

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF AMICI CURIAE, THE OHIO AGGREGATES AND INDUSTRIAL MINERALS ASSOCIATION, FLEXIBLE PAVEMENTS, INC., AND OHIO READY MIX CONCRETE ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLANTS, BEAVER EXCAVATING COMPANY, INC., ET AL.

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FILED
 MAY 29 2012
 CLERK OF COURT
 SUPREME COURT OF OHIO

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ARGUMENT

Allowing the Commercial Activity Tax (“CAT”) revenue from motor vehicle fuel sales to be spent on anything other than for highway purposes is impermissible and unconstitutional. The remedy sought by Appellant is to have the CAT, as applied to motor vehicle fuel sales, declared unconstitutional. This must happen because Ohio’s Constitution, Section 5a, limits the expenditure of taxes collected from motor vehicle fuel sales to highway purposes only. Presently, the CAT violates this provision and this Court should rule prospectively. Once it does so, and declares the tax unconstitutional from the date of its decision forward, the General Assembly should act to establish conforming legislation that enables the state to collect taxes on motor vehicle fuel sales but requires spending in a way that comports with the constitutional limitations of Section 5a. In particular, the revenue must be spent in the way Ohio voters demanded—on the roads and bridges that are the circulatory system of the state.

The CAT Has an Unconstitutional Objective and Must Be Struck Down

As detailed in Appellant’s Merit Brief, having no fund as the object of CAT revenue derived from the sale of motor vehicle fuels is in direct contravention of the mandate of Section 5a. (Appellant’s Brief, 43-46). Section 5a could not be more clear: revenue collected from motor vehicle fuel sales is to be set aside for highway purposes. Ohio Constitution, Article XII, Section 5a. In other words, this revenue has a particular purpose.

If Section 5a appears to “straight-jacket” the legislation by preventing it from placing these particular purpose moneys into discretionary general funds, that is because Ohio’s voters, with their eyes wide open, deliberately decided to restrict the legislation in this manner. 1982 Ohio Atty.Gen.Ops. No. 84. Safe and convenient road infrastructure was so important to Ohioans that

they amended their Constitution to restrict the legislature from allocating moneys derived from highways and fuels from being spent on anything other than highway purposes. The same holds true today as the voters have already decided this issue by constitutional amendment, and it is not lawful for the General Assembly to controvert their intent. *Village of Lucas v. Lucas Local Sch. Dist.*, 2 Ohio St.3d 13, 14, 442 N.E.2d 449 (1982), quoting *Cleveland v. Pub. Util. Comm.*, 102 Ohio St. 341, 131 N.E. 714 (1921) (“[W]hat the sovereign people do by their constitution, their subordinate, the legislature, may not undo by statute....”).

Thus, the General Assembly may not lawfully distribute this particular purpose revenue as general revenue. These moneys must be deposited into a special fund for the purpose described in Section 5a. *In re Perry Twp.*, 52 Ohio App. 3d 1, 3, 556 N.E.2d 191 (2nd Dist. 1988). Because the CAT is inconsistent with the mandates of the Constitution, it must be struck down.

Separation of Powers Requires That the General Assembly, Not the Court, Rewrite the Legislation

While the preferred remedy would be for the Court to edit the CAT legislation to enable revenue collected from motor vehicle fuel sellers to be allocated to a special fund for highway purposes, the power to legislate is vested in the General Assembly, and the Court may not usurp this power. Ohio Constitution, Article II, Section 1; Ohio Constitution, Article IV, Section 1; *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 55. Rather, the Court’s role is to ensure that the laws enacted by the General Assembly are not in violation of our state Constitution. *Corbett v. Ohio Bldg. Auth.*, 86 Ohio App.3d 44, 52, 619 N.E.2d 1145 (1993), citing *Village of Lucas*, 2 Ohio St.3d at 15, 442 N.E.2d 449. Because the CAT violates the Constitution, the Court may strike the CAT down as applied to motor vehicle fuel sales, but the

Court may not rewrite the legislation to make it conform. *Bd. of Ed. of Pike-Delta-York Local Sch. Dist. v. Fulton County Budget Comm'n*, 41 Ohio St.2d 147, 153, 324 N.E.2d 566 (1975) (the “court does not sit as a superlegislature to amend Acts of the General Assembly”). “The remedy desired by appellants from this court must be obtained from the source of their problem—the General Assembly.” *Id.*

Appellee’s Merit Brief misrepresented Appellant’s position when it wrote, “...Beaver does not seek to protect *a single penny* for road repair. It seeks instead to have its taxes lowered.” (Appellee’s Merit Brief, 45.) Nothing could be further from the truth. Appellee’s statements are a red herring written to distract the Court from its purpose: to ensure that Ohio’s laws are written in conformance with the Constitution and to ensure that specified moneys are spent to improve Ohio’s roads and bridges in accordance thereof.

Amici trust, however, that if the Court uses its power to invalidate the CAT as written, the General Assembly will use its power to rewrite the legislation in a conforming manner. No party to this case is arguing that a tax on motor vehicle fuel sellers should not be collected. Rather, Amici want the tax collected, but argue that the CAT legislation, as currently written, contradicts the mandates of Section 5a. Given this, the General Assembly should draft legislation to ensure the money collected is deposited in a special fund for that purpose. Amici do not seriously believe that the General Assembly will sit by and allow the elimination of \$140 million in tax revenue. Rather, it is only reasonable to believe the General Assembly will draft legislation to continue to collect the CAT revenue on motor vehicle fuel sales, but add a special purpose fund for those moneys to be spent only for highway purposes.

Ohio Voters Demanded That These Funds Be Used for Highway Purposes

The mandate in Section 5a is no accident—Ohio’s voters understand that it is imperative to the state’s economy that our infrastructure be improved and maintained. In the most direct way, highway construction is a major component of our economy. The building and maintenance of roads and bridges creates jobs in the construction and industrial sectors of our state’s economy. But the condition of our roads is just as important for our economy in less direct ways. These roads and bridges are the circulatory system of our state—allowing the interstate and intrastate economy to flow. Efficient roads keep shipping channels open and schedules on time. And, safe roads decrease fatalities and injuries. Revenue must be allocated to our roads and bridges as provided in the Constitution to ensure the quality of Ohio’s infrastructure and safety for our traveling citizens. In other words, neither Appellants nor Amici in this case have any interest in decreasing state revenue. In fact, it is in Amici’s interest, and the interest of Ohioans, to ensure that these moneys continue to be collected and spent for highway purposes.

The *Sunburst* Doctrine Allows Prospective Application of the Court’s Holding

To ensure that these moneys can be collected for highway purposes and to address the Tax Commissioner’s concerns about refund claims upon the invalidation of the CAT, Amici urge the Court to apply the *Sunburst* Doctrine and provide only prospective relief on this issue. *DiCenzo v. A-Best Prods. Co., Inc.*, 120 Ohio St.3d 149, 2008-Ohio-5327, 897 N.E. 2d 132, ¶ 12, fn. 1 (citing *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S.Ct. 145 (1932) (states have broad authority to determine whether their decisions shall apply prospectively only)). To do so, the Court should find the CAT unlawful from the date of the Court’s decision forward. Assuming the Court issues a prospective only *Sunburst* decision, and the General Assembly

remedies the CAT statute as expected, the State will not lose a single dollar of revenue.

CONCLUSION

For the reasons set forth above, Amici respectfully request that this Court overturn the decision of the Tenth District Court of Appeals to ensure moneys collected from the sale of motor vehicle fuel sales are spent in accordance with Ohio Constitutional mandates.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Memorandum in Support of Plaintiffs-Appellants, Beaver Excavating Company, Inc. was sent this 26th day of May, 2012, via ordinary U.S. Mail, to:

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