ORIGINAL

IN THE SUPREME COURT OF OHIO

PANTHER II TRANSPORTATION, INC. Plaintiff-Appellee, v. VILLAGE OF SEVILLE BOARD OF INCOME TAX REVIEW, *et al.*, Defendants/Appellants.	)))))))))))	CASE NOS. 2012-1589, 2012-1592 (consolidated) On appeal from the Medina County Court of Appeals, Ninth Appellate District Court of Appeals Case Nos. 11CA0092-M, 11CA0093-M, consolidated

MEMORANDUM OF PLAINTIFF-APPELLEE IN RESPONSE TO APPELLANTS' MEMORANDA IN SUPPORT OF JURISDICTION

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FILED
OCT 18 2012
CLERK OF COURT
SUPREME COURT OF OHIO

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I. APPELLANTS' CHALLENGE TO A LONG-EXISTING EXPRESS PREEMPTION OF LOCAL TAXATION, IN FURTHERANCE OF STATEWIDE PUBLIC UTILITY REGULATION, IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION.

Appellants ask this Court to accept their appeal so that statutory language that is "plain", "specific", "express", "clear" and has "no ambiguity"[1] can be liberally reinterpreted to mean the opposite. Appellants recognize that the Village of Seville's taxing authority may be preempted or otherwise prohibited by an express act of the General Assembly, *Cincinnati Bell Tel. Co. v. Cincinnati*, 81 Ohio St.3d 599, 693 N.E.2d 212 (1998), syllabus ("*Cincinnati Bell*"), but reject the obvious fact that the General Assembly did exactly this in R.C. § 4921.25.[2] As both the Board of Tax Appeals ("BTA") and the court of appeals found, R.C. § 4921.25 specifically and

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[1] *See* Aug. 8, 2012 Decision and Journal Entry at p. 5 (referring to "the plain language of R.C. 4921.25" and concluding that "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"); *id.* at 7 ("The plain language of R.C. 4921.25 does not support Seville and Central Collection's argument"); *id.* at 8 ("R.C. 4921.25 prohibits the Village of Seville from taxing Panther II's net profits under the doctrine of express preemption."); Aug. 30, 2011 BTA Correcting Order at p. 8 ("we find the language of the statute to be clear"); *id.* at 9 (as to municipal corporations, "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"); *id.* ("There appears to be no ambiguity in the statement preempting all taxes imposed by local authorities").

[2] R.C. § 4921.25, as in effect during the tax years at issue, reads in full: "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."

expressly exempts motor transportation companies from the Village of Seville's net profits tax. Appellants' refusal to accept the obvious does not make this a case of public or great general interest and does not present a substantial constitutional question. The Court should reject jurisdiction.

Panther II Transportation, Inc. ("Panther") is a motor transportation company – in common parlance, a trucking company or motor carrier – that focuses on expedited and emergency transportation services. Although Panther's headquarters is located in Seville, Panther operates both intrastate, meaning that it picks up and delivers goods within Ohio and other states, and interstate, meaning that it picks up in one state and delivers in another state. Since 1995, Panther's intrastate operations have been regulated by the Public Utilities Commission of Ohio ("PUCO") pursuant to a Certificate of Public Convenience and Necessity. At all times relevant to this appeal, there is no dispute that Panther was in compliance with Ohio's laws regulating motor transportation companies.

Panther mistakenly paid a total of $161,761 in net profits tax to the Village of Seville in tax years 2005 and 2006. It then timely requested a refund on the basis that R.C. § 4921.25 bars political subdivisions from imposing any type of tax, fee or charge, except the general property tax, on motor transportation companies regulated by the PUCO. Seville has never contested that Panther is a motor transportation company regulated by the PUCO and in full compliance with all applicable public utility laws. However, Seville refused to issue the refund due, and the Central Collection Agency ("CCA") joined in defending Seville's conduct. On appeal, the BTA determined that Seville's net profits tax as applied to Panther was illegal and preempted, as expressly provided in R.C. § 4921.25. The Ninth District Court of Appeals agreed, based on the plain language of R.C. § 4921.25.

This appeal does not present a substantial constitutional question. The controlling precedent was established by this Court in *Cincinnati Bell*, and it is not challenged here. Appellants concede that R.C. § 4921.25 may expressly preempt Seville's tax ordinance as to Panther under Article XIII, Section 6, and Article XVIII, Section 13, of the Ohio Constitution. As such, the BTA and court of appeals decisions are not surprising given that R.C. § 4921.25 has two levels of express preemption. The General Assembly provided in the first part of R.C. § 4921.25 that motor carriers are subject to **state** taxation, but then declared as illegal any and all **local** taxes or other exactions except for the general property tax: "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 applicable public utility laws. R.C. § 4921.25.[3] The General Assembly further provided that upon compliance by a motor carrier with applicable public utility laws, "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." *Id.* Thus, **all** local taxes, except the general property tax, are illegal and superseded as to motor transportation carriers, and **all** local laws, such as a village tax ordinance, are inoperative as to motor transportation carriers, except for general police regulations not inconsistent with those laws.

Appellants fail to direct this Court to *City of Cleveland v. Pub. Util. Comm.*, 130 Ohio St. 503 (1936), in which the Court recognized the state's preemption of local taxes and local

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[3] This memorandum references R.C. § 4921.25 as in effect during the tax years at issue. The operative language of R.C. § 4921.25 was recodified without modification as R.C. § 4921.19(J) effective June 11, 2011, pursuant to 129 H.B. 487.

ordinances vis-à-vis motor carriers. In citing to the General Code equivalents of R.C. § 4921.04 and 4921.25, respectively, this Court observed that, "[i]t is most evident that the General Assembly since the creation of the Public Utilities Commission of Ohio has subordinated the right of the municipality to regulate transportation lines within its limits to the authority granted the Public Utilities Commission. A careful reading of sections 614-86 and 614-98, General Code, eradicates all doubt along this line." *Id.* at 512. Similarly, Appellants do not bring to the Court's attention the Second District Court of Appeals' dicta that municipalities are preempted from imposing an income tax on motor carriers. *City of Springfield v. Krichbaum* , 88 Ohio App. 329, 330-31 (2nd Dist. 1950) (citing G.C. 614-98, the predecessor of R.C. § 4921.25, and noting that a municipality's "power to levy a tax on . . . common carriers, Section 614-98, General Code, has been pre-empted by the state."). The express preemption of local fees, taxes and other exactions as applied to motor carriers has long been settled law in Ohio, and would not have engendered the instant dispute but for Panther's initial mistake in paying Seville's net profits tax.

Appellants also have not demonstrated that this appeal presents a question of public or great general interest. The court of appeals simply applied the plain language of the statute before it. Thus, this Court should reject Appellants' attempt to manufacture "great general interest" by raising the specter of "significant adverse implications upon the majority of Ohio municipalities if municipalities are not permitted to impose net profits taxes on MTCs."[4] In all of the many years that motor carriers have been exempt from municipal taxation under G.C. 614-98 and R.C. § 4921.25 (and now R.C. § 4921.19(J)), the instant dispute has produced the only known BTA or court decision involving a motor carrier's responsibility for a local tax. Appellants offer no evidence that affirmation of this long-existing exemption will affect a

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[4] Mem. in Supp. of Jur. of Village of Seville Bd. of Income Tax Review, p. 2.

majority of municipalities; indeed, they offer no evidence, and amicus Ohio Municipal League offers no evidence, that affirmation of this exemption will have any impact beyond Seville. Given the extreme generality with which Appellants assert their claims, it is likely that most other municipalities in Ohio have simply followed the plain and unambiguous language of R.C. § 4921.25. Therefore, there is no need for the Court to accept this appeal for review.

II. R.C. § 4921.25 EXPRESSLY PREEMPTED SEVILLE'S NET PROFITS TAX AS APPLIED TO PANTHER.

A. The Provisions Of R.C. § 718.01 Do Not Require Imposition Of Seville's Tax On Panther.

The court of appeals properly rejected CCA's and Seville's argument that R.C. § 718.01(D)(1) and (H) make it illegal for Seville to exempt Panther from Seville's net profits tax. *See* Seville Mem. at pp. 6-7; CCA Mem. at pp. 13-14. R.C. § 718.01 is a general statute authorizing the imposition of an income tax by municipal corporations. As set forth in Division (D) thereof, a municipality may not exempt the net income of businesses except as otherwise set forth in R.C. § 718.01. As Appellants note, R.C. § 718.01(H) provides exemptions from taxation, but does not include motor transportation companies. However, there was no need to include an exemption for motor transportation companies in R.C. § 718.01(H) because the exemption has existed for nearly ninety years in R.C. § 4921.25. In fact, Division (J) of R.C. § 718.01 provides that "[n]othing in this section or section 718.02 of the Revised Code shall authorize the levy of any tax on income that a municipal corporation is not authorized to levy under existing laws." R.C. § 4921.25 is one of those existing laws. Thus, it is legal under R.C. § 718.01 for Seville **not** to tax Panther, and it is **illegal** under R.C. § 4921.25 for Seville to tax Panther.

Seville does not need authority under R.C. § 718.01 to enact an exemption specific to motor carriers because the General Assembly already has done so. R.C. § 4921.25 specifically

declares that any municipal tax on a motor transportation company is illegal and superseded by the state-wide regulation of motor carriers. "A special statute covering a particular subject-matter must be read as an exception to a statute covering the same and other subjects in general terms." *State ex rel. Steller v. Zangerle*, 100 Ohio St. 414, 414 (1919). Thus, as noted many years ago by the Second Appellate District, municipalities are preempted from imposing an income tax on motor carriers. *Krichbaum*, 88 Ohio App. at 330-31. R.C. § 4921.25 preempts Seville's tax, and R.C. § 718.01 has no impact on that preemption.

B. The Express Preemption of Local Taxes Under R.C. § 4921.25 Is Unaffected By the State Taxes Imposed By R.C. § 4921.18.

Seville and CCA improperly conflate R.C. § 4921.18 and R.C. § 4921.25. Seville Mem. pp. 8-9; CCA Mem. pp. 9-12. Both Revised Code sections are elements of the PUCO's expansive regulatory authority over motor transportation companies. Under R.C. § 4921.18, a motor transportation company must pay to the PUCO, for the state's general fund, an amount based on the number of motor-propelled vehicles it uses to transport persons or the number of commercial tractors it uses to transport property. In turn, R.C. § 4921.25 includes three provisions addressing costs imposed on motor transportation companies that could hinder the PUCO's regulatory authority. The first provision applies to state-level action, and the next two apply to the exercise of taxing authority and police powers by political subdivisions:

1. A motor transportation company's payment under R.C. § 4921.18 does not affect liability for other taxes, fees and charges exacted by the state in other sections of the Revised Code, except assessments under R.C. § 4905.10;
2. All fees, taxes and other exactions, except the general property tax, imposed by local authorities on motor transportation companies are illegal and superseded by the PUCO's regulatory authority; and

3. A motor transportation company that is in compliance with Ohio utility law is exempt from all local laws and rules, except for reasonable local police regulations not inconsistent with Ohio utility law.

With these three provisions, R.C. § 4921.25 limits governmental exactions from regulated motor transportation companies to those imposed by the state and the general property tax. This protects public utility customers and promotes local economic activity by preventing every political subdivision with some contact with a motor transportation company from using its taxing and/or police powers to drive up transportation costs in Ohio.

Seville's net profits tax, as applied to Panther, is preempted by **both** the second and third provisions of R.C. § 4921.25. There is no dispute that Panther is a motor transportation company regulated by the PUCO under Chapter 4921 of the Ohio Revised Code, and there is no dispute that R.C. § 4921.25 applies to Panther's operations as a motor transportation company. Thus, the BTA and court of appeals had no difficulty determining that the statute's language is clear and unambiguous and must be applied to preempt Seville's net profits tax as applied to Panther. Seville's tax falls under the category of "taxes . . . assessed . . . by local authorities such as municipal corporations" and is, therefore, "illegal."

Moreover, although completely ignored by Seville and CCA, Seville's tax ordinance is inoperative as applied to Panther because it is not a reasonable local police regulation. *See Coventry Twp. v. Ecker*, 101 Ohio App. 3d 38, 43-44 (9th Dist. 1995). Municipal police power is the authority to enact and enforce regulations to preserve and promote the public health, safety, morals and general welfare. Gotherman, Babbit & Lang, Local Government Law – Municipal, § 23:1 (1st ed. 2004 with 2011 update. The police power does not include the power to tax for revenue purposes. *Id.* § 23:2. Thus, Seville's tax is doubly preempted as to Panther by

R.C. § 4921.25, both as "taxes . . . assessed . . . by local authorities such as municipal corporations" and as "local ordinances, resolutions, by laws, and rules in force" at the time Panther is in compliance with Ohio's public utility laws.

As the BTA found, and the court of appeals agreed, there is "no inconsistency in the General Assembly instituting a license fee and preempting a net profits tax."[5] R.C. § 4921.25 does not equate the money paid under R.C. § 4921.18 with municipal taxes. It equates money paid under R.C. § 4921.18 with state-level taxes. R.C. § 4921.18 only has meaning with regard to the first provision of R.C. § 4921.25. What is essential is the second provision of R.C. § 4921.25, which prohibits all fees, taxes and other exactions, however named, imposed by municipalities and other political subdivisions. Also essential is the third provision of R.C. § 4921.25, which prohibits local laws burdening the operation of regulated motor transportation companies – this would include anything that is not a money exaction covered in the immediately preceding sentence – except for reasonable local police regulations.

The preemption language of R.C. § 4921.25 is not limited to a fee or tax of a "similar type" to that imposed by R.C. § 4921.18. There is no reason to believe that the General Assembly meant "all" in R.C. § 4921.25 to mean "only those similar to R.C. § 4921.18" or "any taxes that are not net profits taxes." Indeed, if the General Assembly had intended that the second provision of R.C. § 4928.25 prohibit only local license fees similar to that imposed under R.C. § 4921.18, the language of the second provision would have been quite different. There would have been no reason to refer to "annual payments, . . . or taxes or other money exactions." And there would have been no reason to exclude "the general property tax" from the reach of

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[5] Aug. 30, 2011 BTA Correcting Order at p. 9.

R.C. § 4921.25's second provision.[6] The plain language of R.C. § 4921.25 simply does not support Appellants' claims.

All of Appellants' arguments regarding the proper interpretation of R.C. § 4921.18 and its impact on R.C. § 4921.25 are red herrings intended to distract this Court from the clear language of R.C. § 4921.25 – in its second and third provisions – exempting Panther from Seville's net profits tax. Because R.C. § 4921.25 renders illegal Seville's tax as applied to Panther, the BTA and court of appeals acted reasonably and lawfully in reversing the Seville Tax Board's decision and finding in favor of Panther.

C. Seville's Tax Is Expressly Preempted; Field Preemption Is Not At Issue.

There is no implied preemption or field preemption issue here – R.C. § 4921.25 and G.C. 614-98 before it **expressly** declare that **any** fee, tax or other exaction imposed on a motor transportation company, except the general property tax, is **illegal** and **superseded** by the PUCO's regulatory authority. Remarkably, the General Assembly did not rest after expressly preempting all local taxing authority (except for the general property tax) in the second provision of R.C. § 4921.25. It also preempted all other municipal authority, except for certain local police regulations, in the third provision of R.C. § 4921.25. The General Assembly's intention to protect the PUCO's regulatory authority against incursions by municipalities could not be more clear. The timing of the adoption of local income taxes in Ohio is thus irrelevant – the General

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[6] CCA's argues that "the general property tax" appears in the second provision of R.C. § 4921.25 "solely for the sake of clarity" (CCA Mem. at p. 13), but this ignores the plain language of the statute. If this provision were limited to license fees and taxes, there would be no reason to "clarify" that the general property tax is not a license fee or tax. It also begs the question as to why the General Assembly did not "clarify" that other types of payments, fees, taxes and other money exactions also are not covered.

Assembly preempted all municipal authority, taxing and otherwise, whether then-existing or in the future, that would interfere with the statewide operation of motor transportation companies.

D. R.C. § 4921.25 Supports Statewide Public Utility Regulation of Motor Transportation Companies.

Under R.C. § 4921.25, political subdivisions are prohibited from burdening regulated motor transportation companies with added costs, regardless of whether the political subdivisions are acting pursuant to their taxing power or police power, because those added costs necessarily harm public utility customers. The General Assembly authorized the PUCO to regulate motor transportation companies – *i.e.*, public utilities – pursuant to R.C. § 4921.01-.32, inclusive. The General Assembly taxes motor transportation companies like Panther in R.C. § 4921.18 based on the number of commercial tractors used. In R.C. § 4921.25, the General Assembly limits the authority of the state and political subdivisions to impose on motor transportation companies any other fees, taxes, money exactions, laws or rules. This preemption directly supports the PUCO's regulation of public utilities operating statewide (and, in Panther's case, operating intrastate and interstate).

Appellants have consistently ignored the plain language of R.C. § 4921.25. Much of R.C. § 4921.25 would be surplusage under Appellants' reading. Indeed, there would be no reason to provide in R.C. § 4921.25 that all fees, taxes and other money exactions "are superseded by sections 4503.04, 4905.03, and 4921.02 to 4921.32, inclusive of the Revised Code." R.C. § 4905.03's only relevance is that it defines motor transportation companies as public utilities. R.C. §§ 4921.02-.32 authorize the PUCO's broad regulation of public utilities that are motor transportation companies. Thus, all of these tools to extract money from public utilities, however creatively named by local authorities, are superseded by the PUCO's

regulation of public utilities that are motor transportation companies. Appellants simply ignore that the statutory provisions at issue deal with public utility regulation.

E. How A Motor Transportation Company Allocates The Cost Of The R.C. § 4921.18 Tax Is Not Relevant.

CCA argues that Panther's exemption from municipal taxation is "absurd" because Panther does not pay the R.C. § 4921.18 tax. CCA Mem. at pp. 14-15. What CCA is criticizing is Panther's "business model" under which it pays the R.C. § 4921.18 tax and then may contractually obligate its contractors to reimburse it for taxes paid. This argument itself is absurd because it is based on the false assumption that payment of the R.C. § 4921.18 tax is a trade off for the municipal tax exemption. It is not. Municipal fees, taxes and other money exactions, except the general property tax, are illegal and superseded by the second provision of R.C. § 4921.25 regardless of whether the R.C. § 4921.18 tax is paid.

Moreover, these fees, taxes and other money exactions are illegal and preempted regardless of how the R.C. § 4921.18 tax is paid. Panther is a motor transportation company with a Certificate of Public Convenience and Necessity issued by the PUCO. Panther is the regulated motor transportation company subject to the R.C. § 4921.18 tax, and CCA recognizes that Panther paid the tax at all relevant times (hearing testimony confirmed this). How Panther recovers its costs of doing business has no bearing on whether Seville's net profits tax, as applied to Panther, is illegal and superseded by the PUCO's regulatory authority.

III. CONCLUSION

The Appellants have not raised an issue of public or great general interest or explained why a substantial constitutional question is involved. For the foregoing reasons, Panther requests that the Court decline jurisdiction over the appeals raised in these consolidated cases.

Respectfully submitted,

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