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.	)	Consolidated Case Nos: 2012-1589; 2012-1592 On Appeal from the Medina County Court of Appeals, Ninth Appellate District Court of Appeals Consolidated Case Nos. 11CA0092-M; 11CA0093-M

APPELLANTS NASSIM M. LYNCH AND THE CENTRAL COLLECTION AGENCY'S MOTION FOR RECONSIDERATION OF DECISION DECLINING JURISDICTION

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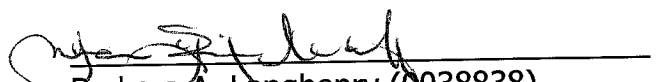
MOTION FOR RECONSIDERATION

Pursuant to S.Ct. Prac. R. 18.02(B)(1), Appellants, Nassim M. Lynch and the Central Collection Agency, hereby move this Honorable Court to reconsider its order journalized on January 23, 2013, refusing to grant jurisdiction to hear a discretionary appeal from the lower court's decision in this case. The grounds for this Motion are set forth in the attached Memorandum.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

The decision sought to be presented for this Court's review is alarming for Ohio municipalities (incorporated villages) and unfair to other taxpayers. This is because not only does R.C. 4921.25 not expressly preempt municipalities from levying their net profits income tax as that tax is applied to motor transportation companies defined under Chapter 4921, the General Assembly has made clear the income of who a municipality is prohibited from taxing.

After this Court held that municipal income taxation could not be preempted by implication in *Cincinnati Bell Telephone Company v. Cincinnati*, 81 Ohio St.3d 599, 493 N.E.2d 212 (1998), the General Assembly amended R.C. 718.01 and enacted R.C. 715.013.

The amendment to R.C. 718.01 addressed the particular facts at issue in *Cincinnati Bell* by prohibiting municipal taxation of "[t]he income of a public utility when that public utility is subject to the public utilities [gross receipts] excise tax [levied] under R.C. 5727.30" (the public utilities gross receipts excise tax is similar to an income tax). R.C. 718.01(F)(6) (since renumbered 718.01(H)(6)); Am. Sub. H.B. 770, 147 Ohio Laws, Part III, 5623. A motor transportation company is not a "public utility" for purposes of R.C. Chapter 5727. *See* R.C. 5727.01(A)[1] ("As used in this chapter: [] 'Public utility' means each person referred to as a telephone company, telegraph company, electric company, natural gas company, pipe-line company, water-works

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1 The definition of "public utility" in R.C. 5727.01(A) has since been amended to include an "energy company." SB 232, §1, 128th General Assembly, effective June 17, 2010.

company, water transportation company, heating company, rural electric company, railroad company or combined company[]").

Enacting R.C. 715.013, the General Assembly went even further by prohibiting municipalities from "levy[ing] a tax that is the same as or similar to a tax levied under Chapter 322, 3734, 3769, 4123, 4301, 4303, 4305, 4307, 4309, 5707, 5725, 5727, 5728, 5729, 5731, 5735, 5737, 5739, 5741, 5743 or 5749. of the Revised Code" unless "otherwise expressly authorized by the Revised Code." R.C. 715.013; Am. Sub. H.B. 770, 147 Ohio Laws, Part III, 5621. The fact that the General Assembly did not include R.C. Chapter 4921 in that list cannot be ignored.

Another fact that cannot be ignored is that the two statutes at issue in this case—R.C. 4921.18 and 4921.25—were originally enacted in 1923 as part of the Ohio Motor Transportation Act (former Gen. Code 614-84 to 614-102). H.B. 474, 110 Ohio Laws 211.[2] The first city income tax in the entire nation was not enacted until 1938 in Philadelphia, Pennsylvania and Toledo was the first Ohio city to enact such a tax in 1946, with Columbus, Dayton, Warren, Youngstown and Springfield following within three years. Fordham & Mallison, *Local Income Taxation*, 11 Ohio St.L.J. 217, 220-223 (1950); Note, *Municipal Personal Income Taxation of Nonresident*, 31 Ohio St. L.J. 770,

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2 The predecessors to R.C. 4921.18 and 4921.25 were Gen. Code 614-94 and 614-98 respectively. They operated like they do today although the fees in Gen. Code 614-94 were higher. Gen. Code 614-98 also clearly provided at the time that "all fees, license fees, annual payments, license tax, or taxes or other money exactions, except the general property tax, assessed, charged, fixed or exacted by local authorities, such as municipalities, townships, counties, or other local boards, or the officers of such subdivisions shall be deemed to be illegal and be superseded by this act."

785 (1970). Clearly, the General Assembly could not have intended to expressly preempt an Ohio municipality's authority to impose an income tax when the statute at issue was originally enacted in 1923 and such income tax did not even exist. In fact this Court in 1950 held that at that time, the General Assembly "had not passed any law limiting the power of municipal corporations to levy and collect income taxes." *Angell v. City of Toledo*, 153 Ohio St. 179, 91 N.E.2d 250, paragraph two fo the syllabus. The General Assembly first limited a municipality's authority to levy an income tax in 1957 well after the statutes at issue were enacted. Am. Sub. S.B. 133, 127 Ohio Laws 91; Glander, *Uniform Municipal Income Tax Act*, 18 Ohio St.L.J. 489, 490 (1950).[3]

The income of a motor transportation company is clearly not exempt under R.C. 718.01 or R.C. 715.013. The decision below holding that the income of a motor transportation company is now suddenly exempt from municipal income tax because of a law enacted in 1923 which taxes the vehicle and has nothing to do with the income of a motor transportation company is more than a little bizarre and certainly at odds with this Court's pronouncement in *Angell*. No doubt other motor transportation companies will seek to rely on the ruling below to also claim exemption from municipal income taxation. This Court must accept jurisdiction of this matter in order to provide clarity that the income earned by these companies are not exempt from municipal taxation

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3 The "1957 Uniform Municipal Income Tax Act" enacted former R.C. 718.01, 718.02 and 718.03. Former sections 718.01 and 718.02 covered much of that which exists in the current version of those statutes (e.g., uniform rates; exemptions from tax; method to apportion income among municipalities, while R.C. 718.03 set forth the effective date of the Act). *Id.*

and that the R.C. 4921.18 tax is simply an "extra tax" for heavy users of the highways as was stated long ago by the United States Supreme Court in *Clark v. Poor*, 274 U.S. 554, 557 (1927). Income tax revenue is the most important source of municipal revenue and a municipality imposes it's general revenue tax on all taxpayers earning net profits within the municipality as required under R.C. 718.01(D)(1). Imposing the general revenue tax on income earned within the municipality simply does not infringe upon the PUCO's authority to regulate some taxpayers operating within the municipality and the holding in this case that such taxpayers are exempt from municipal income tax is not only wholly unfair to other taxpayers but reaps a windfall for motor transportation companies that was clearly never intended.

CONCLUSION

For these reasons, the Court should reconsider its decision declining jurisdiction to hear the appeal of the lower court's decision in this case.

Respectfully submitted,
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By: _____
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CERTIFICATE OF SERVICE

I certify that a copy of this Motion For Reconsideration of Decision Declining 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, Philip Hartman, Rebecca K. Schaltenbrand, Stephen J. Smith, Ice Miller LLP, 250 West Street, Columbus, Ohio 43215 and John Gotherman, Esq., Ohio Municipal League, 175 South Third Street, Suite 510, Columbus, Ohio 43215-7100, on this 31st day of January 2013.

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