ORIGINAL

IN THE SUPREME COURT OF OHIO

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

MEMORANDUM OF AMICUS CURIAE THE OHIO TRUCKING ASSOCIATION IN RESPONSE TO APPELLANTS' MOTION FOR RECONSIDERATION

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I. INTRODUCTION

On January 23, 2013, the Court declined to exercise jurisdiction over this discretionary appeal. 2013-Ohio-158. In asking the Court to accept jurisdiction over the appeal, Appellants, the Village of Seville ("Seville") and the Central Collection Agency ("CCA"), argued that the Ninth District Court of Appeals erred in holding that R.C. 4921.25[1] expressly preempted municipalities from taxing the income of motor transportation companies where the companies comply with the regulatory provisions included in R.C. Chapters 4503., 4905., and 4921. (Seville Memo. in Supp. of Jurisdiction, p. 7; CCA Memo in Supp. of Jurisdiction, p. 12-13.) Seville also alluded to potential consequences that would result to municipalities' revenues if the decision was not overturned. (Seville Memo. in Supp. of Jurisdiction, p. 3.)

Seville and CCA now ask the Court to reconsider its refusal to accept jurisdiction. Appellants' arguments in support of reconsideration, however, do not demonstrate any error in the Court's refusal to accept this jurisdictional appeal, but are instead again directed toward Appellants' perceived errors in the decision of the Ninth District Court of Appeals. As such, Appellants' motions contain improper reargument of the case.

On behalf of over 900 members, the Ohio Trucking Association ("OTA") joins with Appellee, Panther II Transportation, Inc. ("Panther") in affirming that the Court did

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[1] The operative language of R.C. 4921.25 was recodified as R.C. 4921.19(J) effective June 11, 2012, pursuant to 129 H.B. 487. For the reader's ease, the provision will be referred to in this memorandum as R.C. 4921.25. R.C. 4921.25, as in effect at the time relevant to this case, provides in pertinent 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, * * * , 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 * * * are illegal and, are superseded by sections 4503.04, 4905.03, and 4921.02 to 4921.32, inclusive, of the Revised Code."

not err in refusing to accept jurisdiction of this appeal. This appeal is not of public or great general interest and it does not involve a substantial constitutional question that would provide the Court with jurisdiction. The Court therefore did not err in refusing to accept jurisdiction.

II. STANDARD OF REVIEW

Supreme Court Practice Rules allow a party to file a motion for reconsideration of the Court's decision to refuse to accept a jurisdictional appeal. S.Ct.Pract.R. 18.02(B). The motion for reconsideration, however, "shall not constitute a reargument of the case." S.Ct.Pract.R. 18.02(B). The Court has invoked the reconsideration process "to correct decisions which, upon reflection, are deemed to have been made in error." *State ex rel. Huebner v. West Jefferson Village Council*, 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1996).

III. ARGUMENT

A. Seville and CCA have not demonstrated that this case was of public or great general interest that would provide the Court with jurisdiction.

Appellants' stated reasons for reconsideration do not address the Court's jurisdictional threshold that the case be one "of public or great general interest." Ohio Constitution, Article IV, Section 2(B)(2)(e). In its motion for reconsideration, CCA asks the Court to accept jurisdiction "to provide *clarity* that the income earned by these companies are not exempt from municipal taxation." (CCA Mot. for Recons., p. 3-4.) (emphasis added). Seville urges the Court to accept jurisdiction because, "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." (Seville Mot. for Recons., p. 4.). These statements are arguments on the

merits of the appeal and are directed towards Appellants' perceived errors in the Ninth District Court of Appeals' decision. They constitute merely reargument of the case.

While CCA and Seville provide anecdotal support for their loss of revenue as a result of the Ninth District's recognition of the express preemptive provision, Appellants' need for revenue does not convert this appeal to a case of public or great general interest. The case turned on the legal recognition by both the Ohio Board of Tax Appeals and the Ninth District Court of Appeals that the prohibition on municipal taxation, except for the general property tax, under R.C. 4921.25 was expressly preemptive. A municipality's need for income does not alter the analysis of whether a preemptive provision is either express or implied. Appellants' financial needs are irrelevant to the legal analysis and the legal importance of this case.

While Appellants claim a potential impending "economic disaster" (Seville Mot. for Recons., p. 4) and "a windfall for motor transportation companies" (CCA Mot. for Recons., p. 4) because of the Ninth District's decision, these claims are based on anecdotal evidence that may not be representative of the actual impact on municipalities and motor transportation companies. Seville, CCA, and *amicus curiae* The Ohio Municipal League, do not provide facts or any empirical evidence regarding the number of motor transportation companies that pay income taxes to municipalities, the amount of tax that these motor transportation companies pay to them, and the number of municipalities that tax motor transportation companies in disregard of R.C. 4921.25. Appellants' concern for their generation of revenue is understandable, but the impact on municipalities is only speculative based upon the information presented in Appellants' motions. If there were a significant number of municipalities that attempt to apply the

tax, it is logical that those municipalities would be identified. If there was a substantial amount of revenue that would be lost, it is logical that the amount would not only be disclosed but also highlighted. As the motions and memoranda filed with the Court stand, this issue involves one motor carrier and one municipality.

Moreover, Seville and CCA are essentially asking the Court to overlook the plain language of the statute and weigh the need of municipalities to generate additional revenue from motor transportation companies against the impact of the additional tax burden on these companies. Tax exemptions for heavily-regulated motor transportation companies, are policy decisions made by the General Assembly. The preemptive language in R.C. 4921.25 is merely one statutory provision in the volume of statutory and administrative regulations on motor transportation companies. See, e.g., R.C. Chapters 4921. and 4923.; Ohio Adm.Code Chapters 4901:2-1 through 4901:2-21, inclusive. Based on the breadth of regulation, it is logical that taxation was one of many policy decisions made by the General Assembly concerning the motor transportation industry.

Appellants' assertion for the need to tax the income of motor transportation companies in order to generate additional revenue is not a legal issue for the Court, but a policy issue for the General Assembly. The legal importance of this case is not one of public or great general interest to which the Court could accept jurisdiction.

B. Because this appeal does not involve a substantial constitutional question, the Court did not err in refusing to accept jurisdiction.

Seville and CCA also do not demonstrate that the appeal involved a substantial constitutional question that would provide the Court with jurisdiction to accept the appeal. Ohio Constitution, Article IV, Section 2(B)(2)(a)(iii). It is settled in Ohio constitutional law that "the Constitution presumes that both the state and municipalities

may exercise full taxing powers, unless the General Assembly has acted expressly to preempt municipal taxation, pursuant to its constitutional authority to do so." *Cincinnati Bell Tel. Co. v. Cincinnati*, 81 Ohio St.3d 599, 607, 693 N.E.2d 212 (1998).

Contrary to Appellants' assertions of challenges to Home Rule authority of municipalities, the legal issue in this case was not about constitutional authority, it was about statutory interpretation. Both the Ohio Board of Tax Appeals and the Ninth District Court of Appeals interpreted the language of R.C. 4921.25 to be expressly preemptive of municipal taxation of income on motor transportation companies. Aug. 30, 2011 BTA Correcting Order at p. 8; Aug. 8, 2012 Decision and Journal Entry at p. 5.

CCA cites R.C. 718.01 and R.C. 715.013 as the statutes that preempt municipal taxation. (CCA Mot. for Recons., p. 1-2.) These two sections do not state that the items enumerated in them are exclusive of other provisions in the Revised Code. R.C. 718.01 specifies 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. 718.01(J). Additional statutory provisions, such as R.C. 4921.25, are therefore recognized under R.C. 718.01 as imposing a limit on municipal taxation.

In addition to the Ninth District Court of Appeals' recognition of the express preemption provision of R.C. 4921.25, another court has held that a statutory provision, former R.C. 4939.03(A), which was not included in the list in R.C. 715.013[2], was expressly preemptive of municipal taxation. Former R.C. 4939.03(A)[3] provided:

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[2] R.C. 715.013(A) provides in full: "Except as otherwise expressly authorized by the Revised Code, no municipal corporation shall levy a tax that is the same as or similar to a tax levied under Chapter 322., 3734., 3769., 4123., 4141., 4301., 4303., 4305., 4307.,

> A political subdivision of the state shall not levy a tax, fee, or charge or require any non-monetary compensation or free service for the right or privilege of using or occupying a public way for purposes of delivering natural gas, electric, telecommunications, or cable television service.

This statutory provision was held to be an express limit on municipalities to levy a tax that was authorized under the Ohio Constitution. *Dublin v. State*, 118 Ohio Misc.2d 18, 2002-Ohio-2431, ¶ 34 ("[T]hat part of R.C. 4939.03(A) that prohibits the levy of a tax by municipalities for the right or privilege of using or occupying a public way does not violate the home rule provisions of the Ohio Constitution."). This provision, in Chapter 4939. of the Ohio Revised Code, was not included in the list of Chapters identified in R.C. 715.013(A).

Similarly, R.C. 4928.2314 provides another exemption from municipal taxation. R.C. 4928.2314(A) provides:

> The transfer and ownership of phase-in-recovery property and the imposition, charging, collection, and receipt of phase-in-recovery revenues under sections 4928.231 to 4928.2317 of the Revised Code are exempt from all taxes and similar charges imposed by the state or any county, municipal corporation, school district, local authority, or other subdivision.

Chapter 4928. is not included in the list of Revised Code Chapters in R.C. 715.013(A).

Chapter 4921. is likewise not included in the list of Chapters in R.C. 715.013. The non-inclusion of Chapter 4921. in the list does not render R.C. 4921.25 to be preemption by implication. By its plain language, this provision remains expressly

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4309., 5707., 5725., 5727., 5728., 5729., 5731., 5735., 5737., 5739., 5741., 5743., or 5749. of the Revised Code."

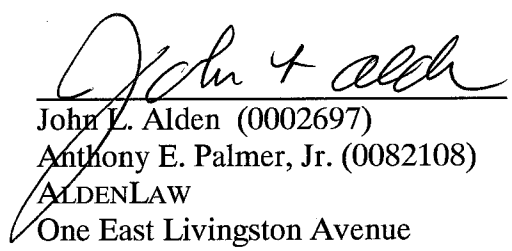
[3] R.C. 4939.03(A) was amended and enacted with significant modification in R.C. 4939.05(A), pursuant to 124 S.B. 255. The provision now provides that "A municipal corporation shall not require any nonmonetary compensation or free service, or levy any tax, for the right or privilege to occupy or use a public way, and shall not levy a public way fee except in accordance with this section." R.C. 4939.05(A).

preemptive of municipal taxation and is therefore authorized under the Ohio Constitution. This case, thus, does not involve a substantial constitutional question. Appellants have not satisfied their burden in proving that the Court erred in not accepting jurisdiction of this appeal.

IV. CONCLUSION

Seville and CCA have not demonstrated that the Court erred in refusing to accept jurisdiction of this appeal. The OTA respectfully requests that the Court deny Appellants' Motions for Reconsideration.

Respectfully Submitted,



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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 11th day of February, 2013:

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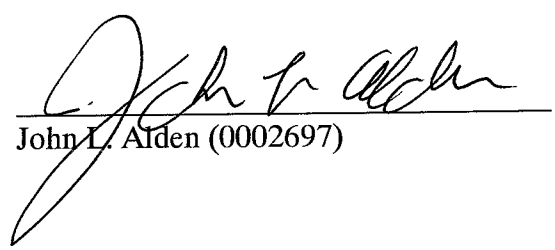

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