

ORIGINAL

IN THE SUPREME COURT OF OHIO

PANTHER II TRANSPORTATION)
INC.)

CASE NO. 2012-1589 and 2012-1592

APPEAL FROM THE MEDINA
COUNTY COURT OF APPEALS
NINTH JUDICIAL DISTRICT
CASE NOS. 11CA0092-M,
11CA0093-M

Plaintiff/Appellee,

vs.

VILLAGE OF SEVILLE BOARD)
OF INCOME TAX REVIEW)

and)

INCOME TAX ADMINISTRATOR)
NASSIM M. LYNCH)
AND THE CENTRAL COLLECTION)
AGENCY)

Defendants/Appellants.)

APPELLANT VILLAGE OF SEVILLE BOARD OF INCOME TAX
REVIEW'S
MOTION FOR RECONSIDERATION OF THE SUPREME COURT OF
OHIO'S REFUSAL TO ACCEPT JURISDICTION

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**MOTION FOR RECONSIDERATION OF THE SUPREME COURT OF OHIO'S
REFUSAL TO ACCEPT JURISDICTION AND
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL
INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

Now comes the Appellant, Village of Seville Board of Income Tax Review ("Seville") and hereby moves this Court to reconsider this Court's previous refusal to accept jurisdiction and to accept jurisdiction to hear this case on the merits. Seville incorporates its Memorandum in Support of Jurisdiction as well as the Memorandum in Support of Jurisdiction of the Income Tax Administrator Nassim M. Lynch and The Central Collection Agency ("CCA") and the Memorandum in Support of Jurisdiction of *Amicus Curiae* of the Ohio Municipal League ("OML") into this Motion for Reconsideration.

Both the Appellee, Panther II Transportation, Inc. ("Panther") and the Ohio Trucking Association ("OTA") in its Memorandum of *Amicus Curiae* in Response to Appellants' Memoranda in Support of Jurisdiction assert that Seville's assessment of net profits taxes on Panther is a unique situation that has only occurred once since the enactment of *R.C. 4921.25* in 1923. They claim that other Ohio municipalities have been following the interpretation of *R.C. 4921.25* set forth in *City of Springfield v. Krichbaum*, 88 Ohio App. 329, 300-321, 100 N.E. 2d 281 (2nd Dist. 1950) that allegedly prohibits a net profits tax on Motor Transportation Companies ("MTC"). However, in *Krichbaum, supra*, the Court merely stated, *in dicta*, that there is a preemption from levying a tax under *G.C. 614-94* which is the predecessor to *R.C. 4921.18*. The *Krichbaum, supra*, case does not refer to *G.C. 614-98* which is the predecessor of *R.C. 4921.25*, contrary to the claims by Panther and OTA.

Seville has clearly admitted that it is preempted from imposing "taxes, fees and charges" upon each motor vehicle used by Panther as is set forth in *R.C. 4921.18*. However, a full reading

of the relevant sections of 1923 Am.H.B. 474 reveal that there is no express preemption from Seville imposing a net profits tax upon Panther.

In the case *sub judice*, the only unique situation is the fact that Panther has created a case of first impression by challenging Seville's Home Rule power to collect net profits tax from an MTC subject to Seville's jurisdiction and Home Rule powers, notwithstanding the fact that Panther had previously paid said tax.

In 1976, Seville enacted its first income tax ordinance which imposed a net profits tax on all corporations subject to its jurisdiction. Neither Seville's original income tax ordinance, nor any amendment thereto has ever excluded MTC's from the imposition of net profits tax. CCA's 55 member communities and the CCA model ordinance, which is used as a basis for its member ordinances, does not exclude MTC's from net profits tax. CCA's members include Akron, Cleveland and Dayton which are three of the largest municipalities in Ohio.

In its Memorandum of *Amicus Curiae* in Response to Appellants' Memoranda in Support of Jurisdiction, OTA states that in 2012 there were over 12,370 trucking companies located in Ohio with over Four Million trucks registered in Ohio in 2010. OTA admits that the trucking industry has a large impact in Ohio.

Panther has requested a refund of \$161,761.00 in net profit taxes paid to Seville for the tax years 2005 and 2006. Municipal tax refunds, especially a refund of this size, are generally not a budgeted item in municipalities.

Seville is a small community with a proper mix of industry and residences. Despite its size, Seville has a reputation of providing excellent services to its residents and businesses, including safety forces, streets, parks, and utilities. Over the last three years, two major taxpayers

in Seville have ceased operations in Seville representing a loss of 6% of Seville's income and net profits tax. Seville's local government distribution is down by 33% from the 2008 level, and Seville's real estate tax income is down 6% since 2005. Seville also lost 90% of its interest income since 2007. Revenue losses such as these are occurring in municipalities all over the State of Ohio. In the CCA member communities alone, the City of Lorain was declared by the Auditor of the State of Ohio to be under Fiscal Watch and the City of Akron was declared to be under Fiscal Caution.

In this declining economic period, Ohio municipal corporations must have the ability to maintain revenue sources permitted under the Ohio Constitution to continue to provide services to its people and businesses, such as the continuing imposition of net profits taxes upon MTCs. Income sources such as the net profits tax are a necessity for municipalities to continue to perform the basic services of government.

There is no express prohibition of a municipal net profits tax upon a MTC. As a result, municipalities are collecting and relying on income from net profits taxes from the multitude of MTCs throughout the state to continue to provide services through their current lean budgets. Allowing the decisions of the Medina County Court of Appeals, Ninth Judicial District and the Ohio Board of Tax Appeals to stand will permit MTCs to obtain refunds of net profits tax paid in the past three years from the majority of municipalities in the State of Ohio.

Both Panther and OTA also contend that this case does not involve a substantial constitutional question, but merely involves the interpretation of *R.C. 4921.25* in light of *Cincinnati Bell Telephone Co. v. City of Cincinnati*, 81 Ohio St. 3d 599, 693 N.E.2d 212 (1998). However, the decisions of the Medina County Court of Appeals, Ninth Judicial District and the Ohio Board of Tax Appeals substantially erode the Home Rule Provision of the Ohio

Constitution as the Ohio General Assembly will be allowed to limit the Home Rule power of municipalities by implication rather than a clear express intent.

In *Cincinnati Bell, supra*, this Court held that there is no constitutional prohibition against double taxation. *Id.* at 607. There is no constitutional provision that directly prohibits both the state and municipalities from occupying the same area of taxation at the same time. *Id.* Rather, the Constitution presumes that both the state and municipalities may exercise full taxing powers, unless the Ohio General Assembly has acted expressly to preempt municipal taxation. *Id.*

R.C. 4921.25 does not expressly prohibit Seville from imposing net profits tax upon a MTC and therefore Seville can tax MTC net profits under the Home Rule Provision of the Ohio Constitution. The intent of the Ohio General Assembly in enacting *R.C. 4921.25* was to prohibit municipalities from entering into the field of the Public Utilities Commission of Ohio (“PUCO”) to charge additional fees upon vehicles owned by MTCs. There is no express intent to prohibit the imposition of net profits taxes.

The Medina County Court of Appeals, Ninth Judicial District’s use of the doctrine of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the other) is clearly an abrogation of Home Rule Power by implication rather than by express intent. Any limit on the municipal power to tax by the Ohio General Assembly must be by express intent of the legislature or the effect of any such law is in direct violation of *Ohio Constitution, Article XVIII, Section 3*.

There is no express prohibition of a municipal net profits tax upon a MTC. Imposing such a prohibition by implication is not only a violation of Home Rule rights under the Ohio Constitution, but also creates a potential for economic disaster for many Ohio municipalities.

CONCLUSION

As is set forth above, this case involves matters of public and great general interest and a substantial constitutional question. Accordingly, Defendant/Appellant Seville requests that this Court accept jurisdiction in this case in order to allow the important issues presented to be reviewed on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

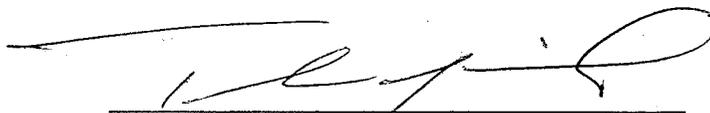
A copy of the foregoing Motion for Reconsideration was sent by regular US Mail this 31st day of January 2013, to the following:

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