

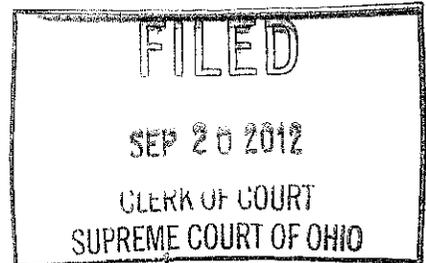
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IN THE SUPREME COURT OF OHIO

PANTHER II TRANSPORTATION, INC., :	Case No. 2012 1589
Plaintiff/Appellee :	On Appeal from the Ninth District
v. :	Court of Appeals, Medina County, Ohio
VILLAGE OF SEVILLE BOARD OF :	Court of Appeals
INCOME TAX REVIEW :	Case Nos. 11CA0092-M
and :	11CA0093-M
INCOME TAX ADMINISTRATOR :	
NASSIM M. LYNCH :	
AND THE CENTRAL COLLECTION :	
AGENCY :	
Defendants/Appellants :	

MEMORANDUM IN SUPPORT OF JURISDICTION
OF AMICUS CURIAE
THE OHIO MUNICIPAL LEAGUE

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**INTRODUCTION: THIS CASE INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION AND A
MATTER OF PUBLIC AND GREAT GENERAL INTEREST**

The Ohio Municipal League (“League”), an amicus curiae on behalf of the Village of Seville Board of Income Tax Review (“Board of Income Tax Review”) and Nassim M. Lynch and the Central Collection Agency (“Central Collection Agency”), urges this Court to accept jurisdiction over this case in order to reverse the decision of the Ninth District Court of Appeals in *Panther II Transportation Inc. v. Village of Seville Board of Income Tax Review, et al*, 2012-Ohio-3525. This Court, in *Cincinnati Bell Telephone Company v. City of Cincinnati*, 81 Ohio St.3d 599, 693 N.E.2d 212 (1998), held that the taxing powers of municipal corporations, granted by the Ohio Constitution, can only be limited if the General Assembly **expressly** acts to preempt municipal taxation. The Court now has the opportunity to clarify that a regulatory statute that does not contain express preemption language, such as former R.C. 4921.25, does not preempt the taxing authority of a municipal corporation.

Article XVIII, Section 3, of the Ohio Constitution grants municipal corporations the “authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”

Article XVIII, Section 13, of the Ohio Constitution provides that “[l]aws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes.”

In *Cincinnati Bell Telephone Company*, this Court analyzed the taxing power of municipal corporations within the context of the Ohio Constitution held that the preemption of municipal taxing authority “requires an **express** act of restriction by the General Assembly.” *Cincinnati Bell Telephone Company* at 217. (Emphasis added.)

In *Panther*, the Ninth District concluded that the regulatory requirements imposed on motor transportation companies and their operations by R.C. Chapter 4921 and the prohibition on fees and charges related to such operations in “R.C. 4921.25 prohibits the Village of Seville from taxing Panther II’s net profits under the doctrine of express preemption.” *Panther* at ¶ 11. This conclusion is contrary to the Ohio Constitution and this Court’s holding in *Cincinnati Bell Telephone Company*, requiring an express act of the General Assembly to preempt a municipal corporation’s taxing authority.

If upheld by this Court, the Ninth District’s decision in *Panther* will prohibit municipal corporations throughout Ohio from imposing an income tax on motor transportation companies, companies that conduct operations within the municipal corporation and utilize resources of the municipal corporation. This matter is of public and great general interest as the Public Utilities Commission of Ohio (“PUCO”), the entity granted jurisdiction over commercial transportation companies, reports that it “registers more than 58,000 general freight carriers, more than 2,500 hazardous materials transporters, more than 1,000 towing companies, and more than 300 household goods movers.” *PUCO Motor Carrier Overview*, Updated March 26, 2009, available at www.PUCO.ohio.gov. A municipal income tax prohibition on these entities will adversely impact tax revenues of municipal corporations throughout Ohio.

Municipal corporations use income tax revenues to provide local government services, including public safety services, street maintenance services, and economic and community development services. These services are vital to the residents of and the businesses located within the municipal corporations, including motor transportation companies. The Ninth District’s decision prohibits the application of municipal income tax to thousands of companies, in the absence of an express preemption by the General Assembly.

This case involves a substantial constitutional question and a matter of public and great general interest and is worthy of the time and attention of this Court. The League urges this Court to accept jurisdiction over this case.

STATEMENT OF AMICUS INTEREST

The Ohio Municipal League (“League”) is a non-profit Ohio corporation composed of a membership of more than 700 Ohio cities and villages. The League and its members have an interest in ensuring that the taxing power of municipal corporations is not preempted in the absence of an express act of preemption by the General Assembly.

STATEMENT OF THE CASE AND FACTS

The League hereby adopts, in its entirety, and incorporates by reference, the statement of the case and facts contained within the Memorandum in Support of Jurisdiction of the Board of Income Tax Review.

ARGUMENT

Proposition of Law No. 1: In the absence of an express act of the General Assembly preempting municipal taxation, municipal taxation is valid; former R.C. 4921.25¹ does not expressly preempt the income tax authority of a municipal corporation.

Preemption of Municipal Taxation Requires An Express Act of the General Assembly

In *Cincinnati Bell Telephone Company*, this Court noted that given the “general, broad grant of power that municipalities enjoy under Article XVIII, of the Ohio Constitution requires that the provisions allowing the General Assembly to limit municipal taxing power be interpreted in a manner consistent with the purpose of home rule.” *Cincinnati Bell Telephone Company* at 217.

¹ On June 11, 2012, certain provisions of Sub. H.B. 487 became effective, including the provision repealing former R.C. 4921.25 and renumbering it as R.C. 4921.19(J). Any references to R.C. 4921.25 in this *Memorandum* are to former R.C. 4921.25, in effect prior to June 11, 2012.

This Court then concluded that “it is evident that a proper exercise of this limiting power requires an express act of restriction by the General Assembly.” *Cincinnati Bell Telephone Company* at 217. (Emphasis added.) Express is defined as “clearly and unmistakably communicated; directly stated.” *Black’s Law Dictionary* (9th edition 2009). Therefore, a municipal income tax is valid unless the General Assembly has clearly and unmistakably communicated and/or directly stated that the tax is preempted.

R.C. 4921.25 Does Not Expressly Preempt
The Income Tax Authority of a Municipal Corporation

R.C. 4921.25 provides in part:

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.

Former R.C. 4921.18 required each motor transportation company operating in the State of Ohio to pay, at the time of the issuance of a certificate of public convenience and necessity by the PUCO, an annual tax or fee of twenty or thirty dollars, depending on the type of vehicle. Former R.C. 4921.18 and R.C. 2921.25 were originally enacted as part of the Ohio Motor Transportation Act and the purpose of the Act, according to the preamble, was “defining motor transportation companies, conferring jurisdiction upon the Public Utilities Commission over the transportation of persons or property for hire in motor vehicles and providing for the supervision and regulation of such transportation, for the enforcement of the provision of this act and for the punishment of violations thereof, and providing for the taxing of motor propelled vehicles.” *H.B. 474, 110 Ohio Laws, 211.*

The intent of R.C. 2921.25, therefore, is to prohibit local authorities from assessing, charging, fixing, or extracting funds for a license or registration fee that is *similar* to the certificate of public convenience and necessity, required by R.C. 4921.18, and from assessing, charging, fixing, or extracting funds for a tax upon each motor propelled vehicle. The imposition of a municipal income tax on the net profits of a motor transportation company is not similar to the fees and charges issued for a certificate of public convenience and necessity and it is not a tax on a motor propelled vehicle. It is a tax on the net profits of a motor transportation company and such tax is not expressly preempted by R.C. 4921.25.

As previously noted, express is defined as “clearly and unmistakably communicated; directly stated.” *Black’s Law Dictionary* (9th edition 2009). The argument that R.C. 4921.25 does not expressly exempt the imposition of a municipal income tax on the net profits of a motor transportation company is supported by the fact that the Plaintiff, prior to the years at issue, and other motor transportation companies throughout Ohio filed net profit tax returns and paid net profit taxes. Any “clear and unmistakably communicated” or “directly stated” tax exemption would be known to the entities covered by the exemption and their tax professionals and, therefore, would not be paid by such entities.

As the Ninth District pointed out, 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.” *Panther II Transportation* at ¶ 11. However, it is important to note that, in 1923 and at the time R.C. 4921.25 was enacted, municipal income taxes did not exist and that the power of municipalities to levy and collect income taxes was not recognized by

this Court until 1950.² Therefore, it is unreasonable to conclude that the General Assembly would have included a municipal income tax exemption in R.C. 4921.25.

However, it is reasonable to conclude that if the General Assembly wanted to exempt motor transportation companies from municipal income tax requirements, it would have included such an exemption in R.C. 718.01(H),³ the statute clearly and unmistakably communicating items that are exempt from municipal taxation.

R.C. 718.01(H) **expressly** states that a municipal corporation shall not tax any of the following: (1) military pay;⁴ (2) certain income of religious, fraternal, charitable, scientific, literary, or educational institutions;⁵ (3) certain forms of intangible income;⁶ (4) compensation paid to precinct election officials;⁷ (5) compensation paid to certain employees of a transit authority;⁸ (6) “the income of a public utility, when that public utility is subject to the tax levied under section 5727.24 or 5727.30 of the Revised Code,” with certain exceptions pertaining to an electric company or telephone company;⁹ (7) certain items excluded from federal gross income pursuant to the Internal Revenue Code;¹⁰ (8) certain compensation paid to a nonresident individual;¹¹ and (9) certain S corporation shareholder distributive shares.¹² The express municipal income tax prohibitions set forth in former R.C. 718.01(H) do not include the imposition of an income tax on the profits of a motor transportation company. Therefore, the

² The first city income tax in Ohio was enacted in 1946 by the City of Toledo and, in *Angell v. City of Toledo*, 153 Ohio St. 179, 91 N.E.2d 250, this Court recognized that Ohio municipalities have the power to levy and collect income taxes.

³ R.C. 718.01(H) was previously numbered R.C. 718.01(F).

⁴ R.C. 718.01(H)(1).

⁵ R.C. 718.01(H)(2).

⁶ R.C. 718.01(H)(3).

⁷ R.C. 718.01(H)(4).

⁸ R.C. 718.01(H)(5).

⁹ R.C. 718.01(H)(6).

¹⁰ R.C. 718.01(H)(7).

¹¹ R.C. 718.01(H)(8).

¹² R.C. 718.01(H)(9).

General Assembly has not chosen to expressly exempt motor transportation companies from municipal taxation.

Accordingly, municipal taxation on the net profits of a motor transportation company is valid.

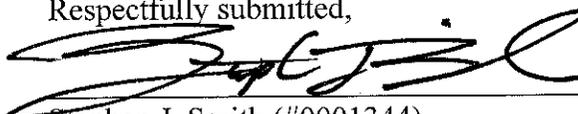
The General Assembly Has No Power to Enact Retroactive Tax Legislation

Article II, Section 28, of the Ohio Constitution provides “[t]he general assembly shall have no power to enact retroactive laws.” This retroactive prohibition extends to tax legislation. *State ex rel. Struble v. Davis*, 132 Ohio St. 555, 9 N.E.2d 684 (1937). Therefore, the General Assembly cannot enact a law prohibiting municipal taxation on the net profits of a motor transportation company that are “due and payable.” *Struble* at 567.

CONCLUSION

This case involves a substantial constitutional question and presents a matter of public and great general interest to municipal corporations throughout Ohio. The exercise of jurisdiction over this case is warranted and respectfully requested.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum in Support of Jurisdiction of Amicus Curiae the Ohio Municipal League*, has been sent via regular U.S. mail, postage pre-paid this 20TH day of September, 2012 to:

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