

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

MEMORANDUM OF PLAINTIFF-APPELLEE IN OPPOSITION TO APPELLANTS' MOTION FOR RECONSIDERATION

JAMES F. LANG (0059668)
 Counsel of Record
 Calfee, Halter & Griswold LLP
 The Calfee Building
 1405 East 6th Street
 Cleveland, OH 44114
 216-622-8563
 216-241-0816 (fax)
 jlang@calfee.com

THEODORE J. LESIAK (0041998)
 3995 Medina Road, Suite 210
 P.O. Box 1329
 Medina, OH 44258
 (330) 764-3200
 (330) 764-3202 (fax)
 lesiak@lhhlaw.com

Attorney for Defendant-Appellant Village of Seville Board of Income Tax Review

Attorneys for Plaintiff-Appellee

RECEIVED
 FEB 11 2013
 CLERK OF COURT
 SUPREME COURT OF OHIO

BARBARA A. LANGHENRY (0038838)
 LINDA L. BICKERSTAFF (0052101)
 City of Cleveland Department of Law
 205 West St. Clair Avenue
 Cleveland, Ohio 44113
 (216) 664-4406
 (216) 420-8299 (fax)
 lbickerstaff@city.cleveland.oh.us

Attorneys for Defendants-Appellants Nassim M. Lynch and The Central Collection Agency

FILED
 FEB 11 2013
 CLERK OF COURT
 SUPREME COURT OF OHIO

I. INTRODUCTION

The Motions for Reconsideration (“Motions”) filed by Appellants, the Central Collection Agency (“CCA”) and the Village of Seville Board of Income Tax Review (“Seville”), do nothing more than repackage and rehash in violation of S.Ct.Prac.R. 18.02(B) issues already considered and rejected by this Court. Section 4921.25 of the Revised Code expressly exempts motor transportation companies from the Village of Seville’s net profits tax by providing 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 such as municipal corporations, townships, counties, or other local boards, or the officers of such subdivisions are illegal and, are superseded” by Ohio’s public utility laws.¹ Appellants cannot show how the express preemption provided in this statute could be any more clear, so they are left to argue that the taxing authority of municipalities should not be limited in this manner. This is an argument for the General Assembly, however, not for this Court. Appellants’ refusal to accept that R.C. § 4921.25 means exactly what it says does not make this a case of public or great general interest and does not present a substantial constitutional question. This Court decided correctly not to accept Appellants’ jurisdictional appeals, and there is no reason to reconsider that decision. The Motions should be denied.

II. STANDARD OF REVIEW

This Court allows a party to move for reconsideration of a refusal to accept a jurisdictional appeal, but does not permit the movant to use its motion as an opportunity to re-argue the case. S.Ct.Prac.R. 18.02(B). Generally, this Court grants reconsideration only “to

¹ This provision was reorganized, without modification, as R.C. § 4921.18(E) by 129 HB 487, effective June 11, 2012.

correct decisions which, upon reflection, are deemed to have been made in error.” See *State ex rel. Huebner v. West Jefferson Village Council*, 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1996). To the extent an appellant has raised an argument in its initial briefs, any attempted reargument is not authorized in a motion for reconsideration. *State ex rel. Shemo v. Mayfield Hts.*, 96 Ohio St.3d 379, 2002-Ohio-4905, 775 N.E.2d 493, ¶¶ 9, 24, *cert. denied*, 538 U.S. 906, 123 S.Ct. 1484, 155 L.Ed.2d 226 (2003) (citing former S.Ct.Prac.R. XI(2)).

III. ARGUMENT

A. CCA Failed to Show That Its Appeal Presented a Case of Public or Great General Interest or a Substantial Constitutional Question.

Remarkably, CCA’s Motion makes no mention of the jurisdictional standard or why the Court erred in determining that the standard was not met. Instead, CCA argues that reconsideration should be granted because it is right and the court of appeals was wrong, based upon *Cincinnati Bell Tel. Co. v. Cincinnati*, 81 Ohio St.3d 599, 693 N.E.2d 212 (1998) (“*Cincinnati Bell*”), R.C. § 718.01 and R.C. § 715.013. Yet CCA also argued in its jurisdictional memorandum that *Cincinnati Bell* and these two statutes somehow avoided the express preemption of R.C. § 4921.25. See CCA Mem. in Support, pp. 7-8, 13-14. Thus, CCA’s Motion is improper and unauthorized in its entirety.

Regardless, Panther II Transportation, Inc. (“Panther”) demonstrated in its jurisdictional memorandum that a proper application of *Cincinnati Bell* results in a finding of express preemption (and, in any case, the controlling precedent of *Cincinnati Bell* is not at issue here). Panther Mem. in Response, p. 3. CCA also fails to address *City of Cleveland v. Pub. Util. Comm.*, 130 Ohio St. 503, 512, 200 N.E. 765 (1936), in which the Court recognized the state’s preemption of local taxes and local ordinances vis-à-vis motor carriers in G.C. 614-98, which is the predecessor to R.C. § 4921.25. See Panther Mem. in Response, pp. 3-4. CCA’s reliance

upon *Angell v. City of Toledo*, 153 Ohio St. 179, 91 N.E.2d 250, is misplaced given that the issue presented was whether the state had generally preempted Toledo's power to levy an income tax, not whether the state had preempted Toledo's power to levy an income tax on motor transportation companies. CCA simply ignores that motor transportation companies have been governed by special rules as public utilities for nearly ninety years.

Panther also demonstrated in its jurisdictional memorandum that R.C. § 718.01 does not require imposition of Seville's net profits tax on motor transportation companies. Panther Mem. in Response, pp. 5-6. CCA makes no effort to address R.C. § 718.01(J), which 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." Because R.C. § 4921.25 is one of those existing laws, it is illegal under R.C. § 4921.25 for Seville to tax Panther. Similarly, R.C. § 715.013 does not come into play because it prohibits municipal taxes that are the same as or similar to several categories of state taxes, not including the state income tax. R.C. § 4921.25 is not one of the broad categories listed in R.C. § 715.013 because it is limited only to local taxes on motor transportation companies.

This leaves CCA with the argument that the General Assembly could not have intended when enacting G.C. 614-98 in 1923 to preempt municipal income taxes that did not exist in 1923. Yet statutes operate prospectively, and it has long been accepted that statutes may apply to future circumstances not present at the time of enactment. *See* R.C. § 1.48; *Desenco, Inc. v. Akron*, 84 Ohio St.3d 535, 542-43, 706 N.E.2d 323 (1999). And the question is not whether the General Assembly intended in 1923 to preempt future municipal income taxes, but whether the language employed plainly preempts municipal income taxes during the tax years at issue in this appeal (2005-2006). "The question is not what did the general assembly intend to enact, but

what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction.” *Tomasik v. Tomasik*, 111 Ohio St.3d 481, 2006-Ohio-6109, 857 N.E.2d 127, ¶ 14 (quoting *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph two of the syllabus). Both G.C. 614-98 as enacted in 1923 and R.C. § 4921.25 as codified in 1953² declared that **all** local taxes imposed on motor transportation companies are illegal and superseded by public utility regulation. Thus R.C. § 4921.25 plainly preempted Seville’s net profits tax in 2005 and 2006.

B. Seville Failed to Show That Its Appeal Presented a Case of Public or Great General Interest or a Substantial Constitutional Question.

The legal arguments put forward by Seville generally are the same as those presented in its jurisdictional brief and should be disregarded pursuant to S.Ct.Prac.R. 18.02(B). The one new argument is Seville’s misguided attempt to distinguish *City of Springfield v. Krichbaum*, 88 Ohio App. 329, 100 N.E.2d 281 (2nd Dist. 1950), as not referring to G.C. 614-98. Seville Mot. for Reconsideration, p. 1. The case, however, specifically states that G.C. 614-98 – the General Code predecessor of R.C. § 4921.25 – preempts municipal taxes on motor transportation companies: “The power to levy a tax on intangibles, Sections 5638 and 5638-1, General Code, on insurance companies, Section 5414-10, General Code, **and on common carriers, Section 614-98**, General Code, has been pre-empted by the state.” *Krichbaum*, 88 Ohio App. at 330-331 (emphasis added). Thus, Seville’s singular attempt at a new legal argument contains a misrepresentation of fact to the Court. Because Panther is a licensed motor carrier and has been

² CCA notes that municipal incomes taxes were adopted in Ohio in the late 1940s (CCA Mem. in Support, p. 2). The preemption language in R.C. § 4921.25 was codified several years thereafter in 1953.

a licensed motor carrier at all times relevant to its refund claim, Seville cannot rely on *Krichbaum* to support its cause.

Seville claims that neither its income tax ordinance nor CCA's model ordinance has ever excluded motor transportation companies from net profits tax. This also is untrue. Both were introduced by CCA as exhibits in the hearing before the BTA, and both specifically exempt from Seville's net profits tax any "net profits, the taxation of which is prohibited by the Constitution of the State of Ohio *or any act of the Ohio General Assembly limiting the power of Seville to impose net profits taxes.*" T.A. Exh. 5 at p. 27 (emphasis added); T.A. Exh. 6 at p. 20 (same). Misstatements to the Court are not firm ground upon which the Court can accept jurisdiction over an appeal.

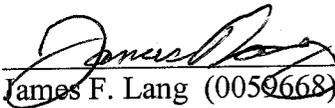
Seville makes the policy argument that municipal income taxation should not be limited by the General Assembly because municipalities need the revenue from income taxes. Seville Mot. for Reconsideration, pp. 2-3. Yet Seville could make the same argument with regard to the exemption for "income of religious, fraternal, charitable, scientific, literary, or educational institutions" in R.C. § 718.01(H)(2), or with regard to any of the many other exemptions provided in Ohio law. These are policy arguments, not legal arguments. The General Assembly has decided that certain entities and/or income should be exempt from local taxation. Indeed, the charitable exemption and motor transportation company exemption have the same basis – eliminating the local tax burden in order to reduce the burdens on private entities serving the public interest. In the case of motor transportation companies, R.C. § 4921.25 supports state-wide public utility regulation and protects public utility customers from redundant local fees, taxes, money exactions, laws and rules. *See Panther Mem. in Response*, pp. 10-11. Seville offers no reason why this particular exemption "erodes" Home Rule powers in a manner that is

qualitatively different than any other of the many exemptions in the Revised Code. Regardless, questions of municipal revenue are to be decided by the legislative branch and are not a sound basis for accepting jurisdiction over Seville's appeal.

IV. CONCLUSION

The Appellants have once again failed to raise an issue of public or great general interest or explained why a substantial constitutional question is involved. For the foregoing reasons, the Court should deny the Motions filed by CCA and Seville.

Respectfully submitted,



James F. Lang (0050668)
Calfee, Halter & Griswold LLP
The Calfee Building
1405 East 6th Street
Cleveland, Ohio 44114
216-622-8200
216-241-0816 (fax)
jlang@calfee.com

Attorneys for Appellee, Panther II Transportation,
Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via regular U.S. Mail, postage pre-paid, upon the following this 8th day of February, 2013:

Barbara A. Langhenry
Linda L. Bickerstaff
City of Cleveland Department of Law
205 West St. Clair Avenue
Cleveland, Ohio 44113

Attorneys for Income Tax Administrator and Central Collection Agency

Theodore J. Lesiak
Lesiak, Hensal & Hathcock
3995 Medina Road, Suite 210
P.O. Box 1329
Medina, Ohio 44258

Attorney for Village of Seville Board of Income Tax Review

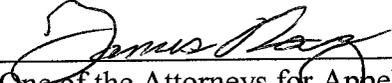
Philip Hartmann
Rebecca K. Schaltenbrand
Stephen J. Smith
Ice Miller LLP
250 West Street
Columbus, Ohio 43215

John Gotherman
Ohio Municipal League
175 S. Third Street, #510
Columbus, Ohio 43215-7100

Attorneys for Amicus Curiae, The Ohio Municipal League

John L. Alden
Anthony E. Palmer, Jr.
Alden Law
One East Livingston Avenue
Columbus, Ohio 43215

Attorneys for Amicus Curiae, The Ohio Trucking Association



One of the Attorneys for Appellee