

ORIGINAL

IN THE SUPREME COURT OF OHIO

PANTHER II TRANSPORTATION, INC.)
)
 Plaintiff-Appellee,)
)
 vs.)
)
 VILLAGE OF SEVILLE BOARD OF)
 INCOME TAX REVIEW,)
)
 Defendant-Appellant)
)
 and)
)
 NASSIM M. LYNCH AND THE)
 CENTRAL COLLECTION AGENCY,)
)
 Defendant-Appellants.)

Case No: 12-1592

On Appeal from the Medina
County Court of Appeals,
Ninth Appellate District

Court of Appeals
Consolidated Case Nos.
11CA0092-M; 11CA0093-M

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS,
 NASSIM M. LYNCH AND THE CENTRAL COLLECTION AGENCY

Barbara A. Langhenry (0038838)
 Interim Director of Law
 Linda L. Bickerstaff (0052101) (COUNSEL OF RECORD)
 Assistant Director of Law
 City of Cleveland Department of Law
 205 W. St. Clair Avenue
 Cleveland, Ohio 44113
 (216) 664-4406
 (216) 420-8299 (facsimile)
 lbickerstaff@city.cleveland.oh.us

COUNSEL FOR APPELLANTS,
 NASSIM M. LYNCH AND THE
 CENTRAL COLLECTION AGENCY

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 SUPREME COURT OF OHIO

James F. Lang (0022850) (COUNSEL OF RECORD)
Trevor Alexander (0080713)
Calfee, Halter & Griswold LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114-1607
(216) 622-8200
(216) 241-0816 (facsimile)
jlang@calfee.com
talexander@calfee.com

COUNSEL FOR APPELLEE,
PANTHER II TRANSPORTATION, INC.

Theodore J. Lesiak (0041998)
Lesiak Hensal & Hathcock, LLC
3995 Medina Road, Suite 210,
Medina, Ohio 44256
(330) 764-3200
(330) 764-3202 (facsimile)
lesiak@lhhlaw.com

COUNSEL FOR APPELLANT,
VILLAGE OF SEVILLE BOARD OF INCOME TAX REVIEW

Rebecca K. Schaltenbrand, Esq. (0064817)
Ice Miller LLP
600 Superior Avenue East, Suite 1701
Cleveland, Ohio 44114
(216) 621-5307
(216) 394-5089 (facsimile)
rebecca.schaltenbrand@icemiller.com

John Gotherman, Esq.
Ohio Municipal League
175 South Third Street, Suite 510
Columbus, Ohio 43215-7100

COUNSEL FOR AMICUS CURIAE,
THE OHIO MUNICIPAL LEAGUE

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EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This cause presents one simple issue: whether R.C. 4921.25 expressly preempts an Ohio municipality (incorporated village) from levying its net profits income tax as that tax is applied to motor transportation companies defined under Chapter 4921.

In this case, the court of appeals found that a motor transportation company that had consistently paid a municipal net profits income tax was now suddenly exempt from paying such tax under R.C. 4921.25. The court of appeals' rationale was that "[t]he statute plainly applies to 'all *** taxes.'" (Ellipsis by court of appeals.)

To understand what R.C. 4921.25 pertains to, one must look to Chapter 4921 as a whole and its related statute R.C. 4921.18.

Chapter 4921 deals with one thing—the licensing, registering and regulation of motor transportation companies; nothing in that chapter deals with taxing *the income of* a motor transportation company. Under that chapter, the PUCO is granted regulatory authority over motor transportation companies. In that capacity, among other things, it issues operating permits. No motor transportation company can operate in the State without first receiving such operating permit.

R.C. 4921.18 is titled "[t]axes" and provides that whenever a PUCO operating permit is issued and annually thereafter, the motor transportation company is required to pay a tax on each *vehicle* used by it in the conduct of its business that registers under the company's PUCO operating permit. The R.C. 4921.18 tax is either \$30 or \$20 depending only on the type of vehicle being used and registered.

R.C. 4921.25 refers to the 4921.18 tax as "fees and charges" and provides that once that fee or charge is paid and *on compliance* with other provisions in the statute, no municipality can levy a similar type license or registration fee or tax. The other provisions cited in R.C. 4921.25 that must be compiled with (R.C. 4503.04, 4905.03, and 4921.02 to 4921.32) only deal with licensing and regulation as well.

R.C. 4921.25 clearly only prohibits a municipality from imposing a license tax under its police power and not a general revenue tax under its taxing power.

The implications of the decision of the court of appeals affect every Ohio municipality and incorporated village that levies an income tax. The public's interest in the uniformity of taxation is profoundly affected by a holding that one taxpayer does not share equally in the burden of taxation. There is no dispute that the General Assembly could have exempted the income of motor transportation companies from the local income tax if it chose. The General Assembly, however, clearly did not make such exemption in R.C. 4921.25.

Apart from this fairness consideration, which makes this case one of great public interest, the decision of the court of appeals has broad general significance. The decision closes an entire revenue stream that local governmental entities use for general purposes and to provide services to their citizens. There will be economic harm in the form of lost tax revenues. "A fundamental power of government is the power to raise revenue." *Angell v. City of Toledo*, 153 Ohio St. 179, 182, 91 N.E.2d 250, 252 (1950).

The decision of the court of appeals creates a bad and troublesome precedent that improperly equates the "right to regulate" with the "right to tax." As this Court long ago acknowledged, "the police and taxing powers *** though co-existent are distinct powers[.]" See *Holst v. Roe*, 39 Ohio St. 340, 344 (1883). And, clearly, the fact that R.C. 4921.25 uses the word "taxes" is not conclusive as to the legal effect of that statute. Words have different meanings depending how they are used.

Clearly, there is a legal difference between a "tax" and a "fee." A tax is a compulsory exaction of money by public authority for public purposes enforceable by law *and* is not payment for services rendered. A fee is generally defined to be a charge for a special service rendered to individuals by some governmental agency. While both a tax and a fee are compulsory exactions, the distinction between the two lies primarily in the fact that a tax is levied as part of the common burden while a fee is paid for a special benefit or privilege. The charge imposed by R.C. 4921.18 is clearly a license or registration fee and R.C. 4921.25 essentially states that once that fee has been paid, no municipality can levy a similar type charge be it labeled a "fee[], license fee[], annual payment[], license tax[], or tax[] or other money exaction[]."

The judgment of the court of appeals has great significance also because it resurrects a form of state-implied preemption which this Court struck down in *Cincinnati Bell Telephone Company v. Cincinnati*, 81 Ohio St.3d 599, 493 N.E.2d 212 (1998). In *Cincinnati Bell*, this Court held that acts by the General Assembly to limit or restrict municipal taxing power must be narrowly interpreted and applied. The court of appeals simply ignored the teachings in that decision and others.

Finally, the case raises a substantial constitutional question as well. The decision offends the delegation of power granted to local authorities and is a violation of the Home-Rule Amendment to the Ohio Constitution. This Court has held time and again that since municipal taxing power is derived directly from the Ohio Constitution and not from the General Assembly, only other constitutional provisions and express acts of the General Assembly can limit or restrict that taxing power. *Cincinnati Bell*, 81 Ohio St.3d at 606-605, 493 N.E.2d at 213. Further, this Court specifically held in *Angell v. City of Toledo*, 153 Ohio St. 179, 91 N.E.2d 250, paragraph two of the syllabus, that the General Assembly had not at that time "passed any law limiting the power of municipal corporations to levy and collect income taxes." The predecessors to R.C. 4921.18 and R.C. 4921.25 were already in existence at that time. See former General Code Sections 614-94 (predecessor to R.C. 4921.18) and 614-98 (predecessor to R.C. 4921.25).

Moreover, Revised Code Section 718.01(D)(1) provides that "no municipal corporation shall exempt from a tax on income *** the net profits from a business or profession." The court of appeals' decision is in direct contradiction of the mandates of R.C. 718.01(D)(1) as well.

The R.C. 4921.18 tax is clearly not the equivalent of an income tax. No portion of such tax is based on income. As stated long ago by the United States Supreme Court in *Clark v. Poor*, this is an "extra tax" for those "who make the highways their place of business." 274 U.S. 544, 557 (1927). If the decision of the court of appeals is allowed to stand "[t]his [C]ourt[s'] [] repeated[] h[o]ld[ings] that the purpose of the motor transportation act is to serve the public convenience and necessity as

distinguished from servicing the advantage and profits of motor transportation companies[,]” *Stark Electric R. Co. v. Public Utilities Commission*, 118 Ohio St. 405, 409, 161 N.E. 208, 210 (1928), would certainly not be true.

This Court has consistently rejected “supposed” strict construction where its application would result in an absurd or unreasonable result. To remedy the absurd result in this case, this Court must grant jurisdiction to hear this case and review the erroneous and dangerous decision of the court of appeals.

STATEMENT OF THE CASE AND FACTS

This case arises from a decision issued by the Board of Review for the Village of Seville (“Seville Board”). It is a tax refund case where the issue before the Board was whether the Village had authority to tax the net profit income earned within its jurisdiction by Appellee, Panther II Transportation Inc. (“Panther”). Panther claimed that since it paid the R.C. 4921.18 tax, it was exempt from a municipal income tax under R.C. 4921.25. Prior to the tax years (“TY”) at issue, Panther filed municipal net profit tax returns and paid municipal net profit tax for TY1994, 1995, 1996, 1997, 1998, 1999, 2000 and 2004 for each city it was located in at the relevant time. No returns were filed or tax paid for TY2001-2003 because Panther was located in a township that did not impose a city income tax.

Appellant, Nassim M. Lynch, the Central Collection Agency’s Tax Administrator, issued a Ruling finding that the refund claim for TY2005-2006 was correctly denied since R.C. 4921.25 does not preempt a municipal income tax.

Panther appealed the Tax Administrator's Ruling to the Seville Board. The Seville Board issued a decision affirming the Ruling.

Panther then appealed to the Ohio Board of Tax Appeals ("Board of Tax Appeals"). In its decision, the Board of Tax Appeals found that "the General Assembly expressly limits the taxes applicable to motor transportation companies" and that R.C. 4921.25 "specifically exempt" the net profits of a motor carrier from a municipal income tax. *See* Decision and Order dated August 23, 2011, slip op. at 8-9 (Appendix, Exh. 1); Decision and Correcting Order dated August 30, 2011, slip op. at 9 (Appendix, Exh. 2).

After the Seville Board, Tax Administrator and Central Collection Agency appealed, the Ninth District Court of Appeals affirmed the Board of Tax Appeals' decision finding that R.C. 4921.25 "plainly applies to 'all *** taxes.'" *See* Opinion and Judgment dated August 6, 2012, slip. op. at ¶11 (Appendix Exh. 3).

The Court of Appeals erred in ruling that an Ohio municipality and incorporated village's net profits income tax is expressly preempted by R.C. 4921.25.

In support of their position on this issue, the Tax Administrator and Central Collection Agency present the following argument.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: Revised Code 4921.25 does not preempt an Ohio municipality's net profits income tax as that tax is applied to motor transportation companies defined under Chapter 4921.

A. Preemption Requires An Express Affirmative Act.

There is no dispute that a municipality's taxing power is "derived [directly] from the Ohio Constitution and not from the General Assembly" and "in the absence of an

express statutory limitation" "the exercise of that power is to be considered in all respects valid[.]” *Cincinnati Bell*, 81 Ohio St.3d at 606, 493 N.E.2d at 217. As this Court would explain in *Cincinnati Bell*:

The adoption of the [Home Rule Amendment] meant that municipalities were entitled to exercise, fully and completely, 'all powers of local self-government.' Among those powers is the power of taxation. Accordingly, given the delegation, by the people of the state, of power to levy taxes for municipal purposes, the exercise of that power is to be considered in all respects valid, *unless the General Assembly has acted affirmatively by exercising its constitutional prerogative. Id.* (Emphasis added.)

This Court would also note that the General Assembly was certainly "aware" of how to exercise that constitutional prerogative. *Id.* The Court noted further that acts by the General Assembly to so limit or restrict must be narrowly interpreted and applied "so that it does not engulf the general power of taxation delegated to municipalities." *Id.* at 606-607, 493 N.E.2d at 217.

B. Examples Of An Express Affirmative Act.

As an example of "an express statutory provision," this Court in *Cincinnati Bell* pointed to R.C. 718.01(F) (since renumbered 718.01(H)). The Court stated that the General Assembly's "awareness:"

is demonstrated by its passage of specific prohibitions on municipal taxation of certain types of income as provided in R.C. 718.01(F). Pursuant to R.C. 718.01(F), '[n]o municipal corporation shall tax' military pay, *income of* certain nonprofit organizations, certain forms of intangible income, compensation paid to precinct election officials, and compensation paid to certain employees of transit authorities. *Id.* (Quotations original, brackets original.)

There are other examples demonstrating the General Assembly exercising its constitutional prerogative to expressly preempt a municipal income tax. One occurred when R.C. 718.01 was amended to include “[t]he income of a public utility when that public utility is subject to the tax under section 5727.30.” Am. Sub. H.B. 770, 147 Ohio Laws, Part III, 5621. Another occurred when R.C. 715.013 was enacted which read (in pertinent part) “[e]xcept as otherwise expressly authorized by the Revised Code, no municipal corporation shall levy a tax that is the same as or similar to a tax levied under Chapter *** 5727 *** of the Revised Code” (chapter 5727 deals with the public utilities gross receipts excise tax which is similar to an income tax). Am. Sub. HB 770, 147 Ohio Laws, Part III, 5621.

C. Case Involves A Motor Transportation Company.

Panther is a motor transportation company engaged in general freight trucking. The nature of its business relies on and requires use of the highways and the same is true of any company in that same line of business. The trucking industry is heavily regulated at both the federal and state level and such regulation imposes a host of different highway user fees and charges. Such highway user fees and charges include (i) the federal heavy vehicle use tax which is an annual tax on the use of heavy highway vehicles based on the taxable gross weight of the vehicle being used and is paid by the vehicle owner and (ii) the highway use tax exacted at both the state and federal level, which is a tax based on miles driven on the public highways and levied only against commercial users, like Panther. *See* IRC 4481; R.C. 5728.06.

D. Ohio's Regulation of Motor Transportation Companies.

R.C. Chapter 4921 deals with the licensing and regulation of motor transportation companies. Under that Chapter, the PUCO is granted regulatory authority over motor transportation companies and issues operating certificates known as certificates of public convenience and necessity. *See* R.C. 4921.04; *E.A. Schlairet Transfer Co. v. Pub. Util. Comm.* (1963), 174 Ohio St. 554, 190 N.E.2d 910. This Court has recognized such certificates as revocable licenses to operate in the state. *Scheible v. Hogan* (1925), 113 Ohio St. 83, 148 N.E.2d 581; *Alsbaugh v. P.U.C.* (1946), 146 Ohio St. 267, 65 N.E.2d 263; *Miller, Inc. v. P.U.C.* (1967), 10 Ohio St.2d 53, 225 N.E. 2d 269; *Westhoven v. Public Utilities Commission* (1925), 112 Ohio St. 411, 147 N.E. 759, syllabus. No motor transportation company can operate in the state without first receiving such operating certificate. *See* R.C. 4921.10; 4921.101.

E. R.C. 4921.18 Imposes An Annual Tax.

Whenever such certificates of public convenience and necessity are issued, the motor transportation company is required to pay a tax under R.C. 4921.18. This statute is titled "Taxes" and states, in part, that:

(A) Every motor transportation company or common carrier by motor vehicle operating in this state shall, at the time of the issuance of a certificate of public convenience and necessity to it and annually thereafter on or between the first and the fifteenth days of July of each year, pay to the public utilities commission, for and on behalf of the treasurer of state the following taxes:

(1) For each motor-propelled or motor-drawn vehicle used for transporting persons, thirty dollars;

(2) For each commercial tractor, as defined in Section 4501.01 of the Revised Code, used for transporting property, thirty dollars;

(3) For each motor truck transporting property, twenty dollars.

According to the plain language of this statute, R.C. 4921.18 imposes an annual tax or fee on each *vehicle* used by a motor transportation company that has been issued a PUCO certificate of public convenience and necessity. The annual tax or fee is either \$30 or \$20 depending on the type of vehicle being used. Each year, the operating license must be renewed and the R.C. 4921.18 tax is again paid on each vehicle to be used by the motor transportation company and registering under its PUCO operating certificate during the relevant reporting period.

F. Use Of The R.C. 4921.18 Revenue.

The revenue generated by the R.C. 4921.18 tax is used for highway maintenance and repairs and to cover administrative expenses of the PUCO. *See* R.C. 4923.12.

G. This Is Clearly A "Privilege" Tax.

As shown above, the R.C. 4921.18 tax is not based on the income of a motor transportation company or even the value of the vehicle on which it is levied. The tax is simply \$30 or \$20 per vehicle depending solely upon whether it is a commercial passenger vehicle, tractor or truck. It clearly is not an income tax, levied on the income of an individual or business. *See Angell v. Toledo*, 153 Ohio St. at 183, 91 N.E.2d at 252 (defining an income tax as "one levied on the *income from* property or an occupation[;] it is a direct tax upon the thing called income"). The R.C. 4921.18 tax also clearly is not a property tax, which is based on the "true value in money" of the

property. *Saviers v. Smith* (1920), 101 Ohio St. 132, 136-37 ("when it comes to taxing property it is required to be taxed" "at its true value in money"). The R.C. 4921.18 tax is a tax on a "privilege" which is based on the reasonable value of the privilege. *Id.* at 136-37; *Southern Gum Co. v. Laylin* (1902), 66 Ohio St. 578, 64 N.E. 564 paragraph three the syllabus ("a tax on a privilege cannot exceed the reasonable value of the privilege" "conferred, or its continued annual value hereafter"); *Calerdine v. Freibert* (1935), 129 Ohio St. 453, 195 N.E. 854, paragraph one of the syllabus ("an excise must not exceed the reasonable value of the privilege conferred"). This explains why the R.C. 4921.18 tax is either \$30 or \$20 per vehicle—it is measuring the value of the privilege not the value of the property itself. This also explains why R.C. 4921.18(D) provides that if "the tax imposed by this section has been paid, [such vehicle] may be used by another [motor transportation company], without further payment of the tax[.]" R.C. 4921.18(D).

H. R.C. 4921.25 Which Is At Issue.

Section 4921.25, is titled "Fees and charges" and states:

The fees and charges provided under Section 4921.18 of the Revised Code shall be in addition to taxes, fees, and charges fixed and exacted by other sections of the Revised Code, except the assessments required by section 4905.10 of the Revised Code, but all fees, license fees, annual payments, license taxes, or taxes or other money exactions, except the general property tax, assessed, charged, fixed, or exacted by local authorities such as municipal corporations, townships, counties, or other local boards, or the officers of such subdivisions are illegal and, are superseded by sections 4503.04, 4905.03 and 4921.02 to 4921.32, inclusive of the Revised Code. On compliance by such motor transportation company with sections 4503.04, 4905.03 and 4921.02 to 4921.32, inclusive, of the Revised Code, all local ordinances,

resolutions, by laws, and rules in force shall cease to be operative as to such company, except that such local subdivisions may make reasonable local police regulations within their respective boundaries not inconsistent with such sections.

Section 4921.25 clearly refers to the R.C. 4921.18 annual tax as "fees and charges."

R.C. 4921.25 also specifically states that "all fees, license fees, annual payments, license taxes, or taxes or other money exactions, except the general property tax, assessed, charged, fixed, or exacted by local authorities ... *are illegal and, are* superseded by sections 4503.04, 4905.03 and 4921.02 to 4921.32[.]" (Emphasis added.)

What do R.C. 4503.04, 4905.03 and 4921.02 to 4921.32 pertain to? Section 4503.04 imposes a license fee or excise tax upon the privilege of operating motor vehicles (both pleasure and commercial) upon the highways. Section 4905.03 defines "motor transportation company" subject to PUCO oversight and regulation. Sections 4921.02 to 4921.32 are the state's regulations for motor transportation companies. The court of appeals simply ignored the "are illegal and are superseded by" language which clearly shows that the prohibition is only about licensing and regulation.

I. R.C. 4921.25 Not Express Affirmative Act.

The court of appeals found that "R.C. 4921.25 specifically provides that the PUCO's provisions supersede any tax a municipal corporation might wish to impose" and that "[a]ny tax, other than the general property tax, is 'illegal.'" Opinion and Judgment, slip. op. at ¶8. Nothing in that statute however comes even close to being an express statutory provision preempting a municipality's right to *tax the income of*

motor transportation companies. As noted, this Court has found that language such as “no municipal corporation shall tax [] pay, income of [], compensation paid to [],” etc., is necessary to demonstrate such an intent. *Cincinnati Bell Telephone* at 606, 493 N.E.2d at 217.

J. Reason Property Tax Referenced Is Clear.

The court of appeals found it significant that R.C. 4921.25 referenced the general property tax noting that “[i]f the General Assembly had intended R.C. 4921.25 only to exempt municipalities from imposing additional licensing and regulatory taxes, it would not have been necessary to exempt general property taxes from R.C. 4921.25’s application.” Opinion and Judgment, slip. op. at ¶11. However, the reason for the reference to the general property tax seems clear. At the time R.C. 4921.25 was originally enacted (and still today), Article XII, Section 2 of the Ohio Constitution, authorized the levy of a general property tax. Obviously, a property tax can be a tax on property items such as the vehicles used by the motor transportation companies which are subject to the R.C. 4921.18 tax. Specific reference to the general property tax was made in R.C. 4921.25 solely for the sake of clarity and to ensure that it was understood that said vehicles could still be subject to any such general property tax as well. No doubt if such were not made clear, motor transportation companies (like Panther) would argue that such vehicles were not subject to the general property tax either.

K. R.C. 718.01(D)(1) *Requires* Net Profits Taxation.

As noted, the court of appeals’ decision also contradicts the mandates of R.C. 718.01(D)(1) which provides (in part) that “no municipal corporation shall exempt from

a tax on income *** the net profit from a business or profession.” Further, any exemption to a municipal income tax is found in R.C. 718.01(H). 2011 Ohio Atty.Gen.Ops. No. 2011-007, paragraph 4 of the syllabus.

As this Court has long recognized “[e]xemption is the exception to the rule and statutes granting exclusions *** are to be strictly construed. *National Tube Co. V. Glander*, 157 Ohio St. 407, 105 N.E.2d 648, paragraph two of the syllabus. This is so since statutes that allow an exemption from tax is “in derogation of equal rights” therefore such exemption must be strictly construed against the taxpayer. *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904 at ¶16. Such “must necessarily be the rule in order to preserve equality in the burden of taxation.” *Lutheran Book Shop v. Bowers*, 164 Ohio St. 359, 362, 131 N.E.2d 221.

L. Owner-Operators Actually Pay The Tax.

It is important to note that Panther does not own any of the vehicles on which the R.C. 4921.18 tax is levied but rather has developed a network of owner-operators that it uses to provide services to its customers. These vehicles are owned by the owner-operators and leased to Panther. Under the lease agreements, the owner-operators exclusively lease their vehicles to Panther and (in some instances) provide driving services as well. As one Ohio appellate court explained “[t]his complex system appears to be intended to permit owner-operators and trucking companies to contractually determine the party that is responsible for paying the tax imposed by R.C. 4921.18[.]” *B&T Express, Inc. v. Pub. Util. Comm.*, 145 Ohio App.3d 656, 670 , 763 N.E.2d 1241, 1252-53 (2001).

Under Panther's owner-operator lease agreement, it is clear that the parties have "contractually" agreed that the owner-operators will pay the R.C. 4921.18 tax. Panther therefore claims an exemption from municipal income tax based on a tax which it ultimately does not even pay. The court of appeals' interpretation of R.C. 4921.25 leads to an absurd outcome clearly never intended by the Ohio General Assembly.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. Appellants request that this Court accept jurisdiction in this case so that the important issues presented can be reviewed on the merits.

Respectfully submitted,
Barbara A. Langhenry, Esq., #0038838
Interim Director of Law

By: 
Linda L. Bickerstaff, Esq., #0052101
Assistant Director of Law

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellee, James F. Lang and N. Trevor Alexander, Calfee, Halter & Griswold LLP, The Calfee Building, 1405 East Sixth Street, Cleveland, Ohio 44114-1607; counsel for appellant, Village of Seville Board of Income Tax Review, Theodore J. Lesiak, Lesiak Hensal & Hathcock, 3995 Medina Road, Suite 210, Medina, Ohio 44256; and counsel for amicus curiae, The Ohio Municipal League, Rebecca K. Schaltenbrand, Esq., Ice Miller LLP, 600 Superior Avenue East, Suite 1701, Cleveland, Ohio 44114 and John Gotherman, Esq., Ohio Municipal League, 175 South Third Street, Suite 510, Columbus, Ohio 43215-7100, on this 18th day of September 2012.


Linda L. Bickerstaff,
Assistant Director of Law

Attorney for Appellants,
Nassim M. Lynch and the
Central Collection Agency

APPENDIX

EXHIBIT 1

OHIO BOARD OF TAX APPEALS

Panther II Transportation, Inc.,)	CASE NO. 2008-M-1247
)	
Appellant,)	(MUNICIPAL INCOME TAX)
)	
vs.)	DECISION AND ORDER
)	
Village of Seville Board of)	
Income Tax Review,)	
)	
Appellee.)	

APPEARANCES:

For the Appellant -	- Calfee, Halter & Griswold LLP
	James F. Lang
	1400 KeyBank Center
	800 Superior Avenue
	Cleveland, Ohio 44114

For the Appellee -	Robert J. Triozzi
Income Tax Administrator	Director of Law
	City of Cleveland Law Department
	Linda L. Bickerstaff
	Assistant Director of Law
	205 W. Saint Clair Avenue
	Cleveland, Ohio 44113

For the Village of -	Lesiak, Hensal & Hathcock
Seville	Theodore J. Lesiak
	3995 Medina Road, Suite 210
	Medina, Ohio 44256

Entered AUG 23 2011

Ms. Margulies, Mr. Johrendt, and Mr. Williamson concur.

This cause and matter comes to be considered by the Board of Tax Appeals upon a notice of appeal filed by Panther Transportation, Inc. ("Panther"), appellant. Panther challenges a decision of the Village of Seville ("Seville") Board of Income Tax Review, Seville's municipal board of appeal established by R.C. 718.11,

in which the MBOA¹ denied the refund of certain income taxes paid by Panther to Seville. The tax years in issue are 2005 and 2006. Panther argues that any imposition of a net profit tax upon the corporation is in violation of the preclusion granted to motor transportation companies by virtue of R.C. 4921.25.

The matter is considered upon the notice of appeal, the statutory transcript certified to this board by the MBOA, the record of the hearing held before this board, and the briefs of the appellant, the Tax Administrator, and Seville.

A review of the record in this matter reveals that Panther is a motor transportation company which began operations in 1992. H.R. at 33. Originally, Panther operated only within the state of Ohio; in 1995, it began interstate operations. H.R. at 34. For the time pertinent to this appeal, Panther's interstate service was regulated by the Federal Highway Administration, a part of the Department of Defense, and its intrastate service by the Public Utilities Commission of Ohio ("PUCO"). At hearing, Panther provided evidence that the company was licensed by and in good standing with both entities. Appellant's Exs. A, C; Appellee Tax Administrator's Ex. 14. As was explained by Mr. Allen H. Motter, vice president of legal and risk management for Panther, the federal and state licenses permit a motor transportation company to operate a business of transportation for hire. H.R. at 24. The licenses also provide a tracking mechanism for equipment used by the carrier. Id.

¹ Although Seville has established a "board of tax review" for income tax purposes, we note that R.C. 718.11 and 5717.011 refer to such an entity as a "municipal board of appeal." For consistency, we shall refer to an entity issuing decisions under R.C. 718.11 as a municipal board of appeal, or MBOA, regardless of the actual name selected by the municipality.

According to Mr. Motter, the primary interest of the PUCO (as well as its federal counterpart) is safety. H.R. at 25. Rate regulation, another primary component of licensing at one time, is no longer a focus, as motor transportation companies have tariffs on file, but are no longer required to have rates on file. H.R. at 27.

Mr. Motter explained that, except for the issuance of commercial driver's licenses, traditionally, federal regulations preempt state regulations regarding interstate transportation. H.R. at 30, 32. On an intrastate basis, the states have the ability to institute some safety regulations. H.R. at 31. However, according to Mr. Motter, municipalities within Ohio have very limited authority to regulate intrastate motor transportation companies. Id.

In both 2005 and 2006, Panther reported and paid income tax to Seville. It now believes that the taxes were paid in error. Panther bases its claim on R.C.

4921.25. That section provides:

"The fees and charges provided under section 4921.18 of the Revised Code shall be in addition to taxes, fees, and charges fixed and exacted by other sections of the Revised Code, except the assessments required by section 4905.10 of the Revised Code, but all fees, license fees, annual payments, license taxes, or taxes or other money exactions, except the general property tax, assessed, charged, fixed, or exacted by local authorities such as municipal corporations, townships, counties, or other local boards, or the officers of such subdivisions are illegal and, are superseded by sections 4503.04, 4905.03, and 4921.02 to 4921.32, inclusive, of the Revised Code. On compliance by such motor transportation company with sections 4503.04, 4905.03, and 4921.02 to 4921.32, inclusive, of the Revised Code, all local ordinances,

resolutions, bylaws, and rules in force shall cease to be operative as to such company, except that such local subdivisions may make reasonable local police regulations within their respective boundaries not inconsistent with such sections." (Emphasis added.)

Panther argues that, by virtue of its status as a motor vehicle transportation company, any taxes assessed by a municipal corporation such as Seville are illegal.

In *Cincinnati Bell Tel. Co. v. City of Cincinnati* (1998), 81 Ohio St.3d 599, the Ohio Supreme Court concluded that preemption in the tax arena requires an express act of the General Assembly. In that appeal, a telephone company made a similar argument to the one before this board today; i.e., municipalities are preempted from imposing a net profits (income) tax on those entities required to pay a public utilities excise tax imposed by R.C. 5727.30. In thoroughly considering the matter, the court held that the "Home Rule Amendment," Ohio Const. Sect. 3, Article XVIII, confers sovereignty upon municipalities to "exercise all powers of local self-government." One such power is the power to tax. *Id.* at 602; *State ex rel. Zielonka v. Carrel* (1919), 99 Ohio St. 220.

The court then recognized an inconsistency within the Ohio Constitution, which also grants to the Ohio General Assembly the power to limit a municipality's taxing authority. Section 6, Article XIII of the Ohio Constitution provides that "the General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation *** so as to prevent the abuse of such power."

In harmonizing this apparent inconsistency, the court overturned earlier case law which had approved the doctrine of "implied preemption." That doctrine was first articulated in *Cincinnati v. Am. Tel. & Tel. Co.* (1925), 112 Ohio St. 493, wherein the court held that a local government such as a municipality was free to impose a tax only if the General Assembly had not entered the field by previously enacting a similar tax. Paragraph 2 of the syllabus provides:

"The power granted to the municipality by Section 3, Article XVIII, of the Constitution of the state of Ohio, to lay an occupational tax in the exercise of its powers of local self-government, does not extend to fields within such municipality which have already been occupied by the state."

In *Cincinnati Bell*, the court concluded that the Home Rule Amendment was a broad grant of power to the municipalities, and should only be restricted by an affirmative act of the General Assembly. The court then turned to R.C. 718.01(F) as an example of such an affirmative act:

"That the General Assembly is aware that it may exercise its limiting power by expressly preempting municipal taxation by statute is demonstrated by its passage of specific prohibitions on municipal taxation of certain types of income as provided in R.C. 718.01(F). Pursuant to R.C. 718.01(F), 'no municipal corporation shall tax' military pay, income of certain nonprofit organizations, certain forms of intangible income, compensation paid to precinct election officials, and compensation paid to certain employees of transit authorities. Similarly, in providing for the collection of a state income tax, the General Assembly has expressly provided that 'the levy of this tax on income does not prevent a municipal corporation, a joint economic development zone created under section 715.691, or a joint economic development

district created under section 715.70 or 715.71 or sections 715.72 to 715.81 of the Revised Code from levying a tax on income.' R.C. 5747.02(C)." Id. at 606.

It is clear that Seville's income tax is applicable to Panther unless expressly preempted by the General Assembly. Panther claims that R.C. 4921.25 is just such an express preemption. Panther argues that R.C. 4921.25 expressly exempts motor transportation companies from *all* municipal taxes, fees, and other exactions except for property tax.

The Tax Administrator's argument in favor of taxation is twofold. First, the Tax Administrator argues that R.C. 4921.18 imposes a license fee for the privilege of conducting a motor transportation business in Ohio. According to the Tax Administrator, the preemption contained in R.C. 4921.25 applies only to the imposition of taxes, fees and charges relating to licensing, registering or regulating the vehicles used by the motor transportation company. As a result, there is no express prohibition against the imposition of a net profits tax on the motor transportation company itself.

The Tax Administrator also argues that the General Assembly through R.C. 718.01(F)² has enacted a statute which expressly preempts a municipality from imposing tax on various types of income. The Tax Administrator argues that there is no prohibition in R.C. 718.01 of the taxation of a motor transportation company's net profits. Therefore, the Tax Administrator argues, the taxation of such income is not

² Our consideration relates to the provisions of R.C. Chapter 718 as applicable during the tax year before us. The provisions of former R.C. 718.01(F) have since been recodified into R.C. 718.01(H).

expressly preempted. Without express preemption, Seville is permitted to tax such income.

We begin our review of this matter by noting that when cases are appealed from a municipal board of review to the BTA, the burden of proof is on the appellant to establish its right to the relief requested. *City of Marion v. City of Marion Bd. of Review* (Aug. 10, 2007), BTA No. 2005-T-1464, unreported, appeal dismissed, Marion App. No. 9-07-37, 2008-Ohio-2496. See, also, *Tetlak v. Bratenahl* (2001), 92 Ohio St.3d 46, at 51, 2001-Ohio-129. Cf. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. In this regard, we will determine the weight and credibility to be accorded the evidence presented. *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St.2d 13.

Panther argues that the specific use of the word "tax" within the list of items included in R.C. 4921.25 requires a finding that any municipal tax (with the exception of general property tax) cannot be imposed upon a motor transportation company. The Tax Administrator, however, argues that income taxes may be imposed against a motor transportation company, because R.C. 4921.25 must be read in conjunction with other provisions within Chapter 4921. The administrator argues that the "taxes" assessed in Chapter 4921 are licensing fees, and, as such, only similar license fees are improperly assessed against a motor transportation company. The administrator also argues that only the specific types of income listed in R.C. 718.01 are exempt from municipal taxation.

There is no case law which directly addresses the R.C. 4921.25 preemption. There are, however, some basic statutory construction precepts which are relevant. The first is that in determining how to apply a statute, a tribunal's "paramount concern is the legislative intent in enacting the statute." *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, ¶ 21; *Dirksen v. Green Cty. Bd. of Revision*, 109 Ohio St.3d 470, 2006-Ohio-2990; *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969.

Legislative intent is first to be sought from the language employed. "[I]f the words be free from ambiguity and doubt, and express plainly, clearly, and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation." *Singluff v. Weaver* (1902), 66 Ohio St. 621, paragraph two of the syllabus.

In the present appeal, we find the language of the statute to be clear. R.C. 4921.25 specifically states that the fees and charges imposed under R.C. 4921.18 are in addition to all other taxes imposed by other sections of the Revised Code, except for assessments required by R.C. 4905.10. Therefore, R.C. 4921.25 recognizes that a motor transportation company is responsible to the state for taxes imposed by law.

However, as to municipal corporations (i.e., cities), townships, and counties, governmental entities which are also constitutionally authorized to impose taxes upon their residents, the General Assembly expressly limits the taxes applicable to motor transportation companies. R.C. 4721.25 specifically exempts such

companies from the taxes imposed by local authorities (except the general property tax) on public utility companies (R.C. 4905.03) and motor transportation companies (R.C. 4921.02 to 4921.32).

There appears to be no ambiguity in the statement preempting all taxes imposed by local authorities. While the Tax Administrator argues that the statute should be read in *pari materia* with R.C. 4921.18, which imposes what it contends is a motor vehicle licensing fee, we see no inconsistency in the General Assembly instituting a license fee and preempting a net profits tax. The General Assembly has been constitutionally authorized to limit a municipality's taxing authority. Sec. 13, Art. VIII, Ohio Const. Therefore, this board can find no impediment to the application of both R.C. 4921.18 and R.C. 4921.25.

The Tax Administrator makes a number of other arguments as to the propriety of taxation in this instance, which we do not find compelling. While R.C. 718.01(D)(1) prohibits a municipal corporation from exempting a specific business or corporation from municipal income tax obligations, this subsection should not be read as inconsistent with the preemption found in R.C. 4921.25. Seville did not legislatively exempt any business from income tax obligations – the General Assembly did. Next, the Tax Administrator criticizes Panther for suggesting that license fees it obligates its drivers to pay or reimburse the company for are a basis for preemption. However, we agree with Panther that it is not the payment of license fees pursuant to R.C. 4721.18 that causes R.C. 4721.25 to be applicable. It is the requirement that Panther obtain a certificate of public convenience and necessity that

is the triggering event that causes R.C. 4721.25 to be applicable to Panther's municipal income tax obligations. The evidence at hearing, as well as the Tax Administrator's finding that Panther was a motor transportation company, is sufficient for this board to conclude that R.C. 4721.25 is applicable.

Finally, the Tax Administrator argues that Panther has failed to produce evidence of a constitutional violation. The Tax Administrator is correct in his argument that this board does not have the authority to reach constitutional claims, but instead serves as a receiver of evidence regarding such claims. *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195. However, in this case, the board finds that R.C. 4721.25 provides the exemption from municipal taxation. Therefore, any constitutional claims are rendered moot.

As a result, this board concludes that Panther is correct in its claim that Seville unlawfully collected gross receipts taxes for tax years 2005 and 2006. Therefore, the determination of the Tax Administrator is hereby reversed.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.


Sally F. VanMeter, Board Secretary

APPENDIX

EXHIBIT 2

OHIO BOARD OF TAX APPEALS

Panther II Transportation, Inc.,)
)
 Appellant,) (MUNICIPAL INCOME TAX)
)
 vs.) CORRECTING ORDER
)
 Village of Seville Board of)
 Income Tax Review,)
)
 Appellee.)

APPEARANCES:

For the Appellant - - Calfee, Halter & Griswold LLP
James F. Lang
1400 KeyBank Center
800 Superior Avenue
Cleveland, Ohio 44114

For the Appellee - Robert J. Triozzi
Income Tax Administrator Director of Law
City of Cleveland Law Department
Linda L. Bickerstaff
Assistant Director of Law
205 W. Saint Clair Avenue
Cleveland, Ohio 44113

For the Village of - Lesiak, Hensal & Hathcock
Seville Theodore J. Lesiak
3995 Medina Road, Suite 210
Medina, Ohio 44256

Entered **AUG 30 2011**

Ms. Margulies, Mr. Johrendt, and Mr. Williamson concur.

The board's decision and order issued on August 23, 2011 included misidentified revised code-sections. Therefore, the board reissues its determination fully herein, correcting only the statutory references.

This cause and matter comes to be considered by the Board of Tax Appeals upon a notice of appeal filed by Panther Transportation, Inc. ("Panther"), appellant. Panther challenges a decision of the Village of Seville ("Seville") Board of Income Tax Review, Seville's municipal board of appeal established by R.C. 718.11, in which the MBOA¹ denied the refund of certain income taxes paid by Panther to Seville. The tax years in issue are 2005 and 2006. Panther argues that any imposition of a net profit tax upon the corporation is in violation of the preclusion granted to motor transportation companies by virtue of R.C. 4921.25.

The matter is considered upon the notice of appeal, the statutory transcript certified to this board by the MBOA, the record of the hearing held before this board, and the briefs of the appellant, the Tax Administrator, and Seville.

A review of the record in this matter reveals that Panther is a motor transportation company which began operations in 1992. H.R. at 33. Originally, Panther operated only within the state of Ohio; in 1995, it began interstate operations. H.R. at 34. For the time pertinent to this appeal, Panther's interstate service was regulated by the Federal Highway Administration, a part of the Department of Defense, and its intrastate service by the Public Utilities Commission of Ohio ("PUCO"). At hearing, Panther provided evidence that the company was licensed by and in good standing with both entities. Appellant's Exs. A, C; Appellee Tax

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Administrator's Ex. 14. As was explained by Mr. Allen H. Motter, vice president of legal and risk management for Panther, the federal and state licenses permit a motor transportation company to operate a business of transportation for hire. H.R. at 24. The licenses also provide a tracking mechanism for equipment used by the carrier. Id.

According to Mr. Motter, the primary interest of the PUCO (as well as its federal counterpart) is safety. H.R. at 25. Rate regulation, another primary component of licensing at one time, is no longer a focus, as motor transportation companies have tariffs on file, but are no longer required to have rates on file. H.R. at 27.

Mr. Motter explained that, except for the issuance of commercial driver's licenses, traditionally, federal regulations preempt state regulations regarding interstate transportation. H.R. at 30, 32. On an intrastate basis, the states have the ability to institute some safety regulations. H.R. at 31. However, according to Mr. Motter, municipalities within Ohio have very limited authority to regulate intrastate motor transportation companies. Id.

In both 2005 and 2006, Panther reported and paid income tax to Seville. It now believes that the taxes were paid in error. Panther bases its claim on R.C. 4921.25. That section provides:

"The fees and charges provided under section 4921.18 of the Revised Code shall be in addition to taxes, fees, and charges fixed and exacted by other sections of the Revised Code, except the assessments required by section 4905.10 of the Revised Code, but all fees, license fees, annual payments, license taxes, or taxes or other money exactions, except the general property tax, assessed,

charged, fixed, or exacted by local authorities such as municipal corporations, townships, counties, or other local boards, or the officers of such subdivisions are illegal and, are superseded by sections 4503.04, 4905.03, and 4921.02 to 4921.32, inclusive, of the Revised Code. On compliance by such motor transportation company with sections 4503.04, 4905.03, and 4921.02 to 4921.32, inclusive, of the Revised Code, all local ordinances, resolutions, bylaws, and rules in force shall cease to be operative as to such company, except that such local subdivisions may make reasonable local police regulations within their respective boundaries not inconsistent with such sections.” (Emphasis added.)

Panther argues that, by virtue of its status as a motor vehicle transportation company, any taxes assessed by a municipal corporation such as Seville are illegal.

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The court then recognized an inconsistency within the Ohio Constitution, which also grants to the Ohio General Assembly the power to limit a

municipality's taxing authority. Section 6, Article XIII of the Ohio Constitution provides that "the General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation *** so as to prevent the abuse of such power."

In harmonizing this apparent inconsistency, the court overturned earlier case law which had approved the doctrine of "implied preemption." That doctrine was first articulated in *Cincinnati v. Am. Tel. & Tel. Co.* (1925), 112 Ohio St. 493, wherein the court held that a local government such as a municipality was free to impose a tax only if the General Assembly had not entered the field by previously enacting a similar tax. Paragraph 2 of the syllabus provides:

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certain forms of intangible income, compensation paid to precinct election officials, and compensation paid to certain employees of transit authorities. Similarly, in providing for the collection of a state income tax, the General Assembly has expressly provided that 'the levy of this tax on income does not prevent a municipal corporation, a joint economic development zone created under section 715.691, or a joint economic development district created under section 715.70 or 715.71 or sections 715.72 to 715.81 of the Revised Code from levying a tax on income.' R.C. 5747.02(C)." Id. at 606.

It is clear that Seville's income tax is applicable to Panther unless expressly preempted by the General Assembly. Panther claims that R.C. 4921.25 is just such an express preemption. Panther argues that R.C. 4921.25 expressly exempts motor transportation companies from *all* municipal taxes, fees, and other exactions except for property tax.

The Tax Administrator's argument in favor of taxation is twofold. First, the Tax Administrator argues that R.C. 4921.18 imposes a license fee for the privilege of conducting a motor transportation business in Ohio. According to the Tax Administrator, the preemption contained in R.C. 4921.25 applies only to the imposition of taxes, fees and charges relating to licensing, registering or regulating the vehicles used by the motor transportation company. As a result, there is no express prohibition against the imposition of a net profits tax on the motor transportation company itself.

The Tax Administrator also argues that the General Assembly through R.C. 718.01(F)² has enacted a statute which expressly preempts a municipality from imposing tax on various types of income. The Tax Administrator argues that there is no prohibition in R.C. 718.01 of the taxation of a motor transportation company's net profits. Therefore, the Tax Administrator argues, the taxation of such income is not expressly preempted. Without express preemption, Seville is permitted to tax such income.

We begin our review of this matter by noting that when cases are appealed from a municipal board of review to the BTA, the burden of proof is on the appellant to establish its right to the relief requested. *City of Marion v. City of Marion Bd. of Review* (Aug. 10, 2007), BTA No. 2005-T-1464, unreported, appeal dismissed, Marion App. No. 9-07-37, 2008-Ohio-2496. See, also, *Tetlak v. Bratenahl* (2001), 92 Ohio St.3d 46, at 51, 2001-Ohio-129. Cf. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. In this regard, we will determine the weight and credibility to be accorded the evidence presented. *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St.2d 13.

Panther argues that the specific use of the word "tax" within the list of items included in R.C. 4921.25 requires a finding that any municipal tax (with the exception of general property tax) cannot be imposed upon a motor transportation company. The Tax Administrator, however, argues that income taxes may be

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imposed against a motor transportation company, because R.C. 4921.25 must be read in conjunction with other provisions within Chapter 4921. The administrator argues that the “taxes” assessed in Chapter 4921 are licensing fees, and, as such, only similar license fees are improperly assessed against a motor transportation company. The administrator also argues that only the specific types of income listed in R.C. 718.01 are exempt from municipal taxation.

There is no case law which directly addresses the R.C. 4921.25 preemption. There are, however, some basic statutory construction precepts which are relevant. The first is that in determining how to apply a statute, a tribunal’s “paramount concern is the legislative intent in enacting the statute.” *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, ¶ 21; *Dirksen v. Green Cty. Bd. of Revision*, 109 Ohio St.3d 470, 2006-Ohio-2990; *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969.

Legislative intent is first to be sought from the language employed. “[I]f the words be free from ambiguity and doubt, and express plainly, clearly, and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation.” *Singluff v. Weaver* (1902), 66 Ohio St. 621, paragraph two of the syllabus.

In the present appeal, we find the language of the statute to be clear. R.C. 4921.25 specifically states that the fees and charges imposed under R.C. 4921.18 are in addition to all other taxes imposed by other sections of the Revised Code, except for assessments required by R.C. 4905.10. Therefore, R.C. 4921.25 recognizes

that a motor transportation company is responsible to the state for taxes imposed by law.

However, as to municipal corporations (i.e., cities), townships, and counties, governmental entities which are also constitutionally authorized to impose taxes upon their residents, the General Assembly expressly limits the taxes applicable to motor transportation companies. R.C. 4921.25 specifically exempts such companies from the taxes imposed by local authorities (except the general property tax) on public utility companies (R.C. 4905.03) and motor transportation companies (R.C. 4921.02 to 4921.32).

There appears to be no ambiguity in the statement preempting all taxes imposed by local authorities. While the Tax Administrator argues that the statute should be read in *pari materia* with R.C. 4921.18, which imposes what it contends is a motor vehicle licensing fee, we see no inconsistency in the General Assembly instituting a license fee and preempting a net profits tax. The General Assembly has been constitutionally authorized to limit a municipality's taxing authority. Sec. 13, Art. VIII, Ohio Const. Therefore, this board can find no impediment to the application of both R.C. 4921.18 and R.C. 4921.25.

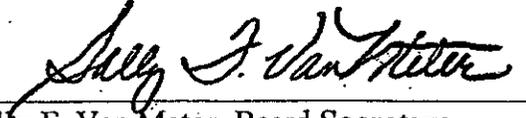
The Tax Administrator makes a number of other arguments as to the propriety of taxation in this instance, which we do not find compelling. While R.C. 718.01(D)(1) prohibits a municipal corporation from exempting a specific business or corporation from municipal income tax obligations, this subsection should not be read as inconsistent with the preemption found in R.C. 4921.25. Seville did not

legislatively exempt any business from income tax obligations – the General Assembly did. Next, the Tax Administrator criticizes Panther for suggesting that license fees it obligates its drivers to pay or reimburse the company for are a basis for preemption. However, we agree with Panther that it is not the payment of license fees pursuant to R.C. 4921.18 that causes R.C. 4921.25 to be applicable. It is the requirement that Panther obtain a certificate of public convenience and necessity that is the triggering event that causes R.C. 4921.25 to be applicable to Panther's municipal income tax obligations. The evidence at hearing, as well as the Tax Administrator's finding that Panther was a motor transportation company, is sufficient for this board to conclude that R.C. 4921.25 is applicable.

Finally, the Tax Administrator argues that Panther has failed to produce evidence of a constitutional violation. The Tax Administrator is correct in his argument that this board does not have the authority to reach constitutional claims, but instead serves as a receiver of evidence regarding such claims. *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195. However, in this case, the board finds that R.C. 4921.25 provides the exemption from municipal taxation. Therefore, any constitutional claims are rendered moot.

As a result, this board concludes that Panther is correct in its claim that Seville unlawfully collected gross receipts taxes for tax years 2005 and 2006. Therefore, the determination of the Tax Administrator is hereby reversed.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

A handwritten signature in cursive script, reading "Sally F. Van Meter". The signature is written in black ink and is positioned above a horizontal line.

Sally F. Van Meter, Board Secretary

APPENDIX

EXHIBIT 3

COURT OF APPEALS

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IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)
PANTHER II TRANSPORTATION, INC.

FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

C.A. No. 11CA0092-M
11CA0093-M

Appellee

v.

VILLAGE OF SEVILLE BOARD OF
INCOME TAX REVIEW, et al.

Appellants

APPEAL FROM JUDGMENT
ENTERED IN THE
OHIO BOARD OF TAX APPEALS
COUNTY OF MEDINA, OHIO
CASE No. 2008-M-1247

DECISION AND JOURNAL ENTRY

Dated: August 6, 2012

WHITMORE, Presiding Judge.

{¶1} Appellants, the Village of Seville Board of Income Tax Review (“Seville”) and Income Tax Administrator Nassim M. Lynch and the Central Collection Agency (collectively, “Central Collection”), now appeal from the judgment of the Ohio Board of Tax Appeals. This Court affirms.

I

{¶2} Plaintiff-Appellee, Panther II Transportation, Inc. (“Panther II”), is a motor vehicle transportation company that leases tractors from owner-operators to haul its trailers for both interstate and intrastate highway travel. As a motor vehicle transportation company, Panther II is subject to the regulation of the Public Utilities Commission of Ohio (“PUCO”) and pays an annual state tax for the issuance of a certificate of public convenience. In 2005 and 2006, Panther II also paid a tax on its local net profits to the Village of Seville, the municipality in which it was headquartered.

{¶3} In March 2007, Panther II filed a refund claim with the Village of Seville for the return of the taxes it paid on its net profits. Panther II argued that the Village of Seville could not levy a local net profits tax upon it because state law preempted the municipality's tax. Central Collection, the tax administrator for the Village of Seville, denied Panther II's refund claim. Panther II appealed Central Collection's final administrative ruling to Seville, which affirmed the administrative ruling and denied Panther II's refund. Panther II then appealed to the Ohio Board of Tax Appeals. The Board of Tax Appeals reversed Central Collection's ruling and determined that state law preempted the Village of Seville's local tax against Panther II.

{¶4} Seville and Central Collection now appeal from the Board of Tax Appeals' decision and collectively raise seven assignments of error for our review. For ease of analysis, we consolidate the assignments of error.

II

Seville Board's Assignment of Error

THE OHIO BOARD OF TAX APPEALS ERRED IN DETERMINING THAT PLAINTIFF/APPELLEE IS NOT SUBJECT TO MUNICIPAL INCOME TAXATION PURSUANT TO R.C. 4921.25[.]

Central Collection's Assignment of Error Number One

THE OHIO BOARD OF TAX APPEALS' DECISION IS UNREASONABLE AND UNLAWFUL AS A MATTER OF LAW IN HOLDING THAT R.C. 4921.25 PREEMPTS A MUNICIPALITY'S NET PROFITS INCOME TAX AS THAT TAX IS APPLIED TO PANTHER AND OTHER MOTOR TRANSPORTATION COMPANIES DEFINED UNDER R.C. CHAPTER 4921.

Central Collection's Assignment of Error Number Two

THE OHIO BOARD OF TAX APPEALS' DECISION IS UNREASONABLE AND UNLAWFUL AS A MATTER OF LAW IN HOLDING THAT R.C. 4921.25 IS AN AFFIRMATIVE EXPRESS ACT OF THE GENERAL ASSEMBLY UNDER SECTION 13, ARTICLE XVIII OF THE OHIO CONSTITUTION THAT LIMITS AND RESTRICTS A MUNICIPALITY'S POWER TO IMPOSE AN INCOME TAX.

Central Collection's Assignment of Error Number Three

THE OHIO BOARD OF TAX APPEALS' DECISION IS UNREASONABLE AND UNLAWFUL AS A MATTER OF LAW WHERE (A) THE WORD "TAX" HAS DIFFERENT MEANINGS DEPENDING UPON THE CONTEXT IN WHICH THE WORD IS USED; (B) THERE IS A CLEAR DISTINCTION BETWEEN A LICENSE FEE OR TAX EXACTED IN THE EXERCISE OF A MUNICIPALITY'S POLICE POWER AND A TAX LEVIED UNDER ITS TAXING POWER; (C) R.C. 4921.25 ONLY DEALS WITH THE LICENSING AND REGULATION OF MOTOR TRANSPORTATION COMPANIES; (D) THE R.C. 4921.18 TAX IS CLEARLY A LICENSE TAX; AND (E) R.C. 4921.25 THEREFORE DOES NOT PREEMPT A MUNICIPALITY'S RIGHT TO TAX UNDER ITS TAXING POWER.

Central Collection's Assignment of Error Number Four

THE OHIO BOARD OF TAX APPEALS' DECISION IS UNREASONABLE AND UNLAWFUL AS A MATTER OF LAW WHERE THE EXPRESS STATUTORY PROHIBITIONS PREEMPTING THE MUNICIPAL TAX ARE FOUND IN R.C. 718.01(F) (SINCE RECODIFIED AS R.C. 718.01(H)).

Central Collection's Assignment of Error Number Five

THE OHIO BOARD OF TAX APPEALS' DECISION IS UNREASONABLE AND UNLAWFUL AS A MATTER OF LAW WHERE R.C. 718.01(D)(1) CLEARLY PROVIDES THAT "NO MUNICIPAL CORPORATION SHALL EXEMPT FROM A TAX ON INCOME . . . THE NET PROFIT FROM A BUSINESS OR PROFESSION."

Central Collection's Assignment of Error Number Six

THE OHIO BOARD OF TAX APPEALS' DECISION IS UNREASONABLE AND UNLAWFUL AS A MATTER OF LAW WHERE PANTHER DOES NOT OWN THE VEHICLES IT USES BUT INSTEAD UTILIZES OWNER-OPERATORS AND OTHER TRUCKING COMPANIES WHO ACTUALLY ARE RESPONSIBLE FOR PAYING THE R.C. 4921.18 LICENSE FEE.

{¶5} In all of the foregoing assignments of error, Seville and Central Collection argue that the Board of Tax Appeals erred by concluding that state law preempts the local net profits tax the Village of Seville levied against Panther II as a motor vehicle transportation company. We do not agree that the Board of Tax Appeals erred in its conclusion.

{¶6} Appeals taken from a tax board's decision are governed by Chapter 5717 of the Revised Code. *Elyria City School Dist. Bd. of Edn. v. Ellis*, 9th Dist. No. 07CA009191, 2008-Ohio-4293, ¶ 9. “[P]ursuant to R.C. 5717.04, our review of the [Board of Tax Appeals] decision is ‘limited to a determination, based on the record, of the reasonableness and lawfulness of the Board of Tax Appeals’ decision.” (Citations omitted.) *Nimon v. Zaino*, 9th Dist. No. 01CA007918, 2002 WL 276775, *1 (Feb. 27, 2002), quoting *Federated Dept. Stores v. Lindley*, 8 Ohio St.3d 35, 38 (1983). This Court will affirm the factual determinations of the Board of Tax Appeals so long as the record contains reliable and probative support for its determination. *Ellis* at ¶ 7. Yet, this Court “will not hesitate to reverse a [Board of Tax Appeals] decision that is based on an incorrect legal conclusion.” *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, ¶ 14, quoting *Gahanna-Jefferson Local School Dist. Bd. of Edn. v. Zaino*, 93 Ohio St.3d 231, 232 (2001).

{¶7} The Home Rule Amendment embodied in Article XVIII, Section 3 of the Ohio Constitution, permits municipalities to exercise the powers of local self-government, including the power to tax. *Cincinnati Bell Tel. Co. v. Cincinnati*, 81 Ohio St.3d 599, 602 (1998). “[T]he intention of the Home Rule Amendment was to eliminate statutory control over municipalities by the General Assembly.” *Id.* at 605. Accordingly, while the General Assembly has the power to restrict a municipality's authority to tax, “a proper exercise of this limiting power requires an express act of restriction by the General Assembly” in the form of “an express statutory limitation.” *Id.* at 605-606. A municipality may enact a net profits tax “in the absence of an express statutory prohibition of the exercise of such power by the General Assembly.” *Id.* at 601. Where a direct conflict exists between a municipal ordinance and a state law, the state law

will prevail. *Wadsworth v. Stanley*, 9th Dist. Nos. 10CA0004-M, 10CA0005-M, 10CA0006-M & 10CA0007-M, 2010-Ohio-4663, ¶ 17.

{¶8} At issue in this appeal is the plain language of R.C. 4921.25. The relevant language of that statute reads:

The fees and charges provided under section 4921.18 of the Revised Code shall be in addition to taxes, fees, and charges fixed and exacted by other sections of the Revised Code, except the assessments required by section 4905.10 of the Revised Code, but all * * * taxes or other money exactions, except the general property tax, assessed, charged, fixed, or exacted by local authorities such as municipal corporations * * * are illegal and, are superseded by sections 4503.04, 4905.03, and 4921.02 to 4921.32, inclusive, of the Revised Code. On compliance by such motor transportation company with sections 4503.04, 4905.03, and 4921.02 to 4921.32, inclusive, of the Revised Code, all local ordinances, resolutions, by laws, and rules in force shall cease to be operative as to such company, except that such local subdivisions may make reasonable local police regulations within their respective boundaries not inconsistent with such sections.

R.C. 4921.25. R.C. 4921.18 governs the specific monetary sum a motor transportation company must annually pay to PUCO to receive its certificate of public convenience; a document necessary for the use of any motor vehicle or truck operated by the company in the state. By virtue of R.C. 4921.25's plain language, a motor transportation company's annual payment for its certificate of public convenience does not absolve it from the payment of other applicable state taxes, fees, and charges. Its status as a motor transportation company, however, subjects it to all the laws and regulations set forth by PUCO. Former R.C. 4905.03(A)(3); R.C. 4905.03(A)(2); R.C. 4921.01(D); R.C. 4921.02(A). R.C. 4921.25 specifically provides that PUCO's provisions supersede any tax a municipal corporation might wish to impose, with the exception of the general property tax. Any tax, other than the general property tax, is "illegal." R.C. 4921.25. Therefore, a motor transportation company that is subject to PUCO's laws and remains compliant with its statutory obligations is not subject to the taxes or laws of a municipal corporation, other than those specifically allowed by statute. *Id.* (exempting motor transportation

company from all taxes, except the general property tax, and all laws, except reasonable local police regulations). *Accord Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 44 (9th Dist.1995) (“[L]ocal subdivisions may make reasonable local police regulations relating to motor transportation companies so long as the local regulations are not inconsistent with the authority of [] PUCO.”).

{¶9} In support of their argument that the General Assembly did not expressly restrict municipalities from taxing the net profits of a motor transportation company, Seville and Central Collection first point to R.C. 718.01. That statute contains several provisions regarding the taxing power of municipal corporations. It provides that “[e]xcept as otherwise provided in this section, no municipal corporation shall exempt from a tax on income compensation * * * the net profit from a business.” R.C. 718.01(D)(1). The statute then goes on to provide a list of compensations and incomes that municipal corporations shall not tax. R.C. 718.01(H); Former R.C. 718.01(F). Seville and Central Collection argue that, because the net profits of a motor transportation company do not appear on the list of exempted items, Panther II’s net profits are not exempted from taxation and R.C. 718.01(D)(1) actually requires the Village of Seville to tax Panther II. Although R.C. 718.01 does contain a specific list of exemptions to the taxing authority of a municipal corporation, it also provides that “[n]othing in this section * * * shall authorize the levy of any tax on income that a municipal corporation is not authorized to levy under existing laws * * *.” R.C. 718.01(J); Former R.C. 718.01(H). The statute recognizes that its list of non-taxable compensations and incomes is not exhaustive and other existing laws may void a municipality’s taxing power. Accordingly, we are not persuaded that Seville had the authority to tax Panther II simply because Panther II’s net profits are not per se exempted from taxation under R.C. 718.01.

{¶10} The primary position of Seville and Central Collection is that when the General Assembly used the word “tax” in R.C. 4921.25 it was not referring to an income tax. Instead, they argue that the tax references in R.C. 4921.25 pertain to license and regulatory fees and charges. Seville and Central Collection point to R.C. 4921.18, which also uses the word “tax,” but which in actuality is a flat licensing fee unrelated to profit or income. Seville and Central Collection posit that the General Assembly’s intent in enacting R.C. 4921.25 was only to expressly prohibit municipalities from imposing any additional licensing or regulatory taxes upon motor transportation companies beyond those already imposed by PUCO. As such, they argue, R.C. 4921.25 does not prohibit Seville from taxing Panther II’s net profits. The plain language of R.C. 4921.25 does not support Seville and Central Collection’s argument.

{¶11} In prohibiting municipal corporations from assessing, charging, fixing or exacting taxes from motor transportation companies, R.C. 4921.25 specifically refers to “all fees, license fees, annual payments, license taxes, or taxes or other money exactions.” R.C. 4921.25. Had the General Assembly intended the word “tax” to mean license fees or charges, it would not have been necessary to separately prohibit the imposition of “license fees” and “license taxes” in addition to “taxes.” See *Leasure v. Adena Local School Dist.*, 9th Dist. No. 11CA3249, 2012-Ohio-3071, ¶ 17 (“To determine legislative intent, a court must first look to the words used in the statute.”). The statute plainly applies to “all * * * taxes.” More importantly, the statute exempts general property taxes from its ban on municipal tax. General property taxes are not simply license and regulatory fees and charges. If the General Assembly had intended R.C. 4921.25 only to exempt municipalities from imposing additional licensing or regulatory taxes, it would not have been necessary to exempt general property taxes from R.C. 4921.25’s application. Lastly, the fact that the General Assembly exempted general property taxes and not net profits

taxes is telling. “Under the general rule of statutory construction *expressio unius est exclusio alterius*, the expression of one or more items of a class implies that those not identified are to be excluded.” *In re Estate of Horton*, 9th Dist. Nos. 20695 & 20741, 2002 WL 465428, *3 (Mar. 27, 2002), quoting *State v. Droste*, 83 Ohio St.3d 36, 39 (1998). The General Assembly specifically chose to exempt general property taxes from its express statutory prohibition on “all * * * taxes” in R.C. 4921.25. Had the General Assembly wished to exempt other taxes in addition to general property taxes, it certainly could have done so. We agree with the conclusion of the Board of Tax Appeals that R.C. 4921.25 prohibits the Village of Seville from taxing Panther II’s net profits under the doctrine of express preemption. Consequently, all of the assignments of error raised by Seville and Central Collection lack merit.

III

{¶12} Seville and Central Collection’s assignments of error are overruled. The judgment of the Board of Tax Appeals is affirmed.

Judgment affirmed.

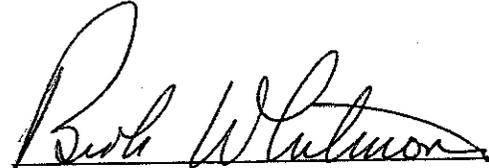
There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Ohio Board of Tax Appeals, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.


BETH WHITMORE
FOR THE COURT

MOORE, J.
BELFANCE, J.
CONCUR.

APPEARANCES:

THEODORE J. LESIAK, Attorney at Law, for Appellant.

BARBARA A. LANGHENRY, Interim Director of Law, and LINDA L. BICKERSTAFF, Assistant Director of Law, for Appellants.

JAMES F. LANG and N. TREVOR ALEXANDER, Attorneys at Law, for Appellee.