and OSBA (collectively hereinafter referred to as "Amici Curiae") consist of county, municipal and public elementary and secondary school members who share in a portion of the revenues raised by the Ohio Commercial Activities Tax (the “CAT”). As further discussed below, after their collection, revenues from the CAT make their way into several different accounts which are distributed to counties, municipalities and public schools. As a

result, revenues from the CAT play a vital role in helping counties, municipalities and public schools fund important programs and provide a wide spectrum of services, often as required under Ohio law. For example, CAT revenues help municipalities fund police and fire protection for their residents, they help counties fund senior and child welfare programs for their residents, and they help public school districts fund academic, arts and athletics programs for their students. These are just a small sampling of the types of programs and services that rely, in part, on revenues raised by the CAT.

As this Court is aware, over the past few years economic considerations have forced local governments to make difficult choices in planning their budget. Counties, municipalities and public schools have had to determine the appropriate spending cuts for particular programs, or some cases, whether to fund a program at all.

In this case, Appellants have requested the unnecessarily broad relief that this Court invalidate the collection of the CAT going forward as it applies to the sale of motor vehicle fuel. If this Court were to grant such relief, counties, municipalities and public schools throughout Ohio would lose out on funding they rely on for not only the programs mentioned above, but also for those relating to the construction, maintenance, repair and monitoring of public highways. At a time when local government budgets have already been stretched perilously thin, the relief requested by Appellants would cause even deeper cuts for counties, municipalities and public schools, harming the residents and students they provide for.

### **STATEMENT OF FACTS**

Amici Curiae hereby adopts in its entirety, and incorporates by reference, the Statement of Facts contained within the Merit Brief of Appellee Ohio Tax Commissioner Richard A. Levin.

## ARGUMENT

**If the expenditure of CAT revenue violates Section 5a of Article XII of the Ohio Constitution to the extent that moneys derived from the CAT relating to sales of motor vehicle fuel are not properly expended on highway purposes, then the proper remedy would be one that enforces the proper, constitutional appropriation of such CAT revenues.**

Appellants and the Appellee dispute the scope of Section 5a of Article XII of the Ohio Constitution (“Section 5a”) as it applies to CAT revenues relating to the sale of motor vehicle fuel by certain companies, including certain of the Appellants. However, Appellants have sought only one remedy to what they perceives as a violation of this constitutional provision - “an order enjoining the Defendant . . . from levying, collecting or enforcing the CAT as it relates to motor fuel.” Complaint at 6. Since both the trial court and the appeals court correctly rejected Appellants’ claims on their merits, those courts did not reach the issue of what remedy would apply if a Section 5a violation were found. If this Court does reach the issue of remedy in this case, Ohio law is clear that Appellants cannot achieve the remedy they seek. The proper remedy to any violation of the expenditure restraints in Section 5a is for this Court to ensure enforcement of those expenditure restraints, and not to invalidate the levy and collection of the CAT or any part thereof.

- a. The levying and collection of the CAT by the General Assembly of Ohio is a valid and constitutional exercise of power

The CAT is a tax imposed by the State of Ohio on the privilege of doing business, and is levied on each person with taxable gross receipts for the privilege of doing business in the State. *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, 916 N.E.2d 446, ¶14. The revenues that the State receives from the CAT are deposited into the “commercial activities tax

fund” and then are divided and sent to (i) the General Revenue Fund, (ii) the School District Tangible Property Tax Replacement Fund, and (iii) the Local Government Fund. R.C. § 5751.20.

This Court has previously held that the levy and collection of the CAT does not violate the Ohio Constitution. *Ohio Grocers* at ¶14. In *Ohio Grocers*, the plaintiffs argued that the CAT violated various sections of the Ohio Constitution prohibiting certain types of taxes levied on food sales. *Id.* at ¶¶11-13. In reaching its decision, this Court noted that the CAT was a tax on the privilege of doing business in Ohio, and that the constitutional provisions cited by the Plaintiffs in *Ohio Grocers* did “not prohibit the state from using gross receipts to compute the amount of a privilege-of-doing-business tax, even if those gross receipts include proceeds from the sale of food.” *Id.* at ¶14. After *Ohio Grocers*, there could be no doubt that the CAT represents a permissible tax on the privilege of doing business in the state of Ohio.

- b. The CAT is levied and collected validly and in accordance with the Ohio Constitution, therefore this Court cannot invalidate the collection of any portion of it based on allegedly improper expenditures

Section 5a, originally passed by voters in 1947 as the “Highway Spending Amendment,” represents a restriction on the expenditure of particular categories of funds. Section 5a states that “[n]o moneys derived from” certain fees and taxes on Ohio drivers “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.” Although the parties to this case

dispute the scope of the tax revenues this provision applies to, Section 5a clearly exists to restrict or limit the expenditure of revenues raised from certain taxes and fees imposed on motorists to highway related purposes.

When the levy of a particular tax is a valid and constitutional exercise of the authority of the General Assembly, but laws relating to disbursement of the funds raised by the tax are found to be unconstitutional, the “levy must stand, leaving the legislature to provide constitutional ways and means by which the fund may be applied to the object named in the statutes.” *State ex rel. Donahey v. Edmondson*, 89 Ohio St. 93, 114, 105 N.E. 269 (1913); *Friedlander v. Gorman*, 126 Ohio St. 163 184 N.E. 530 (1933) (holding that the Ohio General Assembly has the authority to levy and collect a tax for state purposes, but not purely for local purposes). As such, even if this Court were to agree with Appellants on their argument that laws directing the expenditures of CAT revenues, as they relate to motor vehicle fuel, violate Section 5a, under Ohio law, Appellants cannot be granted the remedy they seek. *See Edmondson* at 114.

In *Edmondson*, the State Auditor brought an action in mandamus against the auditor and budget commissioners of a particular county after the county refused to enforce the levy of a tax, passed by the General Assembly of Ohio, on county residents. *Id.* at 97-99. After coming to the conclusion that the particular property tax levied by the General Assembly was in fact valid, the Court reasoned that it could not strike down the levy merely on the argument that laws relating to the distribution and expenditure of the tax revenues were unconstitutional. *Id.* at 114.

Appellants argue that none of the three funds CAT revenues are deposited into relate to public highway expenditures, and that therefore, CAT revenues, as they relate to motor vehicle fuel sales, are spent in violation of Section 5a. Appellants’ Merit Brief, 42-46. Appellants state that “the heart of the case is preventing diversion of highway-related tax revenue to non-

highway-related purposes” and spend considerable time pointing out the financial woes of the State’s highway budget. *Id.* at 12-13, 49-50.

Yet, when proposing how this Court should fix the perceived violation, Appellants quickly change course and ask this Court to invalidate the future collection of the CAT as applied to motor vehicle fuel sales, a remedy which would reduce certain of Appellants’ future obligations under the CAT, a sharp contrast to their “anti-diversion” argument. *See id.* at 47-50. Appellants suggest that this Court should “sunburst” its remedy in order to alleviate “any fiscal concern for the state budget.” *Id.* at 47. Appellants suggest that by sunbursting the remedy, the CAT “would only be unlawful as applied to gross receipts derived from the business of selling Motor Vehicle Fuel from the date of the Court’s decision.” *Id.* at 48. Such an approach does nothing, however, to cure any perceived diversion of funds from highway related purposes or to fix the issues confronting the state highway budget. A more proper remedy to help alleviate these issues would involve ensuring that the use of these revenues was restricted.

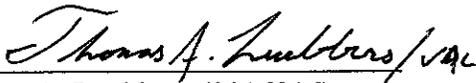
Further, and more importantly, Appellants’ suggested remedy runs contrary to nearly one hundred years of settled case law beginning with this Court’s holding in *Edmondson*. This Court has already declared that the CAT is a constitutional and valid tax passed by the General Assembly. *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, 916 N.E.2d 446, ¶14. As such, by the very words of this Court, the levy imposed by the CAT “must stand,” even if this Court were to agree with Appellants that laws regarding the expenditure of funds raised by the CAT, as they relate to motor vehicle fuel sales, violate Section 5a. *See State ex rel. Donahey v. Edmondson*, 89 Ohio St. 93, 114, 105 N.E. 269 (1913); *Friedlander v. Gorman*, 126 Ohio St. 163, 184 N.E. 530 (1933). Although Appellants’ claims fail on their merits, if this Court does find improper expenditures of CAT revenues in violation of Section 5a, the proper remedy would

be to enforce the spending restraint imposed by that section, and not to invalidate the collection of the tax going forward.

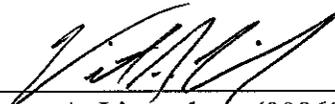
### CONCLUSION

Amici Curiae agrees with the Appellee that this Court need not reach the issue of remedy in this case, as Appellants' arguments fail on their merits, in accordance with the decision of the trial court and appeals court. However, if this Court would need to reach the issue of determining an appropriate remedy, the Appellants cannot be granted the remedy they seek, the invalidation of the CAT as it applies to motor vehicle fuel. Such a remedy contradicts the long-settled case law of this Court. The only proper remedy, if a violation of Section 5a is found, is to continue to uphold the CAT as validly levied and collected but ensure that any appropriate Section 5a-related expenditure restraints are complied with going forward.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing AMICUS BRIEF OF COUNTY COMMISSIONERS ASSOCIATION OF OHIO, OHIO MUNICIPAL LEAGUE AND OHIO SCHOOL BOARDS ASSOCIATION IN SUPPORT OF APPELLEE was sent by hand delivery, this 9th day of May, 2012, to the following:

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