

In the Supreme Court of Ohio

BEAVER EXCAVATING COMPANY,
ET AL.,

Appellants-Appellants,

v.

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

Appellee-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 EQUIPMENT DEALERS ASSOCIATION
IN SUPPORT OF APPELLANTS-APPELLANTS
BEAVER EXCAVATING COMPANY, ET AL.**

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INTRODUCTION

The Appellee Tax Commissioner and the County Commissioners, amici supporting the Appellee's position, present interrelated standing and remedy arguments in the apparent hope that the Court will avoid the question of the application of Section 5a to the Commercial Activity Tax (CAT). Because these arguments rely on a mischaracterization of Appellants' claims, they must fail. Appellant challenges the CAT as an unconstitutional tax. Appellants are not simply claiming that the funds are not being properly spent.

ARGUMENT

The Tax Payer Appellants have standing and an appropriate legal remedy is available.

The Tax Commissioner argues that in order to establish standing, the Appellant must show, among other things, that it has suffered an injury that is redressable by the Court and the relief must be available against the Appellee. Merit Brief of Appellee, at p. 13. The Appellee next argues that the Taxpayer Appellants have no standing because they are injured by paying the tax, but the issue in the case, according to the Appellee, is the misspending of the funds. Merit Brief of Appellee, at p. 15. Later, relying on *State ex rel. Donahey v. Edmondson*, 89 Ohio St. 93 (1913), the Tax Commissioner argues that an expenditure violation does not implicate the validity of the tax. Brief of Tax Commissioner, at p. 46. Similarly, the Amicus Curiae County Commissioners argue that when the laws relating to disbursement of funds are unconstitutional, the tax itself must stand while the legislature provides a constitutional method to apply the funds. Brief of Amicus Curiae County Commissioners, at p. 5. This characterization of the Taxpayer Appellant's claims as misspending claims is incorrect. The Appellants claim that the CAT is unconstitutional, not merely that the funds collected are being improperly spent.

The Appellant's essential claim is that the CAT is an illegal tax because the stated

purpose violates Section 5a. As a tax without a constitutionally valid purpose, the CAT violates Article XII, Section 5, of the Ohio Constitution. It is not simply that the funds cannot be spent according to the spending provisions of the CAT. It is that the tax itself fails because it does not have a proper purpose, and therefore does not satisfy the requirements of Section 5.

Article XII, Section 5 of the Ohio Constitution states that “[n]o tax shall be levied, except in pursuance of law, and every law imposing a tax, shall state, distinctly, the object of the same, to which only it shall be applied.” Therefore, every tax must have a distinct purpose for which the tax is enacted and for which the revenues are spent. *Saviers v. Smith*, 101 Ohio St. 132, 138 (1920). The General Assembly attempted to meet this requirement by providing how the CAT funds should be spent; the CAT must be deposited into the “commercial activities fund” and then divided and forwarded to the following three state treasurer funds: (1) the General Revenue Fund; (2) the School District Tangible Property Tax Fund; and (3) the Local Government Tangible Property Tax Replacement Fund. R.C. 5751.20. This purpose, however, as argued by others elsewhere, is unconstitutional as applied to funds collected on activity related to sales of motor fuel. Therefore, the CAT is an unconstitutional tax.

The Taxpayer Appellants have standing to challenge the tax which is constitutionally flawed. Citing *Cuyahoga Cty. Bd. of Comm'rs. v. State*, 112 Ohio St. 3d 59, 2006-Ohio-6499, ¶22, the Appellee correctly observes that in order to establish standing an Appellant must show that it: has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general; that the law in question has caused the injury; and, that the relief requested will redress the injury. Merit Brief of Appellee, at p. 14. In this case, the Taxpayer Appellants are injured by having to pay an unconstitutional tax that is not paid by all Ohio taxpayers, but only those taxpayers engaged in commercial activity. The CAT

tax law is the source of this injury, and there exists a remedy to redress the injury.

The remedy sought by the Appellant, invalidation of the tax, is appropriate here, because the Appellant is challenging the constitutionality of the CAT. A tax without a valid purpose is unconstitutional, and therefore must be invalidated.

The remedy is not as vexing as the Appellee portrays it to be. Indeed, there are two possible remedies to correct the constitutional problem presented by the tax with an unconstitutional purpose. The first remedy is to simply invalidate the tax. This is the more appropriate remedy, because it addresses the fundamental Section 5 flaw, the failure to provide for a constitutionally valid purpose. This, of course, raises the issue of what should be done with the funds previously collected.

A solution would be for the Court to apply the Sunburst Doctrine to its remedy, providing only prospective relief. This would mean that CAT revenue previously collected could be kept by the State, meaning that no refunds would lie for previously collected CAT revenue because the tax would only be unlawful as applied to gross receipts from the business of selling motor vehicle fuel from the date of the Court's decision. Thereafter, the General Assembly presumably would enact the necessary appropriating legislation, providing the proper Section 5a spending purpose.

Using the Sunburst Doctrine, this Court has limited decisions "to prospective application only as a means of avoiding injustice in cases dealing with questions having widespread ramifications for persons not parties to the action". *See, e.g., Medcorp., Inc. v. Ohio Dept. of Jobs and Family Services*, 124 Ohio St. 3d 1215, 2009-Ohio-6425, at ¶ 3 (2009). This would provide the General Assembly with time to correct the purpose/spending provisions of the CAT, making the tax effective as of January 1, 2012.

The Tax Commissioner contends that the Sunburst Doctrine should not be applied here because the Sunburst Doctrine is "specifically aimed at honoring citizens' reliance upon a prior decision when a new decision reverses course". Brief of Tax Commissioner, at p. 49, citing *DiCenzo v. A Best Products Co.*, 120 Ohio St. 3d 149, 2008-Ohio-5327. This suggested limitation on the application of the Sunburst Doctrine, however, is not supported by the *DiCenzo* decision. Indeed, *DiCenzo* states that "a court also has discretion to impose its decision only prospectively after considering whether retroactive application would fail to promote the rule within the decision and/or cause inequity". *DiCenzo*, 2008-Ohio-5327, ¶14. Therefore, limiting a decision invalidating the CAT to prospective application only would avoid possible inequity and injustice, and would be consistent with such a decision.

Although not as legally elegant, a second remedy is an injunction against spending the funds collected until the General Assembly establishes a proper purpose for the funds. This is not a difficult remedy to apply. The General Assembly temporarily excluded gross receipts from Motor Vehicle Fuel sales from the CAT for a period of two years – from July 1, 2005 to June 30, 2007.¹ The CAT collection system clearly has the capacity to track gross receipts and exempt

¹ The General Assembly temporarily provided:

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.

certain funds. The solution available to the General Assembly is one that it has used before and simply needs to revive on a permanent basis.

CONCLUSION

The Ohio Equipment Dealers Association submits that this case presents two issues of important public interest. First, there is the practical consideration of whether funds raised on sales of motor fuel should be spent on highways as contemplated by Section 5a. As reflected in Section 5a, the citizens of Ohio have established a commitment to Ohio's infrastructure that should be respected by the legislature.

The second issue is the fundamental question of applying a constitutional limitation to a legislative enactment and whether the legislature may avoid the limitation by recasting the tax as a tax on commercial activity, as opposed to tax specifically targeted at motor fuel sales. As discussed in the opening briefs of the Appellant and amici supporting the Appellant, Section 5a was drafted broadly so as to apply to direct and indirect taxes on motor fuel. The General Assembly should not be permitted to frustrate the intent of the citizens by taxing motor fuel sales as commercial activity and then spend the funds so raised for purposes other than those enumerated in Section 5a.

The Ohio Equipment Dealers Association urges the Court to reverse the decision of the Court of Appeals and invalidate the CAT or enjoin misspending of the funds raised by the CAT.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Amicus Curiae Ohio Equipment Dealers Association in Support of Appellant-Appellants Beaver Excavating Company, et al. was served by U.S. Mail, postage prepaid, this 29th day of May, 2012, on the following Counsel of Record:

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