

ORIGINAL

IN THE SUPREME COURT OF OHIO

BEAVER EXCAVATING COMPANY, et al., :
:
Plaintiffs-Appellants, :
:
v. :
:
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

REPLY BRIEF OF AMICUS CURIAE
OHIO CONTRACTORS ASSOCIATION IN SUPPORT OF APPELLANTS

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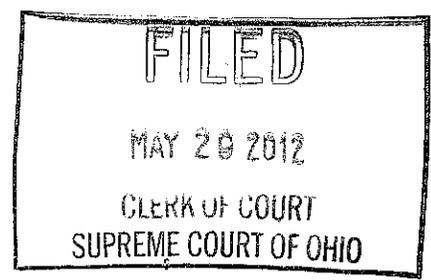


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I. INTRODUCTION

The Ohio Contractors Association and the Tax Commissioner agree that the restrictions of Article XII, Section 5a of the Ohio Constitution apply to Ohio's motor fuel tax. Even though Section 5a, when adopted, applied to monies raised by the motor fuel tax, the object of that tax was roadway funding. The motor fuel tax, thus, remained a constitutional tax after Section 5a was passed. The former liquid fuel tax, on the other hand, was repealed immediately after the passage of Section 5a because that tax had a non-highway object in conflict with Section 5a.

Section 5a's application to the motor fuel tax is a seminal proposition of law in the present case. It presents an opportunity to compare the substance and operation of the tax at issue here, the CAT, with a Section 5a restricted tax, the motor fuel tax.

This Court undertook an identical exercise for the same purpose in *Ohio Grocers Ass'n v. Levin*, 123 Ohio St. 3d 303, 2009-Ohio-4872, 916 N.E. 2d 446, ¶¶ 41-50. There, the question presented was whether Article XII, Sections 3(c) and 13 applied to the CAT. The Court first determined that Sections 3(c) and 13 applied only to excise taxes that were transactional sales taxes and not privilege-of-doing-business excise taxes. *Id.* at ¶40. In reaching this conclusion, the Court relied on the words within the pertinent sections and the historical context of those sections. *Id.* Next, the Court determined whether the true nature of the CAT was a triggering tax on sales or a non-triggering tax on the privilege of engaging in business. Specifically, the Court said it must look at how the tax operates. *Id.* at ¶42.

The text and history of Section 5a are anchored in the broad and inclusive intent of the people to restrict all excise and license taxes relating to motor vehicle fuel to roadway funding purposes. Contrary to the Tax Commissioner's argument, Section 5a does not describe the "relating to" requirement as "directly" or expressly referencing." The framers of Section 5a and the voters did not intend such a limitation.

The purpose of this Brief, therefore, is to explore the baseline comparison of the CAT to a tax known to be Section 5a restricted, i.e., the motor fuel tax. This comparison provides the Court a check and balance of its conclusions based upon text and history and the consistency of that conclusion with the true nature of the CAT. The Court offered six factors important in determining the true nature of the CAT. *Grocers* at ¶41-50. The Tax Commissioner's arguments contradict the Court's analysis on several of the factors.

II. ARGUMENT

A. **The Motor Fuel Tax Operates Like a Tax Upon the Privilege of Doing Business, and So Does the CAT.**

1. The Motor Fuel Tax and the CAT are described as business privilege excise taxes.

The General Assembly describes the motor fuel tax as a privilege of doing business tax. Ohio law requires all persons to first obtain a motor vehicle fuel dealer's license in order to engage in the business. R.C. 5735.01 (I) and (L); R.C. 5735.02. This Court has held that the Ohio statutes make clear "that the [motor fuel] tax is levied against the dealer for the privilege of doing business as a dealer" *Hickok Oil Corp. v. Evatt*, 141 Ohio St. 644, 653; 49 N.E.2d 937; 143 Ohio Lexis 473. Similarly, the CAT is described as a privilege of doing business tax by the General Assembly. R.C. 5751.02(A) (the CAT is levied "for the privilege of doing business in this state"); *Grocer's* at ¶44.

2. The Motor Fuel Tax and the CAT are imposed upon the entity enjoying the privilege.

The motor fuel tax is imposed on the person enjoying the business privilege. R.C. 5735.05(A) ("a motor fuel tax is hereby imposed on all motor fuel dealers"). After the motor fuel tax is paid by the motor fuel dealer, the motor fuel may be used, sold or resold . . . without increasing any liability for such [motor fuel] tax. R.C. 5735.05(C). If the licensed dealer fails to

pay the full amount of the motor fuel tax the Commissioner may revoke the dealer's license. R.C. 5735.04. A licensed dealer that fails to file returns and pay the full tax is subject to an assessment, a penalty, and interest. R.C. 5735.12.

The Court in *Hickok* addressed this factor in the context of the motor fuel tax and held that the foregoing statutes completely contradict any contention that the motor fuel tax is imposed upon consumers or users. *Hickok* at 651-652. Rather, it is imposed on the licensed dealer.¹ *Id.* In like fashion, the CAT is imposed on the person enjoying the privilege of engaging in business and producing gross receipts. R.C. 5751.02(A); *Grocers* at ¶45.

The motor fuel tax is not imposed upon consumers. It is not a transactional sales tax. Contrary to the contention of the Tax Commissioner, the motor fuel tax is plainly a tax on a business privilege measured by the market element of the number of aggregate gallons received. The same is equally true for the CAT. The Tax Commissioner's positions in *Hickok* and *Grocer's* was that the motor fuel and the CAT were business privilege excise taxes, respectively, and not transactional sale taxes.

3. Collection rights for the motor fuel tax and the CAT are aimed at the person/entity enjoying the business privilege, not the user of the commodity.

The motor fuel tax may, in effect, be passed down to retailers and consumers in the form of higher prices. However, this is as a matter of pure business economics, not Ohio statutes. All of the Commissioner's tax collection rights are directed at licensed dealers or persons acting as dealers without a license. *See* discussion on Second Factor, *supra*. Again, the Court addressed

¹ The motor fuel tax is a wholesale tax on the wholesale dealer. The business license granted to "retail dealers" is different from wholesale dealers in that retail dealers do not file returns and are not liable for the tax. R.C. 5735.022. The motor fuel tax is imposed on the licensed wholesale dealer before the fuel is received by retail dealers. *See* R.C. 5735.023(A) and 5735.103 (prohibiting retailers to store or distribute untaxed fuel and granting the Commissioner authority to padlock retail pumps if such actions occur).

this factor when it found the state's motor fuel tax and collection rights were against dealers. *Hickok* at 652.

The current Ohio motor fuel tax does not grant a legal right of the state to collect the tax from the customer. Such rights are only enforceable against the dealer. R.C. 5735.04 (Commissioner may revoke motor fuel dealer's license if the dealer "fails to pay the full amount of tax"); R.C. 5735.044 (Commissioner may revoke license of permissive dealer if it fails to pay the full amount of tax required."). Similarly, the General Assembly makes clear that the Ohio motor fuel tax is imposed on wholesale dealers and paid prior to any retail sale. R.C. 5735.041(A)(1) (Commissioner may revoke *retail dealer's* license if the dealer "sells or attempts to sell any motor fuel upon which any motor fuel tax imposed by this chapter *has not been paid*"). The Ohio motor fuel tax is paid by the wholesale dealer and no one else; whether or not the dealer subsequently sells the fuel.

All the same can and has been said about the CAT. This Court observed that the CAT may not be billed or invoiced to a person other than the licensed business privilege holder. *Grocer's* at ¶46. The CAT imposition, assessment and recovery statutes are directed at the business license/privilege holder. R.C. 5751.02 (levy of the tax on privilege holder); R.C. 5751.051 (CAT return filing requirements for privilege holders); R.C. 5751.06 (assessment of CAT, interest and penalties against privilege holders). Like the motor fuel tax, the privilege holder may recover the CAT in the price charged for a good or service. *Grocer's* at ¶ 46.

4. The motor fuel tax and the CAT are imposed for the exercise of the business privilege for any portion of the calendar year.

Under this factor, the Court looks to whether the tax at issue is imposed for the exercise of privilege for any portion of the calendar quarter. Current law provides that a motor fuel dealer must obtain a license prior to doing business. R.C. 5735.02 ("A motor fuel dealer shall

not . . . engage in business within this state unless the motor fuel dealer holds an unrevoked license issued by the Tax Commissioner . . .”). Similarly, the dealer must agree to pay the motor fuel tax as a requirement to obtain the business license. *Id.* at (E). The tax is still paid monthly based upon a monthly report of gallons received. R.C. 5735.06. Thus, the statutory framework of the motor fuel tax in Ohio is a business privilege tax, returned monthly and applicable to any portion of a calendar year.

Again, CAT is the same as motor fuel tax on this factor. The CAT is imposed for the exercise of the business privilege for any portion of the calendar quarter. R.C. 5751.02(A); *Grocer’s* at ¶47.

5. The motor fuel tax and the CAT are calculated based upon aggregate business results over a business period, not transaction by transaction.

The Ohio motor fuel tax is calculated and imposed based upon a monthly tally of gallons received. R.C. 5735.05; R.C.5735.06. The motor fuel tax is not and never has been a transactional sales tax or any other type of excise tax calculated on a transaction by transaction basis. There is no statutory ability or basis to impose motor fuel tax on any particular transaction.

Likewise the CAT is calculated based on gross receipts earned over certain business periods, not transaction by transaction. R.C. 5751.02(A); *Grocer’s* at ¶48.

6. The motor fuel tax and the CAT are computed using measures of market access that rationally relate to the enjoyment of the business privilege.

This factor is an analysis of the tax and determining whether it is computed using a broad measure of market access that is rationally related to the enjoyment of the business privilege. *Grocer’s* at ¶49. In *Hickok*, at 653, the Court made the following finding:

*** when the entire [motor fuel tax] act *** is considered it is clear that the tax levied is to be measured by the amount of business done. Thus, this Court has

already determined that gallons received is a proper measuring stick for the value of the privilege of doing business as a motor fuel dealer in Ohio.

Implicit in *Grocer's* is the conclusion that gross receipts are a proper measuring stick. When comparing the measuring stick used by the CAT versus that used for the motor fuel tax, a cents-per-gallon tax on a fuel dealer will vary in a linear fashion to a gross receipts tax on gallons sold on a given day. In other words, if a business received 100 gallons of gasoline and pays five cents a gallon of tax at the end of the month based upon that receipt, it will owe \$5 of tax. Assuming the gas is sold for \$4 per gallon, and the business sells all 100 gallons, an identical tax result could be achieved by charging the business a gross receipts tax on the sale of all 100 gallons at a rate of 1.25% (i.e., \$400 gross receipts * .0125 = \$5). Thus, the computational measure of the motor fuel tax and the CAT differ only as to effective rate. Both measures rationally relate to the business privilege (as applied in the present case, to gallons of or gross receipts from motor vehicle fuel).

III. CONCLUSION

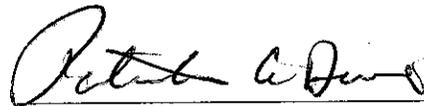
Analysis of all six factors as applied to the Section 5a covered motor fuel tax and the CAT show remarkable uniformity between two business privilege taxes. Both types of taxes, a motor fuel tax and a gross receipts tax, were always considered and treated as having the "same or similar" true nature. The similarities between and the understanding of the true nature of these taxes shows, as applied to motor vehicle fuel gross receipts, the two are virtually identical. They both tax a business privilege, and measure the value of the privilege based on a market measure (amount of motor fuel gallons or gross receipts therefrom). These taxes have the same relationship with the underlying commodity.

From the standpoint of the Ohio Contractors Association, if motor fuel tax is covered by Section 5a, so too is the CAT on motor fuel gross receipts. There is no escaping the close

comparison, the analysis and, therefore, the corresponding conclusion that if Section 5a applies to one it applies to both. This was the intention of the people of Ohio when Section 5a was enacted. The Tax Commissioner's arguments are contrary to the road funding purpose of Section 5a.

The Court of Appeals' decision must be reversed.

Respectfully submitted,



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I certify that a copy of the foregoing *Reply Brief of Amicus Curiae Ohio Contractors Association* was served by U.S. mail, with sufficient postage, this 20th day of May, 2012, on the following:

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