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

MERIT BRIEF OF APPELLANTS,
NASSIM M. LYNCH AND THE CENTRAL COLLECTION AGENCY

Barbara A. Langhenry (0038838)
Director of Law
Linda L. Bickerstaff (0052101) (COUNSEL OF RECORD)
Assistant Director of Law
City of Cleveland Department of Law
205 W. St. Clair Avenue
Cleveland, Ohio 44113
(216) 664-4406
(216) 420-8299 (facsimile)
lbickerstaff@city.cleveland.oh.us

COUNSEL FOR APPELLANTS,
NASSIM M. LYNCH AND THE
CENTRAL COLLECTION AGENCY

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James F. Lang (0022850) (COUNSEL OF RECORD)
Trevor Alexander (0080713)
Calfee, Halter & Griswold LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114-1607
(216) 622-8200
(216) 241-0816 (facsimile)
jlang@calfee.com
talexander@calfee.com

COUNSEL FOR APPELLEE,
PANTHER II TRANSPORATION, INC.

Theodore J. Lesiak (0041998)
Roderick Linton Belfance, LLP
One Cascade Plaza, Suite 1500,
Akron, Ohio 44308
(330) 434-3000
(330) 434-9220 (facsimile)
tlesiak@rlbllp.com

COUNSEL FOR APPELLANT,
VILLAGE OF SEVILLE BOARD OF INCOME TAX REVIEW

Philip Hartman, Esq. (0059413) (COUNSEL OF RECORD)
Rebecca K. Schaltenbrand, Esq. (0064817)
Stephen J. Smith, Esq. (0001344)
Ice Miller LLP
250 West Street
Columbus, Ohio 43215
(614) 462-4941
(614) 222-3443 (facsimile)
Philip.Hartman@icemiller.com

John Gotherman, Esq (0000504).
Ohio Municipal League
175 South Third Street, Suite 510
Columbus, Ohio 43215-7100
(614) 221-4349
jgotherman@columbus.rr.com

COUNSEL FOR AMICUS CURIAE,
THE OHIO MUNICIPAL LEAGUE

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STATEMENT OF THE FACTS

This case arises from a decision issued by the Board of Income Tax Review for the Village of Seville ("Seville Board"). It is a tax refund case where the issue is whether the Village had authority to tax the net profit income earned within its borders by Appellee, Panther II Transportation, Inc. ("Panther"). Panther claimed that since it paid the tax found in R.C. 4921.18 imposed on motor transportation companies that it was exempt from a municipal income tax under R.C. 4921.25.[1]

A. Panther's Municipal Tax Payment History, Request for Refund and Proceedings Below.

This case concerns tax years ("TY") 2005 and 2006. Prior to such years, Panther filed net profit tax returns and paid net profit tax for TY1994, 1995, 1996, 1997, 1998, 1999, 2000 and 2004 for each city it was located in at the relevant time. (Board of Tax Appeals Hearing Transcript ("Tr.") 68:14-16; 84:20-25; 85-90; 91:1-10: 92:5-10; Tr. Exhs. 8-11, 13, 17.) No returns were filed or tax paid for TY2001-2003 because Panther was located in a township which did not impose a city income tax. (Tr. 90:18-25; 91:1-10.)

For the tax years at issue, Panther was located in and conducted business in the Village of Seville. Panther would report and pay net profits tax to Seville for such years.

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1 2012 Am.Sub.H.B. No. 487 "[r]evise[d] and reorganize[d] the laws governing motor-carrier regulation by the Public Utilities Commission (PUCO), effective June 11, 2012." Legislative Service Commission Final Bill Analysis of 2012 Am.Sub.H.B. No. 487 at 329. References to Chapter 4921 and the statutes therein in this Merit Brief are as they existed prior to June 11, 2012.

However, on March 5, 2007, Panther filed a request for refund in the amount of $161,761, representing all net profit tax paid during TY2005-2006. (Tr. Exh. 1.) In the request, Panther claimed that since it is a motor transportation company regulated by (among other things) the PUCO that paid the R.C. 4921.18 tax, R.C. 4921.25 preempted Seville's net profits tax as that tax is applied to it. (*Id.* at 2.) Panther claimed that R.C. 4921.25 "specifically preempts the imposition of a local net profits tax on motor carriers subject to the PUCO tax imposed by [R.C.] 4921.18." (*Id.*)

Appellant, the Central Collection Agency ("Agency"), denied the request for refund.[2] In denying the refund, the Agency explained that R.C. 4921.25 only prohibits municipalities from imposing taxes, fees and charges relating to licensing, registering or regulation of motor transportation companies that have complied with all other requirements under that statute. (Tr. Exh. 2.) And since the net profits tax does not relate to licensing, registering or regulation of motor transportation companies, the net profits tax was not preempted. (*Id.*)

After the Agency denied the refund claim, on August 16, 2007, Panther requested a ruling from Appellant, Nassim M. Lynch, the Central Collection Agency's Tax

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2 The Central Collection Agency is the city of Cleveland entity created by Cleveland Codified Ordinance ("C.O.") 191.2311 that collects and distributes income taxes for its member communities. In accordance with C.O. 191.2303, the Agency is governed by a set of Rules and Regulations approved by the boards of income tax review of each member community. The Rules and Regulations along with the income tax ordinances govern income tax matters within the various member communities. The Village of Seville is a member community of the Agency whose board of income tax review adopted and incorporated the Agency's Rules and Regulations into its Income Tax Ordinance. Tr. 84:11-19; 95:24-25; 96:1-7.

Administrator, challenging that decision. (Tr. Exh. 3.) Panther objected to the Agency's determination that the net profits tax was not expressly preempted by R.C. 4921.25.

The Tax Administrator issued his Ruling on December 28, 2007 confirming that the net profits tax was not preempted and that the decision denying the refund claim was correct. (Tr. Exh. 4.) Thereafter, Panther appealed to the Seville Board.

On June 5, 2008, the Seville Board issued its Decision affirming the Tax Administrator's Ruling in all respects. (Appx. 1-3.) Panther then appealed to the Board of Tax Appeals.

The Board of Tax Appeals issued a decision finding that "the General Assembly expressly limits the taxes applicable to motor transportation companies" and that "R.C. 4921.25 specifically exempts" the net profits of a motor carrier from a municipal income tax. Decision and Correcting Order dated August 30, 2011, slip op. at 9 (Appx. 14-24.)

After the Seville Board, Tax Administrator and Central Collection Agency appealed, the Ninth District Court of Appeals affirmed the Board of Tax Appeals' decision finding that R.C. 4921.25 "plainly applies to 'all *** taxes.'" (Ellipsis by court of appeals.) Decision and Journal Entry dated August 6, 2012, slip. op. at ¶11. (Appx. 25-33.)

The Tax Administrator and Central Collection Agency filed their notice of appeal to this Court on September 19, 2012. (Appx. 34-37.) The Seville Board separately appealed. On September 28, 2012, the Court consolidated the cases for purposes of the appeal. (Appx. 38.) While this Court initially declined to accept jurisdiction of the

case, on March 13, 2013, it granted the Appellants' motions for reconsideration and accepted jurisdiction to hear the case and allow the appeal. (Appx. 39-40.)

B. The Nature of Panther's Business and Its Reliance on The Owner-Operator Business Model.

Panther is a general freight trucking company. (Tr. 50:10-13.) The nature of its business relies on and requires use of the highways and the same is true of any company in that line of business. (Tr. 59:15-25; 60:1-3.) The trucking industry is heavily regulated at both the federal and state level and such regulation imposes a host of different highway user fees and charges. (Tr. 60:4-25; 61-63:1-6.) Such highway user fees and charges include (i) the federal heavy vehicle use tax which is an annual tax on the use of heavy highway vehicles based on the taxable gross weight of the vehicle being used and is paid by the vehicle owner (Tr. 63:13-23); and (ii) the highway use tax exacted at both the state and federal level, which is a tax based on miles driven on the public highways and levied only against commercial users, like Panther. (Tr. 63:24-25; 64:1-15.)

Panther does not own any of the vehicles on which the R.C. 4921.18 tax is levied but rather has developed a network of owner-operators that it uses to provide services to its customers. (Tr. 52:4-15; 52:24-25; 53:1-13.) These vehicles are owned by the owner-operators and leased to Panther. (Tr. 54:19-22; 55:2-15; 56:10-14; Tr. Exh. 16 at 50.) Under the lease agreements, the owner-operators exclusively lease their vehicles to Panther and (in some instances) provide driving services as well. (Tr. 53:24-25; 54:1-4; 54:19-22; Tr. Exh. 15 at 1-2, Sections 2:01, 2:03.) The owner-operators may own a single vehicle or several vehicles. (Tr. 53:21-25; 54:1-14; Tr.

Exh. 16 at 57-59.) Either way, Panther views the owner-operators as independent contractors. (Tr. 54:15-22; Tr. Exh. 15 at 1, Section 2:01.) Further, no Panther employee drives the vehicles used to provide its services; owner-operators or employees of owner-operators drive said vehicles. (Tr. Exh. 16 at 51.)

The owner-operator business model is very common in the trucking industry. (Tr. 56:20-23.) It is commonly used because it helps the motor transportation companies maintain fixed costs. (Tr. Exh. 16 at 50-52.) Using the owner-operator business model maintains fixed costs because the owner-operators are responsible for all trip expenses like fuel, vehicle maintenance, vehicle insurance, etc. (Tr. 57:8-25; 58-59:1-10; Tr. Exh. 15 at 5-8, 2A-3A (Addendum); Tr. Exh. 16 at 50-51.) This is because owner-operators are viewed as other business owners. (Tr. 55:21-25; 56:1-9; Tr. Exh. 15 at 7-8; Tr. Exh. 16 at 57-58.)

While 100% of the power equipment (motorized vehicle units) used by Panther is owned by owner-operators (Tr. 56:10-14), Panther does own some of the trailers attached to some of the motorized vehicles. (Tr. 56:15-19; Tr. Exh. 16 at 50.) When the trailer is attached to the motorized unit, it is known as a "tractor-trailer." The tractor is the motorized or power unit portion; while the trailer which is not motorized is hitched or attached to the tractor which is required to allow the trailer to move. (Tr. 55:7-15.) The trailer is the unit where the customer's shipment of goods is loaded and stored for travel. (Tr. 55:7-15.) While the tractor is subject to the R.C. 4921.18 tax, such tax however is not imposed on trailers. (Tr. 65:10-20.) Section 4921.18(B) states

that: "[a] trailer used by a motor transportation company or common carrier by motor vehicle shall not be taxed under this section."

Simply put, the R.C. 4921.18 tax is only levied on the equipment owned by the owner-operators not the trailers that may be owned by Panther.

Under R.C. 4921.18, either Panther or its owner-operator could be the entity responsible for paying the tax. (Tr. 65:21-24.) When the owner-operator has paid the tax, Panther can use the vehicle without again paying the tax during the relevant reporting period. (Tr. 65:25; 66:1-4.) Where the tax has not been paid, Panther must register the owner-operator's vehicle under its Public Utilities Commission of Ohio ("PUCO") operating number and pay the tax. (Tr. 66:11-25; 67:1-2.) But even where Panther pays the 4921.18 tax, that tax is recovered from the owner-operators. (Tr. 67:3-17; Tr. Exh. 15 at 3A (Addendum).) Under Panther's owner-operator lease agreement, the parties "contractually" agreed that the owner-operators will pay the R.C. 4921.18 tax. (Tr. 67:3-17; Tr. Exh. 15 at 3A (Addendum).)

ARGUMENT

Proposition of Law:

Revised Code 4921.25 does not preempt an Ohio municipality's net profits income tax as that tax is applied to motor transportation companies defined under Chapter 4921.

The legal issue presented by this appeal concerns an Ohio municipality's authority to levy its income tax and whether R.C. 4921.25 preempts a municipality's net profits income tax as that tax is applied to motor transportation companies defined in Revised Code Chapter 4921. At issue here, is the proper interpretation of R.C. 4921.25 as well as its related provision R.C. 4921.18.

At all relevant times here, R.C. 4921.25 was titled "Fees and charges" and stated as follows:

> 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. (Appx. 41.)

R.C. 4921.18 (which is referenced in R.C. 4921.25) was titled "Taxes" and stated, in pertinent part, that:

> (A) Every motor transportation company or common carrier by motor vehicle operating in this state shall, at the time of the issuance of a certificate of public convenience and necessity to it and annually thereafter on or between the first and the fifteenth days of July of each year, pay to the public utilities commission, for and on behalf of the treasurer of state the following taxes:
>
> (1) For each motor-propelled or motor-drawn vehicle used for transporting persons, thirty dollars;
>
> (2) For each commercial tractor, as defined in Section 4501.01 of the Revised Code, used for transporting property, thirty dollars;

(3) For each motor truck transporting property, twenty dollars. (Appx. 42-43.)

As shown, R.C. 4921.18 requires a motor transportation company operating in Ohio to pay a tax at the time of issuance of their certificate of public convenience and necessity, and annually thereafter based on the number of vehicles used. The R.C. 4921.18 tax is either $30 or $20 depending only on the type of vehicle being used and registered. R.C. 4921.25 clearly refers to the 4921.18 tax as "fees and charges." The statute then states 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 ... are illegal and, are superseded by sections 4503.04, 4905.03 and 4921.02 to 4921.32, inclusive of the Revised Code." The statute also states that "[o]n 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 ... shall cease to be operative as to such company[.]" The issue in this appeal is whether this statute—R.C. 4921.25—makes a local income tax levied against the income earned by a motor transportation company within the boundaries of a municipality (incorporated village) "illegal" and "inoperative." (Appx. 41.)

The Ninth District rejected the argument that R.C. 4921.25 was never intended to preempt a general revenue income tax levied by a local authority on income earned by all individuals and businesses within its borders. Instead, the court held that R.C. 4921.25 prohibits a local authority from taxing the net profits of a motor transportation company "under the doctrine of express preemption." Decision and Journal Entry, slip op. at ¶11. (Appx. 32.) The appellate court stated that "[h]ad the General Assembly

intended the word 'tax' to mean license fees or charges, it would not have been necessary to separately prohibit the imposition of 'license fees' and 'license taxes' in addition to 'taxes.'" Decision and Journal Entry, slip op. at ¶11. (Appx. 31.) The court also stated that it found "the fact that the General Assembly exempted general property taxes and not net profits taxes [to be] telling." Decision and Journal Entry slip op. at ¶11. (Appx. 31-32.)

The Ninth District without question erred in reaching its conclusion. As set forth below, R.C. 4921.25 is not and was never intended to be an express act of the General Assembly to preempt the municipal income tax.

A. The statutory predecessors to R.C. 4921.18 and 4921.25 were enacted in 1923 as part of the Ohio Motor Transportation Act.

The Ohio Motor Transportation Act (Gen. Code 614-84 to 614-102) was originally enacted in 1923 as part of H.B. No. 474. H.B. No. 474, 110 Ohio Laws, 211-223. (Supp. 1-14.) As the United States Supreme Court explained, this Act

> provides that a motor transportation company desiring to operate within the state shall apply to the Public Utilities Commission for a certificate so to do, and shall not begin to operate without first obtaining it; also that such a company must pay, at the time of the issuance of the certificate and annually thereafter, a tax graduated according to the number and capacity of the vehicles used.

Clark v. Poor, 274 U.S. 554, 555-56 (1927).

The Act contained the predecessors to R.C. 4921.18 and 4921.25, which were Gen. Code 614-94 and 614-98, respectively. Gen. Code 614-94 (the predecessor to R.C. 4921.18) read, in pertinent part, as follows:

> Every motor transportation company now operating or which shall hereafter operate in this state shall at the time of the issuance of such certificate, and annually thereafter ... pay to the treasurer of state the following taxes for the expense of the administration and enforcement of the provision of sections 614-84 to 614-102 of the General Code, and for the maintenance and repair of the highways of the state[:]
>
> ...
>
> For each motor propelled vehicle used for transporting property between fixed termini or over a regular route the manufacturer's rated carrying capacity of which is one and three-fourths tons or less, forty dollars; for each such motor propelled vehicle the manufacturer's rated carrying capacity of which is more than one and three-fourths but not more than two and one-half tons, eighty dollars; for each such motor propelled vehicle the manufacturer's rated carrying capacity of which is more than two and one-half but not more than three and one-half tons, one hundred and forty dollars; and for each such motor propelled vehicle the manufacturer's rated carrying capacity of which is more than three and one-half tons, two hundred dollars.
>
> For each motor propelled vehicle used for transporting property not between fixed termini or over a regular route the manufacturer's rated carrying capacity of which is one and three-fourths tons or less, twenty dollars; for each such motor propelled vehicle the manufacturer's rated carrying capacity of which is more than one and three-fourths but not more than two and one-half tons, fifty dollars; for each such motor propelled vehicle the manufacturer's rated carrying capacity of which is more than two and one-half but not more than three and one-half tons, one hundred dollars; and for each such motor propelled vehicle the manufacturer's rated carrying capacity of which is more than three and one-half tons, one hundred and fifty dollars.
>
> ...[3]

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3 The original Act applied to private motor carriers as well as motor transportation companies but this Court held in *Hissem v. Guran*, 112 Ohio St. 59, 146 N.E. 808 (1925) that the Act could not apply to private motor carriers. The General Assembly would later enact former Chapter 4923 for private motor carriers.

(Supp. 15-16.) Gen. Code 614-98 (the predecessor to R.C. 4921.25) stated:

> The fees and charges provided under section 614-94 of the General Code shall be in addition to taxes, fees, and charges fixed and exacted by other provisions of the general laws of Ohio; except the assessments required by section 606 of the General Code, but 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. On such motor transportation company complying with the provisions of this act, all local ordinances, resolutions, by-laws, and rules in force shall cease to be operative as to them, except that such local subdivisions may make reasonable local police regulations within their respective boundaries not inconsistent with the provisions of this act. (Supp. 17.)

As shown above, the predecessors to R.C. 4921.18 and 4921.25 (Gen. Code 614-94 and 614-98) operated like they do today (although the fees appear to have been higher). R.C. 4921.18 and 4921.25 retained the same concepts originally established under the General Code and R.C. 4921.25 contains almost identical language as had Gen. Code 614-98.

B. This Act (Chapter 4921) concerns the licensing and regulation of motor transportation companies.

The preamble to H.B. 474 states that the purpose of the Ohio Motor Transportation Act was to (among other things) "enact supplemental sections ... of the General Code,"

> defining motor transportation companies, conferring jurisdiction upon the Public Utilities Commission over the transportation of persons or property for hire in motor vehicles and providing for the supervision and regulation of such transportation, for the enforcement of the provisions of

> this act and for the punishment of violations thereof, and providing for the taxing of motor propelled vehicles. (Supp. 2.)

That this Act concerns the licensing and regulation of motor transportation companies could not be clearer where the preamble states that one purpose is providing for the "supervision and regulation." That this Act was enacted under the state's police regulations is also clear where another purpose was "the enforcement of the provisions" and "the punishment of violations thereof." While the preamble specifically refers to "the taxing of motor propelled vehicles," this is as the United States Supreme Court recognized long ago in specific reference to the Ohio Motor Transportation Act, an "extra tax" for those "who make the highways their place of business." *Clark v. Poor*, 274 U.S. at 557.

Chapter 4921 deals with one thing—the licensing, registering and regulation of motor transportation companies; nothing in that chapter deals with taxing the *income earned by* a motor transportation company. Under that chapter, the PUCO is granted regulatory authority over motor transportation companies. In that capacity, among other things, it issues operating permits. No motor transportation company can operate in the State without first receiving such operating permit.

Again, R.C. 4921.18 imposes an annual tax or fee on each *vehicle* used by a motor transportation company that has been issued a PUCO certificate of public convenience and necessity. *See* R.C. 4921.18(A). (Appx. 42.) The annual tax or fee is either $30 or $20 depending on the type of vehicle being used. *Id.* Each year, the operating license must be renewed and the R.C. 4921.18 tax is paid. *Id.* Revenue

generated by the R.C. 4921.18 tax is used for highway maintenance and repairs and to cover administrative expenses of the PUCO. *See* R.C. 4921.18(E); 4923.12.

Section 4921.25 then provides if a motor transportation company pays this tax and complies with R.C. 4503.04, 4905.03 and 4921.02 to 4921.32, similar local ordinances cannot operate against such company. (Appx. 41.) What do R.C. 4503.04, 4905.03 and 4921.02 to 4921.32 pertain to? Section 4503.04 imposes a license fee or excise tax upon the privilege of operating motor vehicles (both pleasure and commercial) upon the highways. Section 4905.03 defines "motor transportation company" subject to PUCO oversight and regulation. Sections 4921.02 to 4921.32 are the state's regulations for motor transportation companies.

And if there is any doubt that these are police regulations, a review of Chapter 4901:2 of the Ohio Administrative Code should resolve it. Such OAC regulations deal with safety standards, OAC 4901:2-5-02; inspections of vehicles, OAC 4901:2-5-11; hazardous material registration, OAC Chapter 4901:2-6; the required insurance, OAC Chapter 4901:2-13; and a host of other similar type regulations.

The documentary evidence in the record also shows that the statutes at issue only deal with licensing and regulation. Among the attachments to Panther's request for refund are copies of the PUCO's "Application for *Registration* of Motor Carriers," the PUCO's "Annual Tax Form[s]" which shows the number of vehicles being registered and copies of Panther's checks payable to the PUCO's "Motor Carrier *Reg[istration]* Division." (Emphasis added.) (Tr. Exh 1.) This evidence shows that the purpose of the R.C. 4921.18 tax is to *register* vehicles to be used by Panther under its PUCO operating

authority, pursuant to PUCO regulations and requirements. Even Panther's own PUCO operating permit provides further evidence relating to this issue. The permit states, in pertinent part, that:

> This Certificate of Public Convenience and Necessity recognizes the above-named motor transportation company as an intrastate, motor carrier for hire, transporting under the jurisdiction of the Public Utilities Commission of Ohio and authorizes this entity to operate as an intrastate motor transportation company in accordance with all effective orders of the Public Utilities Commission of Ohio[.]
>
> This certificate is conditioned in that local subdivisions may make reasonable local police regulations within their respective boundaries not inconsistent with the provisions of Chapter[] 4921 ... [of the] Revised Code of Ohio.

(Tr. Exh. 14.) (Supp. 18.) The first paragraph authorizing Panther to operate as a motor carrier in the state clearly shows that this is a license. The second paragraph indicating that local entities can still make local police regulations "not inconsistent" with Chapter 4921 clearly reflects the fact that these are police regulations in that Chapter. And a notice from the PUCO to Panther dated December 22, 2006, advising it about the expiration of the single state *registration* system as of January 1, 2007 and its replacement with the unified carrier *registration* system[4] should further remove any doubt that Chapter 4921 is limited to the licensing and regulation of motor transportation companies. (Supp. 19.) (Panther's Identification of Exhibits, filed with the Board of Tax Appeals on June 10, 2010.)

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4 2012 Am.Sub.H.B No. 487 adopted the unified carrier registration system. *See* fn. 1, *infra*.

This Court has repeatedly held that "[a] certificate of convenience and necessity issued to a motor transportation company by the Public Utility Commission is a revocable license[.]" *Scheible v. Hogan*, 113 Ohio St. 83, 148 N.E.2d 581 (1925), paragraph one of the syllabus. *See also Alspaugh v. P.U.C.*, 146 Ohio St. 267, 65 N.E.2d 263 (1946); *Miller, Inc. v. P.U.C.*, 10 Ohio St.2d 53, 225 N.E. 2d 269 (1967); *Westhoven v. Public Utilities Commission*, 112 Ohio St. 411, 147 N.E. 759 (1925), paragraph one of the syllabus. "This [C]ourt has repeatedly [also] held that the purpose of the motor transportation act is to serve the public convenience and necessity as distinguished from serving the advantage and profits of motor transportation companies[.]" *Stark Electric R. Co. v. Public Utilities Commission*, 118 Ohio St. 405, 409, 161 N.E. 208, 210 (1928). The Ninth District's decision in this case unfairly and improperly serves to the advantage and profits of motor transportation companies and must be reversed.

C. This Court's decision in *Angell v. City of Toledo*, 153 Ohio St. 179 (1950) is dispositive of the issue here.

In *Angell v. City of Toledo*, 153 Ohio St. 179, 91 N.E.2d 250 (1950), this Court held that the General Assembly "has not [] passed any law limiting the power of municipal corporations to levy and collect income taxes."[5] *See id.* at paragraph two of the syllabus. That case is therefore clearly dispositive of the issue in this case since the Ohio Motor Transportation Act was already in existence at the time *Angell* was decided.

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5 In *Angell*, this Court held that a municipality may tax the income of a nonresident who works and receives his wages in that municipality.

This fact cannot be ignored. The decision of the court below must be reversed on the authority of *Angell* alone.

D. R.C. 4921.25 prohibits a municipality from imposing a fee or tax under its police not taxing power.

The decision of the court of appeals is also wrong since clearly it improperly equates the "right to regulate" with the "right to tax." As this Court long ago acknowledged, "the police and taxing powers *** though co-existent are distinct powers[.]" *See Holst v. Roe*, 39 Ohio St. 340, 344 (1883). This Court has recognized that "[l]icensing and regulating are an exercise of the police power[] [and not] an exercise of the taxing power." *Firestone v. City of Cambridge*, 113 Ohio St. 57, 62, 148 N.E. 470, 472 (1925).

As shown above, the R.C. 4921.18 tax is not based on the *income of* a motor transportation company or even the value of the vehicle on which it is levied. The tax is simply $30 or $20 per vehicle depending solely upon whether it is a commercial passenger vehicle, tractor or truck. It clearly is not an income tax, levied on the income of an individual or business. *See Angell*, 153 Ohio St. at 183, 91 N.E.2d at 252 (defining an income tax as "one levied on the *income from* property or an occupation[;] it is a direct tax upon the thing called income"). The R.C. 4921.18 tax also clearly is not a property tax, which is based on the "true value in money" of the property. *Saviers v. Smith*, 101 Ohio St. 132, 136, 128 N.E. 269, 270 (1920) ("when it comes to taxing property it is required to be taxed" "at its true value in money").

The R.C. 4921.18 tax is a tax on a "privilege" which is based on the reasonable value of the privilege. *Id.* at 136-37; *Southern Gum Co. v. Laylin*, 66 Ohio St. 578, 64

N.E. 564 (1902), paragraph three the syllabus ("a tax on a privilege cannot exceed the reasonable value of the privilege" "conferred, or its continued annual value hereafter"); *Calerdine v. Freibert*, 129 Ohio St. 453, 195 N.E. 854 (1935), paragraph one of the syllabus ("an excise must not exceed the reasonable value of the privilege conferred"). This explains why the R.C. 4921.18 tax is either $30 or $20 per vehicle—it is measuring the value of the privilege not the value of the property itself. This also explains why R.C. 4921.18(D) provides that if "the tax imposed by this section has been paid, [such vehicle] may be used by another [motor transportation company], without further payment of the tax[.]" R.C. 4921.18(D). (Appx. 42.) A license by definition is the granting of a privilege. *State v. Frame*, 39 Ohio St. 399, 413 *overruled by State v. Finks*, 42 Ohio St. 345 (1884) ("[a] license is essentially the granting of a special privilege to one or more persons not enjoyed by citizens generally, or at least, not enjoyed by a class of citizens to which the licensee belongs"). Here, Panther freely acknowledges that the benefit of its operating permit and annual registration is the privilege (authority) to operate in the state. (Tr. 65:6-9.)

In short, there is a clear distinction between a license fee or tax exacted in the exercise of the police power and a tax levied under the taxing power. *Barrett v. New York*, 232 U.S. 14 (1914); *Firestone*, 113 Ohio St. at 62, 148 N.E. at 472; *City of Richmond Heights v. LoConti,* 19 Ohio App. 2d 110, 112, 250 N.E.2d 84, 92. The R.C. 4921.18 fee or charge is one that is exacted in the exercise of the state's police (not taxing) power. R.C. 4921.25 only makes illegal a local fee, tax or charge purportedly exacted in the exercise of the police power.

The fact that R.C. 4921.25 uses the word "taxes" is not conclusive as to the legal effect of that statute. (Appx. 41.) "Courts have recognized that a word can be subject to different interpretations depending on the context in which the word appears." *State ex rel. International Paper, Inc. v. Trucinski*, 2004-Ohio-5520 at ¶25, 2004 WL 2335803 at *5 (10th Dist).

A "broad and general usage of the word 'taxes' includes" "license fees, inspection fees, tolls, tribute, tallage, impost, duty, [and] custom" as opposed to what might be referred to as a pure "tax." *Paramount Film Distributing Corp. v. Tracy*, 118 Ohio App. 29, 33, 193 N.E. 2d 283, 286 (1962). The essence of the latter is that it raises revenues for general governmental purposes and is compulsory in nature versus a license fee that is levied in relation to a particular benefit. *U.S. v. Reorganized DF&I Fabricators of Utah, Inc.,* 518 U.S. 213, 224 (1996) ("[a] tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government"). That "[t]he distinction is clearly recognized between a license granted or required as a condition precedent before a certain thing can be done, and a tax assessed on a business which one is authorized to engage in[]" is beyond dispute. *Anderson* v. *Brewster*, 44 Ohio St. 576, 588, 9 N.E. 683, 689 (1887).

Simply put, "[a] license [] grants authority to engage in a particular business conferring a privilege, and a tax grant[s] no such authority." *Binns v. United States* 194 U.S. 486 (1904); *Nat'l Cable Television Ass'n v. U.S.*, 415 U.S. 336, 340-41 (1974) (a fee is a charge exacted in exchange for a benefit to the payor not shared by other members of society). By its very definition, the term "license fee" requires payment of

some fee as a prerequisite to engaging in the activity in question. *City of Richmond Heights*, 19 Ohio App.2d at 112, 250 N.E.2d at 92. Here, it simply cannot be clearer that the R.C. 4921.18 fee or charge only applies to motor carriers that have been issued PUCO operating permits. Further, the revenue generated by the R.C. 4921.18 fee or charge is not used for general governmental purposes which is a hallmark characteristic of a true "tax" but rather is used solely for highway maintenance and repairs and to cover administrative expenses of the PUCO. *See* R.C. 4923.12. Nor is the R.C. 4921.18 fee or charge compulsory in nature since by its very terms, the statute is limited to motor transportation companies and common carriers by motor vehicles who make the highways their place of business.

The court of appeals' finding therefore that R.C. 4921.25 "plainly applies to 'all *** taxes'" is in error and the decision must be reversed. R.C. 4921.25 clearly only prohibits a municipality from imposing a tax under its police power—not a general revenue tax under its taxing power.

E. R.C. 4921.25 is not an express act of the General Assembly to limit or restrict municipal taxing power.

The court of appeals in this case found that R.C. 4921.25 was an express statutory provision preempting a municipality's right to *tax the income of* motor transportation companies. Decision and Journal Entry, slip op. at ¶11. (Appx. 32.) However, is that correct?

This Court in *Cincinnati Bell Telephone Co. v. Cincinnati*, 81 Ohio St.3d 599, 693 N.E.2d 212 (1998), pointed to R.C. 718.01(F) (since renumbered 718.01(H)) as an

example of "an express statutory provision" that prohibited the municipal taxing power. The Court noted that the General Assembly was certainly "aware" of how to exercise its constitutional prerogative and that such "awareness" was

> demonstrated by [the General Assembly's] passage of specific prohibitions on municipal taxation of certain types of income as provided in R.C. 718.01(F). Pursuant to R.C. 718.01(F), '[n]o municipal corporation shall tax' military pay, *income of* certain nonprofit organizations, certain forms of intangible income, compensation paid to precinct election officials, and compensation paid to certain employees of transit authorities. *Id.* at 606, 693 N.E.2d at 217. (Quotations original, brackets original.)

After the Court's *Cincinnati Bell Telephone* case, the General Assembly amended R.C. 718.01 and enacted R.C. 715.013. (Appx. 44-50.)

The amendment to R.C. 718.01 addressed the particular facts at issue in *Cincinnati Bell*[6] 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 section [] 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. No. 770, 147 Ohio Laws, Part III, 5623. (Appx. 49.) Again, this is an example of an express statutory provision that preempts the municipal income taxing power. It would be noted that a motor transportation company is not a "public utility"

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6 The issue in *Cincinnati Bell* was whether municipalities could tax the net profits of public utility companies that were also subject to the public utilities gross receipts excise tax under R.C. 5727.30 imposed by the state. This Court would strike down the doctrine of state implied preemption and find that municipalities could holding that the taxing authority of a municipality may only be preempted or otherwise prohibited by an express act of the General Assembly.

for purposes of Chapter 5727. *See* R.C. 5727.01(A)[7] ("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 company, water transportation company, heating company or rural electric company or railroad company[]"). A motor transportation company was therefore not affected by this amendment to R.C. 718.01.

Neither were motor transportation companies affected by the enactment of R.C. 715.013 where the General Assembly prohibited 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. No. 770, 147 Ohio Laws, Part III, 5621. (Appx. 44.) This is another example of an express statutory provision preempting the municipal income taxing power. The fact that the General Assembly did not include Chapter 4921 in the list of chapters mentioned in R.C. 715.013 cannot be ignored.

R.C. 4921.25 is not an express statutory provision to preempt a municipal income tax and the court below erred in so finding. R.C. 4921.25 simply does not preempt a motor transportation company from paying a net profits tax just like all other businesses.

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7 The definition of "public utility" in R.C. 5727.01(A) has since been amended to include an "energy company." 2010 S.B. No. 232.

F. The court of appeals' interpretation that R.C. 4921.25 "plainly applies to 'all *** taxes'" is not supported by the statute's language.

The court of appeals in this case found that R.C. 4921.25 "plainly applies to all *** taxes." There is no question, however, that a particular word can have a different meaning depending on the context. A word must "be defined in the context and in light of the purpose of the particular statute in which it is used." *Patmon, Young & Kirk v. Commissioner*, 536 F.2d 142, 144 (6th Cir. 1976). Until the Ninth District held as it did in the present case, no court had ever held that use of the word "taxes" in a statute such as R.C. 4921.25[8] applied to a municipal income tax.

R.C. 4921.25 states "all fees, license fees, annual payments, license taxes, or taxes or other money exactions" by a municipality are "illegal and [] superseded by sections 4503.04, 4903.04 and 4921.02 to 4921.32[.]" There is a long-established principle of tax law that the construction of words in a tax statute should be in "harmony with the statutory scheme and purpose." *Helvering v. Hutchings*, 312 U.S. 393, 398 (1941). Under this principle, there is no reason to suppose that the word "taxes" in R.C. 4921.25 includes a municipal income tax.

A reading of the word "taxes" makes sense only if the General Assembly intended to preclude any special tax on motor transportation companies or their vehicles. Again, the language at issue is "all fees, license fees, annual payments, license taxes, or taxes or other money exactions." A closer review of this language shows that it has five separable parts: (i) "fees"; (ii) "license fees"; (iii) "annual

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8 The language in former R.C. 4923.13 is identical to R.C. 4921.25 but that statute dealt with private motor carriers. (Supp. 20.) *See* fn 1, infra.

payments"; (iv) "license taxes"; and (v) "or taxes or other money exactions." Contrary to the Court below, the statute does not just state "taxes" but utilizes the phrase "or taxes or other money exactions." This is because there are two "ors" in said language and the first "or" is used in its usual disjunctive sense but the same is not true of the second "or." The second "or" is clearly used in a conjunctive sense.

The word "exactions" is an adjective qualifying the word "taxes" in R.C. 4921.25. What exactly is an exaction? Black's Law Dictionary defines an "exaction" as "1. The act of demanding more money than is due; extortion. 2. A fee, reward, or other compensation arbitrarily or wrongfully demanded." Black's Law Dictionary 600 (8th ed. 2004). More simply, an exaction is "something exacted"; that which is "call[ed] for forcibly or urgently and obtain[ed]." Merriam—Webster's Collegiate Dictionary 403 (10th ed. 1996). This Court explained long ago in *Marmet v. State*, 45 Ohio St. 63, 71 (1887) "exactions are treated as direct taxes for revenue on occupations [in some cases], in others as assessments on account of benefits, and in others as police regulations." A municipal income tax is none of these. There is no reason why a municipal income tax would be "illegal" and "superseded" by the statute.

Moreover, sometimes the literal reading of the language in a statute produces an absurd result. For example, R.C. 4921.25 also states "[o]n compliance by such motor transportation company with sections 4503.04, 4905.03 and 4921.02 to 4921.32, inclusive, of the Revised Code, all ordinances ... shall cease to be operative as to such company[.]" Does this mean that motor transportation companies are not subject to local building and zoning ordinances? The answer is obviously no.

The imposition or levy of a municipal income tax on the *income of* a motor transportation company is not any type of "exaction" on motor transportation companies by tax or otherwise. It has not been made either "illegal" or "inoperative" by R.C. 4921.25. This Court must therefore reverse the judgment of the Court below.

G. It is clear why the general property tax is referenced in R.C. 4921.25 and not the net profits tax.

The Court below also seeks to justify its decision by saying that "the fact that the General Assembly exempted general property taxes and not net profits taxes" was significant. Decision and Journal Entry, slip op. at ¶11. (Appx. 31-32.) However as set forth below, it is not.

The Ninth District would like one to believe that had the General Assembly wanted to exempt the net profits tax it would have specifically stated such in R.C. 4921.25. For a couple of reasons, the appellate court's reasoning is faulty.

First, as noted earlier, the predecessor to R.C. 4921.25 (Gen. Code 614-98) was originally enacted in 1923 as part of the Ohio Motor Transportation Act. H.B. No. 474, 110 Ohio Laws 211. There was no such thing as a municipal income tax in the entire nation at that time. The first city income tax was not enacted until 1938 in Philadelphia, Pennsylvania. Fordham & Mallison, *Local Income Taxation*, 11 Ohio St. L.J. 220, 223 (1950). Toledo would be the first Ohio city to enact such a tax in 1946, with Columbus, Dayton, Warren, Youngstown and Springfield following within three years. Note, *Municipal Personal Income Taxation of Nonresidents*, 31 Ohio St. L.J. 770, 785 (1970). Clearly, there would be no reason to "exempt" a net profits tax at the time the predecessor to R.C. 4921.25 was enacted since that tax did not exist.

Second, the first time the General Assembly acted to preempt municipal taxing power was in 1957. This is when the "1957 Uniform Municipal Income Tax Act" was passed. Am.Sub.S.B. No. 133, 127 Ohio Laws 911. (Supp. 21-24.) Glander, *The Uniform Municipal Income Tax Act*, 18 Ohio St L.J. 489, 490-91 (1957). That Act enacted Revised Code Sections 718.01, 718.02 and 718.03. The preemption was contained in R.C. 718.01 which originally read, in pertinent part, as follows:

> No municipal corporation shall tax the military pay or allowances of members of the armed forces of the United States, or the income of religious, fraternal, charitable, scientific, literary or educational institutions to the extent that such income is derived from tax exempt real estate, tax exempt tangible or intangible property or tax exempt activities. (*Id.*)[9] (Supp. 23.)

The fact that R.C. 4921.25 did not reference the net profits tax is not significant. As set forth in the next section, there is also a valid reason why the general property tax was referenced.

H. The reference to the general property tax in R.C. 4921.25 is for clarity since the R.C. 4921.18 tax is on the vehicles.

As noted, the court of appeals found it significant that R.C. 4921.25 referenced the general property tax. Decision and Journal Entry, slip op. at ¶11. (Appx. 31-32.) However, the reason for the reference to the general property tax seems clear.

Obviously, a property tax can be a tax on property items such as the vehicles used by the motor transportation companies which are subject to the R.C. 4921.18 tax. Specific reference to the general property tax was made in R.C. 4921.25 solely for the

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9 As noted, this Court in *Cincinnati Bell* would cite to R.C. 718.01 as an example of "an express statutory provision" that prohibits municipal taxing power.

sake of clarity and to ensure that it was understood that said vehicles could still be subject to any such general property tax as well. If anything, the fact that R.C. 4921.25 references the general property tax supports the proposition that the General Assembly would make motor transportation companies subject to any general revenue income tax had such tax existed as well.

I. R.C. 718.01(D) prohibits municipalities from exempting net profits from their income tax.

R.C. 718.01(D)(1) provides (in part) that "no municipal corporation shall exempt from a tax on income *** the net profit from a business or profession." (Appx. 47.) Therefore, not only does a municipality have the authority to tax such net profits, it is generally prohibited from doing otherwise. The court of appeals' decision clearly contradicts the mandates of state law in this regard as well.

J. It is clear that laws exempting from taxation are in derogation of equal rights.

All laws exempting from taxation are in derogation of equal rights. *Cincinnati College v. State*, 19 Ohio 110, 115 (1850). Consequently, as this Court stated in *Lutheran Book Shop v. Bowers:* "Tax exemption statutes must be strictly construed. No presumption favorable to the exemption of property will be indulged. This must necessarily be the rule in order to preserve the equality in the burden of taxation." 164 Ohio St. 359, 362, 131 N.E.2d 219, 220-21. The decision by the court of appeals is therefore also violative of this constitutional mandate as well.

K. The court of appeals' decision offends the delegation of power granted to local authorities by the Oho Constitution.

There is no dispute that with the adoption of the Home Rule Amendment to the Ohio Constitution (Section 3 of Article XVIII) that a dual delegation of power was granted to municipalities and the General Assembly as to the taxing power. (Appx. 51.) *See State ex rel. Zielonka v. Carrel*, 99 Ohio St. 220, 227, 124 N.E. 134, 136 (1919) ("we find in Section 3, art. 18, [to be] as complete a grant of power as the General Assembly has received in section 1, art. 2"). It is true that the General Assembly has the authority to restrict or limit the municipal taxing power. However, as this Court explained in *Cincinnati Bell:* "This balance is best maintained by interpreting the specific limiting power of the General Assembly so that it does not engulf the general power of taxation delegated to municipalities." 81 Ohio St.3d at 605-605, 493 N.E.2d at 217. The decision by the court of appeals wholly ignores that directive and therefore violates the Home Rule Amendment to the Ohio Constitution.

L. The added absurdity here is that this motor transportation company does not even pay the R.C. 4921.18 tax.

It is important to remember that Panther does not own any of the vehicles on which the R.C. 4921.18 tax is levied but rather has developed a network of owner-operators that it uses to provide services to its customers. These vehicles are owned by the owner-operators and leased to Panther. Under the lease agreements, the owner-operators exclusively lease their vehicles to Panther and (in some instances) provide driving services as well. As one Ohio appellate court explained "[t]his complex system appears to be intended to permit owner-operators and trucking companies to

contractually determine the party that is responsible for paying the tax imposed by R.C. 4921.18[.]" *B&T Express, Inc. v. Pub. Util. Comm.*, 145 Ohio App.3d 656, 670 , 763 N.E.2d 1241, 1252-53 (2001).

Under Panther's owner-operator lease agreement, it is clear that the parties have "contractually" agreed that the owner-operators will pay the R.C. 4921.18 tax. Panther therefore claims an exemption from municipal income tax based on a tax which it ultimately does not even pay.

After it was demonstrated in the proceedings below that Panther does not even pay the R.C. 4921.18 tax, Panther changed the theory of its case—instead of being exempted because it paid the R.C. 4921.18 tax, it now claims that R.C. 4921.25 exempts it from the municipal net profits tax because it is subject to the PUCO's regulatory authority.[10] That Panther has changed the theory of its case does not change the *absurdity* of Panther's claim as being wholly exempt from a municipal income tax.

CONCLUSION

The decision below is fundamentally wrong in its reasoning and unreasonable in its application since it improperly limits and restricts the authority of Ohio municipalities

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10 In its Brief to the Ninth District, Panther explained as follows: "Panther is not claiming exemption from Seville's tax simply because Panther paid the R.C. 4921.18 tax. Panther is exempt from Seville's tax because Panther, as a motor transportation company regulated by the PUCO, is exempt under the second provision of R.C. 4921.25[.]" (Brief of Appellee, Panther II Transportation, Inc. at 19.) (Citations omitted.) Panther describes the second provision as follows: "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." (*Id.* at p. 11.)

to exercise their constitutional right to levy and collect an income tax under Section 3, Article XVIII of the Ohio Constitution. R.C. 4921.25 is not an express statutory provision preempting the municipal income taxing power. The decision also cannot be reconciled with this Court's decision in *Angell v. City of Toledo*, 153 Ohio St. 179 (1950) where the Court recognized that the General Assembly had not passed any law at that time to limit the municipal taxing power. Further, it is contrary to this Court's decision in *Cincinnati Bell Telephone Co. v. Cincinnati*, 81 Ohio St.3d 699, 693 N.E.2d 212 (1998), as it resurrects a form of state-implied preemption of municipal taxing power which was struck down in that case.

The decision below must be reversed. A reversal will reaffirm that municipal taxing power is derived directly from the Ohio Constitution (not the General Assembly) and that the "exercise of that power is [] valid in all respects unless the General Assembly has acted affirmatively by exercising its constitutional prerogative." *Cincinnati Bell,* 81 Ohio St. at 606, 693 N.E.2d at 217.

Respectfully submitted,
Barbara A. Langhenry, Esq., 0038838
Director of Law

By: _____
Linda L. Bickerstaff, Esq., #0052101
Assistant Director of Law

CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief of Appellants, Nassim M. Lynch and the Central Collection Agency 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, Roderick Linton Belfance, LLP, One Cascade Plaza, Suite 1500, Akron, Ohio 44308; 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 1st day of May 2013.

Linda L. Bickerstaff,
Assistant Director of Law

COUNSEL FOR APPELLANTS,
NASSIM M. LYNCH AND THE
CENTRAL COLLECTION AGENCY

APPENDIX

VILLAGE OF SEVILLE BOARD OF INCOME TAX REVIEW
MEDINA COUNTY, OHIO

In Re: Panther II Transportation, Inc. Taxpayer ID: 34-1711719 Taxable Years: 2005-2006	)))))))	**DECISION**

Ms. Roberts, Mrs. Smith, and Mrs. Fontana concur.

This appeal presents a question as to whether O.R.C. §4921.25 precludes the Village of Seville from imposing a net profit tax on the appellant. Upon argument and review, the Village of Seville Board of Income Tax Review (the "Board") affirms the decision of the Tax Administrator and finds that the appellant owed the net profit tax paid during tax year 2005-2006.

FACTS

The appellant, Panther II Transportation, Inc., is a transportation company that focuses on expedited and emergency transportation services.[1] As a transportation company, Panther is subject to the jurisdiction of the Federal Highway Administration and the Public Utilities Commission of Ohio ("PUCO").[2] The PUCO imposes an annual tax on motor carriers pursuant to O.R.C. §4921.18,[3] the Revised Code Title pertaining to Public Utilities. This tax is paid at a fixed amount for each tractor and trailer the appellant uses in transporting property.[4]

1 Panther Refund Claim, dated March 5, 2007.
2 Id.
3 Id.
4 Id.

LAW

The appellant argues that Title 49 of the Ohio Revised Code, particularly O.R.C.§4921.25, precludes a local municipal net profit tax from being imposed on a transportation company governed by O.R.C. Title 49 and under the jurisdiction of the PUCO. In support of this argument, the appellant points to the language of O.R.C. §4921.25. O.R.C. §4921.25 provides as follows:

> 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.
> (Emphasis added).

Relying upon the foregoing highlighted language, the appellant claims that a local municipality's net profit tax is illegal, as it is a tax exacted by a municipal corporation in contravention of this statutory provision. However, the appellant's reading of the statute in question is too restrictive, and fails to recognize the purpose behind Title 49, Chapter 21 of the Ohio Revised Code, to-wit: the establishment of the *PUCO's* jurisdiction over motor transportation companies for the supervision, regulation, and taxation of motor carrier vehicles (as set forth in the Preamble to H.B. 474, enacted in 1923, the precursor to O.R.C. §4921, et seq.[5]), as opposed to a local municipality's exercise of supervision or regulation of motor carrier vehicles, or a municipality's

5 See, attachment to Appellant's Memorandum of March 19, 2008.

taxation of motor carrier vehicles. As noted by the Tax Administrator in the Final Administrative Ruling of December 28, 2007, which analysis is adopted herein, at page 2:

> * * * Section 4921.25 only prohibits municipalities from imposing taxes, fees and charges relating to licensing, registering or regulation of entities covered by that Section that may conflict with the rules and regulations of the PUCO. Because the net profits tax does not relate to licensing, registering or regulation, no conflict with state law exists. State law only prohibits municipalities from levying a tax on income the same as or similar to the public utilities gross receipts excise tax imposed under Title 57 of the Revised Code. Since the tax levied under Section 4921.18 is not of that type, nothing prohibits the Village of Seville from levying its income tax.

The Board further notes that O.R.C. §718.01(D)(1) does not allow a municipality to exempt from a tax on income compensation for the net profit from a business or profession. This statute specifically obliges the Village of Seville to impose a net profit tax on appellant.

For the reasons noted herein, and for the reasons noted in the Final Administrative Ruling of December 28, 2007, the Village of Seville Board of Income Tax Review hereby AFFIRMS said decision denying the appellant's appeal.

Glenna M. Roberts, Chair 6/05/08

Michelle Fontana 6-5-08
Michelle Fontana

Elizabeth J. Smith
Elizabeth Smith

OHIO BOARD OF TAX APPEALS

Panther II Transportation, Inc.,	)	CASE NO. 2008-M-1247
	)	
Appellant,	)	(MUNICIPAL INCOME TAX)
	)	
vs.	)	DECISION AND ORDER
	)	
Village of Seville Board of Income Tax Review,	)	
	)	
Appellee.	)	

APPEARANCES:

For the Appellant -	Calfee, Halter & Griswold LLP James F. Lang 1400 KeyBank Center 800 Superior Avenue Cleveland, Ohio 44114
For the Appellee - Income Tax Administrator	Robert J. Triozzi Director of Law City of Cleveland Law Department Linda L. Bickerstaff Assistant Director of Law 205 W. Saint Clair Avenue Cleveland, Ohio 44113
For the Village of - Seville	Lesiak, Hensal & Hathcock Theodore J. Lesiak 3995 Medina Road, Suite 210 Medina, Ohio 44256

Entered AUG 23 2011

Ms. Margulies, Mr. Johrendt, and Mr. Williamson concur.

This cause and matter comes to be considered by the Board of Tax Appeals upon a notice of appeal filed by Panther Transportation, Inc. ("Panther"), appellant. Panther challenges a decision of the Village of Seville ("Seville") Board of Income Tax Review, Seville's municipal board of appeal established by R.C. 718.11,

in which the MBOA[1] denied the refund of certain income taxes paid by Panther to Seville. The tax years in issue are 2005 and 2006. Panther argues that any imposition of a net profit tax upon the corporation is in violation of the preclusion granted to motor transportation companies by virtue of R.C. 4921.25.

The matter is considered upon the notice of appeal, the statutory transcript certified to this board by the MBOA, the record of the hearing held before this board, and the briefs of the appellant, the Tax Administrator, and Seville.

A review of the record in this matter reveals that Panther is a motor transportation company which began operations in 1992. H.R. at 33. Originally, Panther operated only within the state of Ohio; in 1995, it began interstate operations. H.R. at 34. For the time pertinent to this appeal, Panther's interstate service was regulated by the Federal Highway Administration, a part of the Department of Defense, and its intrastate service by the Public Utilities Commission of Ohio ("PUCO"). At hearing, Panther provided evidence that the company was licensed by and in good standing with both entities. Appellant's Exs. A, C; Appellee Tax Administrator's Ex. 14. As was explained by Mr. Allen H. Motter, vice president of legal and risk management for Panther, the federal and state licenses permit a motor transportation company to operate a business of transportation for hire. H.R. at 24. The licenses also provide a tracking mechanism for equipment used by the carrier. Id.

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[1] Although Seville has established a "board of tax review" for income tax purposes, we note that R.C. 718.11 and 5717.011 refer to such an entity as a "municipal board of appeal." For consistency, we shall refer to an entity issuing decisions under R.C. 718.11 as a municipal board of appeal, or MBOA, regardless of the actual name selected by the municipality.

According to Mr. Motter, the primary interest of the PUCO (as well as its federal counterpart) is safety. H.R. at 25. Rate regulation, another primary component of licensing at one time, is no longer a focus, as motor transportation companies have tariffs on file, but are no longer required to have rates on file. H.R. at 27.

Mr. Motter explained that, except for the issuance of commercial driver's licenses, traditionally, federal regulations preempt state regulations regarding interstate transportation. H.R. at 30, 32. On an intrastate basis, the states have the ability to institute some safety regulations. H.R. at 31. However, according to Mr. Motter, municipalities within Ohio have very limited authority to regulate intrastate motor transportation companies. Id.

In both 2005 and 2006, Panther reported and paid income tax to Seville. It now believes that the taxes were paid in error. Panther bases its claim on R.C. 4921.25. That section provides:

> "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, bylaws, 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." (Emphasis added.)

Panther argues that, by virtue of its status as a motor vehicle transportation company, any taxes assessed by a municipal corporation such as Seville are illegal.

In *Cincinnati Bell Tel. Co. v. City of Cincinnati* (1998), 81 Ohio St.3d 599, the Ohio Supreme Court concluded that preemption in the tax arena requires an express act of the General Assembly. In that appeal, a telephone company made a similar argument to the one before this board today; i.e., municipalities are preempted from imposing a net profits (income) tax on those entities required to pay a public utilities excise tax imposed by R.C. 5727.30. In thoroughly considering the matter, the court held that the "Home Rule Amendment," Ohio Const. Sect. 3, Article XVIII, confers sovereignty upon municipalities to "exercise all powers of local self-government." One such power is the power to tax. Id. at 602; *State ex rel. Zielonka v. Carrel* (1919), 99 Ohio St. 220.

The court then recognized an inconsistency within the Ohio Constitution, which also grants to the Ohio General Assembly the power to limit a municipality's taxing authority. Section 6, Article XIII of the Ohio Constitution provides that "the General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation *** so as to prevent the abuse of such power."

In harmonizing this apparent inconsistency, the court overturned earlier case law which had approved the doctrine of "implied preemption." That doctrine was first articulated in *Cincinnati v. Am. Tel. & Tel. Co.* (1925), 112 Ohio St. 493, wherein the court held that a local government such as a municipality was free to impose a tax only if the General Assembly had not entered the field by previously enacting a similar tax. Paragraph 2 of the syllabus provides:

> "The power granted to the municipality by Section 3, Article XVIII, of the Constitution of the state of Ohio, to lay an occupational tax in the exercise of its powers of local self-government, does not extend to fields within such municipality which have already been occupied by the state."

In *Cincinnati Bell,* the court concluded that the Home Rule Amendment was a broad grant of power to the municipalities, and should only be restricted by an affirmative act of the General Assembly. The court then turned to R.C. 718.01(F) as an example of such an affirmative act:

> "That the General Assembly is aware that it may exercise its limiting power by expressly preempting municipal taxation by statute is demonstrated by its passage of specific prohibitions on municipal taxation of certain types of income as provided in R.C. 718.01(F). Pursuant to R.C. 718.01(F), 'no municipal corporation shall tax' military pay, income of certain nonprofit organizations, certain forms of intangible income, compensation paid to precinct election officials, and compensation paid to certain employees of transit authorities. Similarly, in providing for the collection of a state income tax, the General Assembly has expressly provided that 'the levy of this tax on income does not prevent a municipal corporation, a joint economic development zone created under section 715.691, or a joint economic development

> district created under section 715.70 or 715.71 or sections 715.72 to 715.81 of the Revised Code from levying a tax on income.' R.C. 5747.02(C)." Id. at 606.

It is clear that Seville's income tax is applicable to Panther unless expressly preempted by the General Assembly. Panther claims that R.C. 4921.25 is just such an express preemption. Panther argues that R.C. 4921.25 expressly exempts motor transportation companies from *all* municipal taxes, fees, and other exactions except for property tax.

The Tax Administrator's argument in favor of taxation is twofold. First, the Tax Administrator argues that R.C. 4921.18 imposes a license fee for the privilege of conducting a motor transportation business in Ohio. According to the Tax Administrator, the preemption contained in R.C. 4921.25 applies only to the imposition of taxes, fees and charges relating to licensing, registering or regulating the vehicles used by the motor transportation company. As a result, there is no express prohibition against the imposition of a net profits tax on the motor transportation company itself.

The Tax Administrator also argues that the General Assembly through R.C. 718.01(F)[2] has enacted a statute which expressly preempts a municipality from imposing tax on various types of income. The Tax Administrator argues that there is no prohibition in R.C. 718.01 of the taxation of a motor transportation company's net profits. Therefore, the Tax Administrator argues, the taxation of such income is not

[2] Our consideration relates to the provisions of R.C. Chapter 718 as applicable during the tax year before us. The provisions of former R.C. 718.01(F) have since been recodified into R.C. 718.01(H).

expressly preempted. Without express preemption, Seville is permitted to tax such income.

We begin our review of this matter by noting that when cases are appealed from a municipal board of review to the BTA, the burden of proof is on the appellant to establish its right to the relief requested. *City of Marion v. City of Marion Bd. of Review* (Aug. 10, 2007), BTA No. 2005-T-1464, unreported, appeal dismissed, Marion App. No. 9-07-37, 2008-Ohio-2496. See, also, *Tetlak v. Bratenahl* (2001), 92 Ohio St.3d 46, at 51, 2001-Ohio-129. Cf. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. In this regard, we will determine the weight and credibility to be accorded the evidence presented. *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St.2d 13.

Panther argues that the specific use of the word "tax" within the list of items included in R.C. 4921.25 requires a finding that any municipal tax (with the exception of general property tax) cannot be imposed upon a motor transportation company. The Tax Administrator, however, argues that income taxes may be imposed against a motor transportation company, because R.C. 4921.25 must be read in conjunction with other provisions within Chapter 4921. The administrator argues that the "taxes" assessed in Chapter 4921 are licensing fees, and, as such, only similar license fees are improperly assessed against a motor transportation company. The administrator also argues that only the specific types of income listed in R.C. 718.01 are exempt from municipal taxation.

There is no case law which directly addresses the R.C. 4921.25 preemption. There are, however, some basic statutory construction precepts which are relevant. The first is that in determining how to apply a statute, a tribunal's "paramount concern is the legislative intent in enacting the statute." *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, ¶ 21; *Dirksen v. Green Cty. Bd. of Revision*, 109 Ohio St.3d 470, 2006-Ohio-2990; *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969.

Legislative intent is first to be sought from the language employed. "[I]f the words be free from ambiguity and doubt, and express plainly, clearly, and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation." *Singluff v. Weaver* (1902), 66 Ohio St. 621, paragraph two of the syllabus.

In the present appeal, we find the language of the statute to be clear. R.C. 4921.25 specifically states that the fees and charges imposed under R.C. 4921.18 are in addition to all other taxes imposed by other sections of the Revised Code, except for assessments required by R.C. 4905.10. Therefore, R.C. 4921.25 recognizes that a motor transportation company is responsible to the state for taxes imposed by law.

However, as to municipal corporations (i.e., cities), townships, and counties, governmental entities which are also constitutionally authorized to impose taxes upon their residents, the General Assembly expressly limits the taxes applicable to motor transportation companies. R.C. 4721.25 specifically exempts such

companies from the taxes imposed by local authorities (except the general property tax) on public utility companies (R.C. 4905.03) and motor transportation companies (R.C. 4921.02 to 4921.32).

There appears to be no ambiguity in the statement preempting all taxes imposed by local authorities. While the Tax Administrator argues that the statute should be read in pari materia with R.C. 4921.18, which imposes what it contends is a motor vehicle licensing fee, we see no inconsistency in the General Assembly instituting a license fee and preempting a net profits tax. The General Assembly has been constitutionally authorized to limit a municipality's taxing authority. Sec. 13, Art. VIII, Ohio Const. Therefore, this board can find no impediment to the application of both R.C. 4921.18 and R.C. 4921.25.

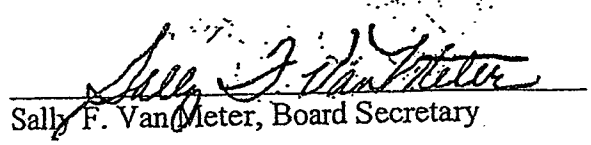
The Tax Administrator makes a number of other arguments as to the propriety of taxation in this instance, which we do not find compelling. While R.C. 718.01(D)(1) prohibits a municipal corporation from exempting a specific business or corporation from municipal income tax obligations, this subsection should not be read as inconsistent with the preemption found in R.C. 4921.25. Seville did not legislatively exempt any business from income tax obligations – the General Assembly did. Next, the Tax Administrator criticizes Panther for suggesting that license fees it obligates its drivers to pay or reimburse the company for are a basis for preemption. However, we agree with Panther that it is not the payment of license fees pursuant to R.C. 4721.18 that causes R.C. 4721.25 to be applicable. It is the requirement that Panther obtain a certificate of public convenience and necessity that

is the triggering event that causes R.C. 4721.25 to be applicable to Panther's municipal income tax obligations. The evidence at hearing, as well as the Tax Administrator's finding that Panther was a motor transportation company, is sufficient for this board to conclude that R.C. 4721.25 is applicable.

Finally, the Tax Administrator argues that Panther has failed to produce evidence of a constitutional violation. The Tax Administrator is correct in his argument that this board does not have the authority to reach constitutional claims, but instead serves as a receiver of evidence regarding such claims. *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195. However, in this case, the board finds that R.C. 4721.25 provides the exemption from municipal taxation. Therefore, any constitutional claims are rendered moot.

As a result, this board concludes that Panther is correct in its claim that Seville unlawfully collected gross receipts taxes for tax years 2005 and 2006. Therefore, the determination of the Tax Administrator is hereby reversed.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



Sally F. VanMeter, Board Secretary

OHIO BOARD OF TAX APPEALS

Panther II Transportation, Inc.,	)	CASE NO. 2008-M-1247
	)	
Appellant,	)	(MUNICIPAL INCOME TAX)
	)	
vs.	)	CORRECTING ORDER
	)	
Village of Seville Board of Income Tax Review,	)	
	)	
Appellee.	)	

APPEARANCES:

For the Appellant - Calfee, Halter & Griswold LLP
James F. Lang
1400 KeyBank Center
800 Superior Avenue
Cleveland, Ohio 44114

For the Appellee - Income Tax Administrator
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For the Village of - Seville
Lesiak, Hensal & Hathcock
Theodore J. Lesiak
3995 Medina Road, Suite 210
Medina, Ohio 44256

Entered AUG 30 2011

Ms. Margulies, Mr. Johrendt, and Mr. Williamson concur.

The board's decision and order issued on August 23, 2011 included misidentified revised code sections. Therefore, the board reissues its determination fully herein, correcting only the statutory references.

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Administrator's Ex. 14. As was explained by Mr. Allen H. Motter, vice president of legal and risk management for Panther, the federal and state licenses permit a motor transportation company to operate a business of transportation for hire. H.R. at 24. The licenses also provide a tracking mechanism for equipment used by the carrier. Id.

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Panther argues that the specific use of the word "tax" within the list of items included in R.C. 4921.25 requires a finding that any municipal tax (with the exception of general property tax) cannot be imposed upon a motor transportation company. The Tax Administrator, however, argues that income taxes may be

[2] Our consideration relates to the provisions of R.C. Chapter 718 as applicable during the tax year before us. The provisions of former R.C. 718.01(F) have since been recodified into R.C. 718.01(H).

imposed against a motor transportation company, because R.C. 4921.25 must be read in conjunction with other provisions within Chapter 4921. The administrator argues that the "taxes" assessed in Chapter 4921 are licensing fees, and, as such, only similar license fees are improperly assessed against a motor transportation company. The administrator also argues that only the specific types of income listed in R.C. 718.01 are exempt from municipal taxation.

There is no case law which directly addresses the R.C. 4921.25 preemption. There are, however, some basic statutory construction precepts which are relevant. The first is that in determining how to apply a statute, a tribunal's "paramount concern is the legislative intent in enacting the statute." *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, ¶ 21; *Dirksen v. Green Cty. Bd. of Revision*, 109 Ohio St.3d 470, 2006-Ohio-2990; *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969.

Legislative intent is first to be sought from the language employed. "[I]f the words be free from ambiguity and doubt, and express plainly, clearly, and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation." *Singluff v. Weaver* (1902), 66 Ohio St. 621, paragraph two of the syllabus.

In the present appeal, we find the language of the statute to be clear. R.C. 4921.25 specifically states that the fees and charges imposed under R.C. 4921.18 are in addition to all other taxes imposed by other sections of the Revised Code, except for assessments required by R.C. 4905.10. Therefore, R.C. 4921.25 recognizes

that a motor transportation company is responsible to the state for taxes imposed by law.

However, as to municipal corporations (i.e., cities), townships, and counties, governmental entities which are also constitutionally authorized to impose taxes upon their residents, 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 (except the general property tax) on public utility companies (R.C. 4905.03) and motor transportation companies (R.C. 4921.02 to 4921.32).

There appears to be no ambiguity in the statement preempting all taxes imposed by local authorities. While the Tax Administrator argues that the statute should be read in pari materia with R.C. 4921.18, which imposes what it contends is a motor vehicle licensing fee, we see no inconsistency in the General Assembly instituting a license fee and preempting a net profits tax. The General Assembly has been constitutionally authorized to limit a municipality's taxing authority. Sec. 13, Art. VIII, Ohio Const. Therefore, this board can find no impediment to the application of both R.C. 4921.18 and R.C. 4921.25.

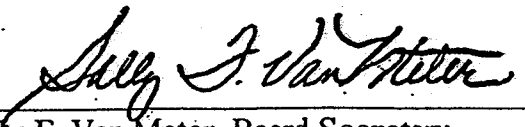
The Tax Administrator makes a number of other arguments as to the propriety of taxation in this instance, which we do not find compelling. While R.C. 718.01(D)(1) prohibits a municipal corporation from exempting a specific business or corporation from municipal income tax obligations, this subsection should not be read as inconsistent with the preemption found in R.C. 4921.25. Seville did not

legislatively exempt any business from income tax obligations – the General Assembly did. Next, the Tax Administrator criticizes Panther for suggesting that license fees it obligates its drivers to pay or reimburse the company for are a basis for preemption. However, we agree with Panther that it is not the payment of license fees pursuant to R.C. 4921.18 that causes R.C. 4921.25 to be applicable. It is the requirement that Panther obtain a certificate of public convenience and necessity that is the triggering event that causes R.C. 4921.25 to be applicable to Panther's municipal income tax obligations. The evidence at hearing, as well as the Tax Administrator's finding that Panther was a motor transportation company, is sufficient for this board to conclude that R.C. 4921.25 is applicable.

Finally, the Tax Administrator argues that Panther has failed to produce evidence of a constitutional violation. The Tax Administrator is correct in his argument that this board does not have the authority to reach constitutional claims, but instead serves as a receiver of evidence regarding such claims. *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195. However, in this case, the board finds that R.C. 4921.25 provides the exemption from municipal taxation. Therefore, any constitutional claims are rendered moot.

As a result, this board concludes that Panther is correct in its claim that Seville unlawfully collected gross receipts taxes for tax years 2005 and 2006. Therefore, the determination of the Tax Administrator is hereby reversed.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



Sally F. Van Meter, Board Secretary

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DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

PANTHER II TRANSPORTATION, INC.

Appellee

v.

VILLAGE OF SEVILLE BOARD OF INCOME TAX REVIEW, et al.

Appellants

C.A. No. 11CA0092-M
11CA0093-M

APPEAL FROM JUDGMENT
ENTERED IN THE
OHIO BOARD OF TAX APPEALS
COUNTY OF MEDINA, OHIO
CASE No. 2008-M-1247

DECISION AND JOURNAL ENTRY

Dated: August 6, 2012

WHITMORE, Presiding Judge.

{¶1} Appellants, the Village of Seville Board of Income Tax Review ("Seville") and Income Tax Administrator Nassim M. Lynch and the Central Collection Agency (collectively, "Central Collection"), now appeal from the judgment of the Ohio Board of Tax Appeals. This Court affirms.

I

{¶2} Plaintiff-Appellee, Panther II Transportation, Inc. ("Panther II"), is a motor vehicle transportation company that leases tractors from owner-operators to haul its trailers for both interstate and intrastate highway travel. As a motor vehicle transportation company, Panther II is subject to the regulation of the Public Utilities Commission of Ohio ("PUCO") and pays an annual state tax for the issuance of a certificate of public convenience. In 2005 and 2006, Panther II also paid a tax on its local net profits to the Village of Seville, the municipality in which it was headquartered.

{¶3} In March 2007, Panther II filed a refund claim with the Village of Seville for the return of the taxes it paid on its net profits. Panther II argued that the Village of Seville could not levy a local net profits tax upon it because state law preempted the municipality's tax. Central Collection, the tax administrator for the Village of Seville, denied Panther II's refund claim. Panther II appealed Central Collection's final administrative ruling to Seville, which affirmed the administrative ruling and denied Panther II's refund. Panther II then appealed to the Ohio Board of Tax Appeals. The Board of Tax Appeals reversed Central Collection's ruling and determined that state law preempted the Village of Seville's local tax against Panther II.

{¶4} Seville and Central Collection now appeal from the Board of Tax Appeals' decision and collectively raise seven assignments of error for our review. For ease of analysis, we consolidate the assignments of error.

II

Seville Board's Assignment of Error

THE OHIO BOARD OF TAX APPEALS ERRED IN DETERMINING THAT PLAINTIFF/APPELLEE IS NOT SUBJECT TO MUNICIPAL INCOME TAXATION PURSUANT TO R.C. 4921.25[.]

Central Collection's Assignment of Error Number One

THE OHIO BOARD OF TAX APPEALS' DECISION IS UNREASONABLE AND UNLAWFUL AS A MATTER OF LAW IN HOLDING THAT R.C. 4921.25 PREEMPTS A MUNICIPALITY'S NET PROFITS INCOME TAX AS THAT TAX IS APPLIED TO PANTHER AND OTHER MOTOR TRANSPORTATION COMPANIES DEFINED UNDER R.C. CHAPTER 4921.

Central Collection's Assignment of Error Number Two

THE OHIO BOARD OF TAX APPEALS' DECISION IS UNREASONABLE AND UNLAWFUL AS A MATTER OF LAW IN HOLDING THAT R.C. 4921.25 IS AN AFFIRMATIVE EXPRESS ACT OF THE GENERAL ASSEMBLY UNDER SECTION 13, ARTICLE XVIII OF THE OHIO CONSTITUTION THAT LIMITS AND RESTRICTS A MUNICIPALITY'S POWER TO IMPOSE AN INCOME TAX.

Central Collection's Assignment of Error Number Three

THE OHIO BOARD OF TAX APPEALS' DECISION IS UNREASONABLE AND UNLAWFUL AS A MATTER OF LAW WHERE (A) THE WORD "TAX" HAS DIFFERENT MEANINGS DEPENDING UPON THE CONTEXT IN WHICH THE WORD IS USED; (B) THERE IS A CLEAR DISTINCTION BETWEEN A LICENSE FEE OR TAX EXACTED IN THE EXERCISE OF A MUNICIPALITY'S POLICE POWER AND A TAX LEVIED UNDER ITS TAXING POWER; (C) R.C. 4921.25 ONLY DEALS WITH THE LICENSING AND REGULATION OF MOTOR TRANSPORTATION COMPANIES; (D) THE R.C. 4921.18 TAX IS CLEARLY A LICENSE TAX; AND (E) R.C. 4921.25 THEREFORE DOES NOT PREEMPT A MUNICIPALITY'S RIGHT TO TAX UNDER ITS TAXING POWER.

Central Collection's Assignment of Error Number Four

THE OHIO BOARD OF TAX APPEALS' DECISION IS UNREASONABLE AND UNLAWFUL AS A MATTER OF LAW WHERE THE EXPRESS STATUTORY PROHIBITIONS PREEMPTING THE MUNICIPAL TAX ARE FOUND IN R.C. 718.01(F) (SINCE RECODIFIED AS R.C. 718.01(H)).

Central Collection's Assignment of Error Number Five

THE OHIO BOARD OF TAX APPEALS' DECISION IS UNREASONABLE AND UNLAWFUL AS A MATTER OF LAW WHERE R.C. 718.01(D)(1) CLEARLY PROVIDES THAT "NO MUNICIPAL CORPORATION SHALL EXEMPT FROM A TAX ON INCOME . . . THE NET PROFIT FROM A BUSINESS OR PROFESSION."

Central Collection's Assignment of Error Number Six

THE OHIO BOARD OF TAX APPEALS' DECISION IS UNREASONABLE AND UNLAWFUL AS A MATTER OF LAW WHERE PANTHER DOES NOT OWN THE VEHICLES IT USES BUT INSTEAD UTILIZES OWNER-OPERATORS AND OTHER TRUCKING COMPANIES WHO ACTUALLY ARE RESPONSIBLE FOR PAYING THE R.C. 4921.18 LICENSE FEE.

{¶5} In all of the foregoing assignments of error, Seville and Central Collection argue that the Board of Tax Appeals erred by concluding that state law preempts the local net profits tax the Village of Seville levied against Panther II as a motor vehicle transportation company. We do not agree that the Board of Tax Appeals erred in its conclusion.

{¶6} Appeals taken from a tax board's decision are governed by Chapter 5717 of the Revised Code. *Elyria City School Dist. Bd. of Edn. v. Ellis*, 9th Dist. No. 07CA009191, 2008-Ohio-4293, ¶ 9. "[P]ursuant to R.C. 5717.04, our review of the [Board of Tax Appeals'] decision is 'limited to a determination, based on the record, of the reasonableness and lawfulness of the Board of Tax Appeals' decision." (Citations omitted.) *Nimon v. Zaino*, 9th Dist. No. 01CA007918, 2002 WL 276775, *1 (Feb. 27, 2002), quoting *Federated Dept. Stores v. Lindley*, 8 Ohio St.3d 35, 38 (1983). This Court will affirm the factual determinations of the Board of Tax Appeals so long as the record contains reliable and probative support for its determination. *Ellis* at ¶ 7. Yet, this Court "will not hesitate to reverse a [Board of Tax Appeals'] decision that is based on an incorrect legal conclusion." *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, ¶ 14, quoting *Gahanna-Jefferson Local School Dist. Bd. of Edn. v. Zaino*, 93 Ohio St.3d 231, 232 (2001).

{¶7} The Home Rule Amendment embodied in Article XVIII, Section 3 of the Ohio Constitution, permits municipalities to exercise the powers of local self-government, including the power to tax. *Cincinnati Bell Tel. Co. v. Cincinnati*, 81 Ohio St.3d 599, 602 (1998). "[T]he intention of the Home Rule Amendment was to eliminate statutory control over municipalities by the General Assembly." *Id.* at 605. Accordingly, while the General Assembly has the power to restrict a municipality's authority to tax, "a proper exercise of this limiting power requires an express act of restriction by the General Assembly" in the form of "an express statutory limitation." *Id.* at 605-606. A municipality may enact a net profits tax "in the absence of an express statutory prohibition of the exercise of such power by the General Assembly." *Id.* at 601. Where a direct conflict exists between a municipal ordinance and a state law, the state law

will prevail. *Wadsworth v. Stanley*, 9th Dist. Nos. 10CA0004-M, 10CA0005-M, 10CA0006-M & 10CA0007-M, 2010-Ohio-4663, ¶ 17.

{¶8} At issue in this appeal is the plain language of R.C. 4921.25. The relevant language of that statute reads:

> 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 * * * 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. 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.

R.C. 4921.25. R.C. 4921.18 governs the specific monetary sum a motor transportation company must annually pay to PUCO to receive its certificate of public convenience; a document necessary for the use of any motor vehicle or truck operated by the company in the state. By virtue of R.C. 4921.25's plain language, a motor transportation company's annual payment for its certificate of public convenience does not absolve it from the payment of other applicable state taxes, fees, and charges. Its status as a motor transportation company, however, subjects it to all the laws and regulations set forth by PUCO. Former R.C. 4905.03(A)(3); R.C. 4905.03(A)(2); R.C. 4921.01(D); R.C. 4921.02(A). 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. Any tax, other than the general property tax, is "illegal." R.C. 4921.25. Therefore, a motor transportation company that is subject to PUCO's laws and remains compliant with its statutory obligations is not subject to the taxes or laws of a municipal corporation, other than those specifically allowed by statute. *Id.* (exempting motor transportation

company from all taxes, except the general property tax, and all laws, except reasonable local police regulations). *Accord Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 44 (9th Dist.1995) ("[L]ocal subdivisions may make reasonable local police regulations relating to motor transportation companies so long as the local regulations are not inconsistent with the authority of [] PUCO.").

{¶9} In support of their argument that the General Assembly did not expressly restrict municipalities from taxing the net profits of a motor transportation company, Seville and Central Collection first point to R.C. 718.01. That statute contains several provisions regarding the taxing power of municipal corporations. It provides that "[e]xcept as otherwise provided in this section, no municipal corporation shall exempt from a tax on income compensation * * * the net profit from a business." R.C. 718.01(D)(1). The statute then goes on to provide a list of compensations and incomes that municipal corporations shall not tax. R.C. 718.01(H); Former R.C. 718.01(F). Seville and Central Collection argue that, because the net profits of a motor transportation company do not appear on the list of exempted items, Panther II's net profits are not exempted from taxation and R.C. 718.01(D)(1) actually requires the Village of Seville to tax Panther II. Although R.C. 718.01 does contain a specific list of exemptions to the taxing authority of a municipal corporation, it also provides that "[n]othing in this section * * * 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); Former R.C. 718.01(H). The statute recognizes that its list of non-taxable compensations and incomes is not exhaustive and other existing laws may void a municipality's taxing power. Accordingly, we are not persuaded that Seville had the authority to tax Panther II simply because Panther II's net profits are not per se exempted from taxation under R.C. 718.01.

{¶10} The primary position of Seville and Central Collection is that when the General Assembly used the word "tax" in R.C. 4921.25 it was not referring to an income tax. Instead, they argue that the tax references in R.C. 4921.25 pertain to license and regulatory fees and charges. Seville and Central Collection point to R.C. 4921.18, which also uses the word "tax," but which in actuality is a flat licensing fee unrelated to profit or income. Seville and Central Collection posit that the General Assembly's intent in enacting R.C. 4921.25 was only to expressly prohibit municipalities from imposing any additional licensing or regulatory taxes upon motor transportation companies beyond those already imposed by PUCO. As such, they argue, R.C. 4921.25 does not prohibit Seville from taxing Panther II's net profits. The plain language of R.C. 4921.25 does not support Seville and Central Collection's argument.

{¶11} In prohibiting municipal corporations from assessing, charging, fixing or exacting taxes from motor transportation companies, R.C. 4921.25 specifically refers to "all fees, license fees, annual payments, license taxes, or taxes or other money exactions." R.C. 4921.25. Had the General Assembly intended the word "tax" to mean license fees or charges, it would not have been necessary to separately prohibit the imposition of "license fees" and "license taxes" in addition to "taxes." *See Leasure v. Adena Local School Dist.*, 9th Dist. No. 11CA3249, 2012-Ohio-3071, ¶ 17 ("To determine legislative intent, a court must first look to the words used in the statute."). The statute plainly applies to "all * * * taxes." More importantly, the statute exempts general property taxes from its ban on municipal tax. General property taxes are not simply license and regulatory fees and charges. If the General Assembly had intended R.C. 4921.25 only to exempt municipalities from imposing additional licensing or regulatory taxes, it would not have been necessary to exempt general property taxes from R.C. 4921.25's application. Lastly, the fact that the General Assembly exempted general property taxes and not net profits

taxes is telling. "Under the general rule of statutory construction *expressio unius est exclusio alterius*, the expression of one or more items of a class implies that those not identified are to be excluded." *In re Estate of Horton*, 9th Dist. Nos. 20695 & 20741, 2002 WL 465428, *3 (Mar. 27, 2002), quoting *State v. Droste*, 83 Ohio St.3d 36, 39 (1998). The General Assembly specifically chose to exempt general property taxes from its express statutory prohibition on "all * * * taxes" in R.C. 4921.25. Had the General Assembly wished to exempt other taxes in addition to general property taxes, it certainly could have done so. We agree with the conclusion of the Board of Tax Appeals that R.C. 4921.25 prohibits the Village of Seville from taxing Panther II's net profits under the doctrine of express preemption. Consequently, all of the assignments of error raised by Seville and Central Collection lack merit.

III

{¶12} Seville and Central Collection's assignments of error are overruled. The judgment of the Board of Tax Appeals is affirmed.

Judgment affirmed.

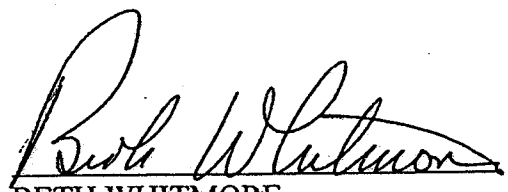
There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Ohio Board of Tax Appeals, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.



BETH WHITMORE
FOR THE COURT

MOORE, J.
BELFANCE, J.
CONCUR.

APPEARANCES:

THEODORE J. LESIAK, Attorney at Law, for Appellant.

BARBARA A. LANGHENRY, Interim Director of Law, and LINDA L. BICKERSTAFF, Assistant Director of Law, for Appellants.

JAMES F. LANG and N. TREVOR ALEXANDER, Attorneys at Law, for Appellee.

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.	)	Case No: 12-1592 On Appeal from the Medina County Court of Appeals, Ninth Appellate District Court of Appeals Consolidated Case Nos. 11CA0092-M; 11CA0093-M

NOTICE OF APPEAL OF APPELANTS,
NASSIM M. LYNCH AND THE CENTRAL COLLECTION AGENCY

Barbara A. Langhenry (0038838)
Interim Director of Law
Linda L. Bickerstaff (0052101) (COUNSEL OF RECORD)
Assistant Director of Law
City of Cleveland Department of Law
205 W. St. Clair Avenue
Cleveland, Ohio 44113
(216) 664-4406
(216) 420-8299 (facsimile)
lbickerstaff@city.cleveland.oh.us

COUNSEL FOR APPELLANTS,
NASSIM M. LYNCH AND THE
CENTRAL COLLECTION AGENCY

FILED
SEP 10 2012
CLERK OF COURT
SUPREME COURT OF OHIO

James F. Lang (0022850) (COUNSEL OF RECORD)
Trevor Alexander (0080713)
Calfee, Halter & Griswold LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114-1607
(216) 622-8200
(216) 241-0816 (facsimile)
jlang@calfee.com
talexander@calfee.com

COUNSEL FOR APPELLEE,
PANTHER II TRANSPORATION, INC.

Theodore J. Lesiak (0041998)
Lesiak Hensal & Hathcock, LLC
3995 Medina Road, Suite 210,
Medina, Ohio 44256
(330) 764-3200
(330) 764-3202 (facsimile)
lesiak@lhhlaw.com

COUNSEL FOR APPELLANT,
VILLAGE OF SEVILLE BOARD OF INCOME TAX REVIEW

Rebecca K. Schaltenbrand, Esq. (0064817)
Ice Miller LLP
600 Superior Avenue East, Suite 1701
Cleveland, Ohio 44114
(216) 621-5307
(216) 394-5089 (facsimile)
rebecca.schaltenbrand@icemiller.com

John Gotherman, Esq.
Ohio Municipal League
175 South Third Street, Suite 510
Columbus, Ohio 43215-7100

COUNSEL FOR AMICUS CURIAE,
THE OHIO MUNICIPAL LEAGUE

NOTICE OF APPEAL OF APPELLANTS,
NASSIM M. LYNCH AND THE CENTRAL COLLECTION AGENCY

Appellants Nassim M. Lynch and the Central Collection Agency hereby give notice of appeal to the Supreme Court of Ohio from the judgment and opinion of the Medina County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Consolidated Case Nos. 11CA0092-M; 11CA0093-M on August 6, 2012.

This case raises a substantial constitutional question and is one of public or great general interest. A time-stamped copy of the Court of Appeals' judgment and opinion is attached hereto for the Court's reference.

Respectfully submitted,
Barbara A. Langhenry, Esq.
Interim Director of Law

By: _____
Linda L. Bickerstaff, Counsel of Record
Assistant Director of Law

COUNSEL FOR APPELLANTS,
NASSIM M. LYNCH AND THE
CENTRAL COLLECTION AGENCY

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellee, Panther II Transportation, Inc., 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, Rebecca K. Schaltenbrand, Esq., Ice Miller LLP, 600 Superior Avenue East, Suite 1701, Cleveland, Ohio 44114 and John Gotherman, Esq., Ohio Municipal League, 175 South Third Street, Suite 510, Columbus, Ohio 43215-7100, on this 18th day of September 2012.

Linda L. Bickerstaff, Counsel of Record
Assistant Director of Law

COUNSEL FOR APPELLANTS,
NASSIM M. LYNCH AND THE
CENTRAL COLLECTION AGENCY

FILED
SEP 28 2012
CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

Panther II Transportation, Inc.

v.

Village of Seville Board of Income Tax Review, et al.

Case No. 2012-1592

ENTRY

This cause is pending before the court as a discretionary appeal and claimed appeal of right.

It is ordered by the court, sua sponte, that this cause is consolidated with Supreme Court Case No. 2012-1589, *Panther II Transportation, Inc. v. Village of Seville Board of Income Tax Review, et al.* The parties shall file two originals of all future documents filed in this case, and include both case numbers on the cover page of the documents, but shall only file the appropriate number of copies for a document that are required for a single case.

(Medina County Court of Appeals; Nos. 11CA0092-M and 11CA0093-M)

Maureen O'Connor
Chief Justice

FILED
JAN 23 2013
CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

Panther II Transportation, Inc.

v.

Village of Seville Board of Income Tax Review et al.

Case No. 2012-1592

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Medina County Court of Appeals; Nos. 11CA0092-M and 11CA0093-M)

Maureen O'Connor
Chief Justice

The Supreme Court of Ohio

FILED
MAR 13 2013
CLERK OF COURT
SUPREME COURT OF OHIO

Panther II Transportation, Inc. v. Village of Seville Board of Income Tax Review et al.	Case No. 2012-1592 RECONSIDERATION ENTRY Medina County

It is ordered by the court that appellant and appellees' motions for reconsideration in this case are granted and the appeal is accepted.

It is further ordered that the clerk shall issue an order for the transmittal of the record from the Court of Appeals for Medina County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Medina County Court of Appeals; Nos. 11CA0092-M and 11CA0093-M)

Maureen O'Connor
Chief Justice

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*** ARCHIVE DATA ***

Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through file 47
*** Annotations current through July 22, 2011 ***

TITLE 49. PUBLIC UTILITIES
CHAPTER 4921. PUBLIC UTILITIES COMMISSION -- MOTOR TRANSPORTATION COMPANIES

*ORC Ann. **4921.25*** (2011)

§ **4921.25.** Fees and charges

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.

HISTORY:

GC § 614-98; 110 v 211; Bureau of Code Revision. Eff 10-1-53.

5 of 7 DOCUMENTS

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*** ARCHIVE DATA ***

Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through file 47
*** Annotations current through July 22, 2011 ***

TITLE 49. PUBLIC UTILITIES
CHAPTER 4921. PUBLIC UTILITIES COMMISSION -- MOTOR TRANSPORTATION COMPANIES

ORC Ann. 4921.18 (2011)

§ 4921.18. Taxes

(A) Every motor transportation company or common carrier by motor vehicle operating in this state shall, at the time of the issuance of a certificate of public convenience and necessity to it and annually thereafter on or between the first and the fifteenth days of July of each year, pay to the public utilities commission, for and on behalf of the treasurer of state, the following taxes:

(1) For each motor-propelled or motor-drawn vehicle used for transporting persons, thirty dollars;

(2) For each commercial tractor, as defined in *section 4501.01 of the Revised Code*, used for transporting property, thirty dollars;

(3) For each motor truck transporting property, twenty dollars.

(B) A trailer used by a motor transportation company or common carrier by motor vehicle shall not be taxed under this section.

(C) The annual tax levied by this section does not apply in those cases where the commission finds that the movement of agricultural commodities or foodstuffs produced therefrom requires a temporary and seasonal use of vehicular equipment for a period of not more than ninety days. In such event the tax on such vehicular equipment shall be twenty-five per cent of the annual tax levied by this section. If any vehicular equipment is used in excess of such ninety-day period the annual tax levied by this section shall be paid.

(D) Any motor-propelled or motor-drawn vehicle used for transporting persons, commercial tractor as defined in *section 4501.01 of the Revised Code*, or motor truck used for the transportation of property, with respect to which the tax imposed by this section has been paid, may be used by another motor transportation company or common carrier, or by a private motor carrier or contract carrier, without further payment of the tax imposed by this section or by *section 4923.11 of the Revised Code.*

(E) The commission shall account for the taxes collected pursuant to this section, and shall pay such taxes to the treasurer of state pursuant to *section 4923.12 of the Revised Code* on or before the fifteenth day of each month for the taxes collected in each preceding month.

(F) All taxes levied upon the issuance of a certificate to any motor transportation company or common carrier by motor vehicle shall be reckoned as from the beginning of the quarter in which such certificate is issued or the use of equipment under any existing certificate began.

HISTORY:

GC § 614-94; 110 v 211; 115 v 254; 116 v 478; 119 v 339; Bureau of Code Revision, 10-1-53; 125 v 1135 (Eff 1-19-54); 129 v 1601 (Eff 10-25-61); 129 v 381 (Eff 7-1-62); 130 v PtII, 238 (Eff 12-2-64); 133 v S 150 (Eff 11-5-69); 137 v H 1 (Eff 8-26-77); 139 v H 694 (Eff 11-15-81); 146 v H 670 (Eff 12-2-96); 149 v H 94. Eff 9-5-2001.

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*** ARCHIVE DATA ***

Current through Legislation passed by the 129th Ohio General Assembly
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*** Annotations current through July 22, 2011 ***

TITLE 7. MUNICIPAL CORPORATIONS
CHAPTER 715. GENERAL POWERS

ORC Ann. 715.013 (2011)

§ 715.013. Prohibited municipal taxes

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

(B) This section does not prohibit a municipal corporation from levying a tax on any of the following:

(1) Amounts received for admission to any place;

(2) The income of an electric company or combined company, as defined in *section 5727.01 of the Revised Code*;

(3) On and after January 1, 2004, the income of a telephone company, as defined in *section 5727.01 of the Revised Code*.

HISTORY:

147 v H 770 (Eff 9-16-98); 148 v S 3. Eff 10-5-99; 150 v H 95, § 1, eff. 6-26-03.

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TITLE 7. MUNICIPAL CORPORATIONS
CHAPTER 718. MUNICIPAL INCOME TAXES

*ORC Ann. **718.01*** (2011)

§ **718.01.** Uniform rates; limitations without vote; prohibitions

(A) As used in this chapter:

(1) "Adjusted federal taxable income" means a C corporation's federal taxable income before net operating losses and special deductions as determined under the Internal Revenue Code, adjusted as follows:

(a) Deduct intangible income to the extent included in federal taxable income. The deduction shall be allowed regardless of whether the intangible income relates to assets used in a trade or business or assets held for the production of income.

(b) Add an amount equal to five per cent of intangible income deducted under division (A)(1)(a) of this section, but excluding that portion of intangible income directly related to the sale, exchange, or other disposition of property described in *section 1221 of the Internal Revenue Code*;

(c) Add any losses allowed as a deduction in the computation of federal taxable income if the losses directly relate to the sale, exchange, or other disposition of an asset described in *section 1221* or *1231 of the Internal Revenue Code*;

(d) (i) Except as provided in division (A)(1)(d)(ii) of this section, deduct income and gain included in federal taxable income to the extent the income and gain directly relate to the sale, exchange, or other disposition of an asset described in *section 1221* or *1231 of the Internal Revenue Code*;

(ii) Division (A)(1)(d)(i) of this section does not apply to the extent the income or gain is income or gain described in *section 1245* or *1250 of the Internal Revenue Code.*

(e) Add taxes on or measured by net income allowed as a deduction in the computation of federal taxable income;

(f) In the case of a real estate investment trust and regulated investment company, add all amounts with respect to dividends to, distributions to, or amounts set aside for or credited to the benefit of investors and allowed as a deduction in the computation of federal taxable income;

(g) Deduct, to the extent not otherwise deducted or excluded in computing federal taxable income, any income derived from providing public services under a contract through a project owned by the state, as described in *section 126.604 of the Revised Code* or derived from a transfer agreement or from the enterprise transferred under that agreement under *section 4313.02 of the Revised Code.*

If the taxpayer is not a C corporation and is not an individual, the taxpayer shall compute adjusted federal taxable income as if the taxpayer were a C corporation, except guaranteed

payments and other similar amounts paid or accrued to a partner, former partner, member, or former member shall not be allowed as a deductible expense; amounts

paid or accrued to a qualified self-employed retirement plan with respect to an owner or owner-employee of the taxpayer, amounts paid or accrued to or for health insurance for an owner or owner-employee, and amounts paid or accrued to or for life insurance for an owner or owner-employee shall not be allowed as a deduction.

Nothing in division (A)(1) of this section shall be construed as allowing the taxpayer to add or deduct any amount more than once or shall be construed as allowing any taxpayer to deduct any amount paid to or accrued for purposes of federal self-employment tax.

Nothing in this chapter shall be construed as limiting or removing the ability of any municipal corporation to administer, audit, and enforce the provisions of its municipal income tax.

(2) "Internal Revenue Code" means the Internal Revenue Code of 1986, *100 Stat. 2085, 26 U.S.C. 1,* as amended.

(3) "Schedule C" means internal revenue service schedule C filed by a taxpayer pursuant to the Internal Revenue Code.

(4) "Form 2106" means internal revenue service form 2106 filed by a taxpayer pursuant to the Internal Revenue Code.

(5) "Intangible income" means income of any of the following types: income yield, interest, capital gains, dividends, or other income arising from the ownership, sale, exchange, or other disposition of intangible property including, but not limited to, investments, deposits, money, or credits as those terms are defined in Chapter 5701. of the Revised Code, and patents, copyrights, trademarks, tradenames, investments in real estate investment trusts, investments in regulated investment companies, and appreciation on deferred compensation. "Intangible income" does not include prizes, awards, or other income associated with any lottery winnings or other similar games of chance.

(6) "S corporation" means a corporation that has made an election under subchapter S of Chapter 1 of Subtitle A of the Internal Revenue Code for its taxable year.

(7) For taxable years beginning on or after January 1, 2004, "net profit" for a taxpayer other than an individual means adjusted federal taxable income and "net profit" for a taxpayer who is an individual means the individual's profit required to be reported on schedule C, schedule E, or schedule F, other than any amount allowed as a deduction under division (E)(2) or (3) of this section or amounts described in division (H) of this section.

(8) "Taxpayer" means a person subject to a tax on income levied by a municipal corporation. Except as provided in division (L) of this section, "taxpayer" does not include any person that is a disregarded entity or a qualifying subchapter S subsidiary for federal income tax purposes, but "taxpayer" includes any other person who owns the disregarded entity or qualifying subchapter S subsidiary.

(9) "Taxable year" means the corresponding tax reporting period as prescribed for the taxpayer under the Internal Revenue Code.

(10) "Tax administrator" means the individual charged with direct responsibility for administration of a tax on income levied by a municipal corporation and includes:

(a) The central collection agency and the regional income tax agency and their successors in interest, and other entities organized to perform functions similar to those performed by the central collection agency and the regional income tax agency;

(b) A municipal corporation acting as the agent of another municipal corporation; and

(c) Persons retained by a municipal corporation to administer a tax levied by the municipal corporation, but only if the municipal corporation does not compensate the person in whole or in part on a contingency basis.

(11) "Person" includes individuals, firms, companies, business trusts, estates, trusts, partnerships, limited liability companies, associations, corporations, governmental entities, and any other entity.

(12) "Schedule E" means internal revenue service schedule E filed by a taxpayer pursuant to the Internal Revenue Code.

(13) "Schedule F" means internal revenue service schedule F filed by a taxpayer pursuant to the Internal Revenue Code.

(B) No municipal corporation shall tax income at other than a uniform rate.

(C) No municipal corporation shall levy a tax on income at a rate in excess of one per cent without having obtained the approval of the excess by a majority of the electors of the municipality voting on the question at a general, primary, or special election. The legislative authority of the municipal corporation shall file with the board of elections at least ninety days before the day of the election a copy of the ordinance together with a resolution specifying the date the election is to be held and directing the board of elections to conduct the election. The ballot shall be in the following form: "Shall the Ordinance providing for a per cent levy on income for (Brief description of the purpose of the proposed levy) be passed?

For the Income Tax
Against the Income Tax

In the event of an affirmative vote, the proceeds of the levy may be used only for the specified purpose.

(D) (1) Except as otherwise provided in this section, no municipal corporation shall exempt from a tax on income compensation for personal services of individuals over eighteen years of age or the net profit from a business or profession.

(2) (a) For taxable years beginning on or after January 1, 2004, no municipal corporation shall tax the net profit from a business or profession using any base other than the taxpayer's adjusted federal taxable income.

(b) Division (D)(2)(a) of this section does not apply to any taxpayer required to file a return under *section 5745.03 of the Revised Code* or to the net profit from a sole proprietorship.

(E) (1) The legislative authority of a municipal corporation may, by ordinance or resolution, exempt from withholding and from a tax on income the following:

(a) Compensation arising from the sale, exchange, or other disposition of a stock option, the exercise of a stock option, or the sale, exchange, or other disposition of stock purchased under a stock option; or

(b) Compensation attributable to a nonqualified deferred compensation plan or program described in *section*

3121(v)(2)(C) of the Internal Revenue Code.

(2) The legislative authority of a municipal corporation may adopt an ordinance or resolution that allows a taxpayer who is an individual to deduct, in computing the taxpayer's municipal income tax liability, an amount equal to the aggregate amount the taxpayer paid in cash during the taxable year to a health savings account of the taxpayer, to the extent the taxpayer is entitled to deduct that amount on internal revenue service form 1040.

(3) The legislative authority of a municipal corporation may adopt an ordinance or resolution that allows a taxpayer who has a net profit from a business or profession that is operated as a sole proprietorship to deduct from that net profit the amount that the taxpayer paid during the taxable year for medical care insurance premiums for the taxpayer, the taxpayer's spouse, and dependents as defined in *section 5747.01 of the Revised Code.* The deduction shall be allowed to the same extent the taxpayer is entitled to deduct the premiums on internal revenue service form 1040. The deduction allowed under this division shall be net of any related premium refunds, related premium reimbursements, or related insurance premium dividends received by the taxpayer during the taxable year.

(F) If an individual's taxable income includes income against which the taxpayer has taken a deduction for federal income tax purposes as reportable on the taxpayer's form 2106, and against which a like deduction has not been allowed by the municipal corporation, the municipal corporation shall deduct from the taxpayer's taxable income an amount equal to the deduction shown on such form allowable against such income, to the extent not otherwise so allowed as a deduction by the municipal corporation.

(G) (1) In the case of a taxpayer who has a net profit from a business or profession that is operated as a sole proprietorship, no municipal corporation may tax or use as the base for determining the amount of the net profit that shall be considered as having a taxable situs in the municipal corporation, an amount other than the net profit required to be reported by the taxpayer on schedule C or F from such sole proprietorship for the taxable year.

(2) In the case of a taxpayer who has a net profit from rental activity required to be reported on schedule E, no municipal corporation may tax or use as the base for determining the amount of the net profit that shall be considered as having a taxable situs in the municipal corporation, an amount other than the net profit from rental activities required to be reported by the taxpayer on schedule E for the taxable year.

(H) A municipal corporation shall not tax any of the following:

(1) The military pay or allowances of members of the armed forces of the United States and of members of their reserve components, including the Ohio national guard;

(2) The income of religious, fraternal, charitable, scientific, literary, or educational institutions to the extent that such income is derived from tax-exempt real estate, tax-exempt tangible or intangible property, or tax-exempt activities;

(3) Except as otherwise provided in division (I) of this section, intangible income;

(4) Compensation paid under *section 3501.28* or *3501.36 of the Revised Code* to a person serving as a precinct election official, to the extent that such compensation does not exceed one thousand dollars annually. Such compensation in excess of one thousand dollars may be subjected to taxation by a municipal corporation. A municipal corporation shall not require the payer of such compensation to withhold any tax from that compensation.

(5) Compensation paid to an employee of a transit authority, regional transit authority, or regional transit commission created under Chapter 306. of the Revised Code for operating a transit bus or other motor vehicle for the authority or commission in or through the municipal corporation, unless the bus or vehicle is operated on a regularly scheduled route, the operator is subject to such a tax by reason of residence or domicile in the municipal corporation, or the headquarters of the authority or commission is located within the municipal corporation;

(6) The income of a public utility, when that public utility is subject to the tax levied under *section 5727.24* or *5727.30 of the Revised Code*, except a municipal corporation may tax the following, subject to Chapter 5745. of the Revised Code:

(a) Beginning January 1, 2002, the income of an electric company or combined company;

(b) Beginning January 1, 2004, the income of a telephone company.

As used in division (H)(6) of this section, "combined company," "electric company," and "telephone company" have the same meanings as in *section 5727.01 of the Revised Code*.

(7) On and after January 1, 2003, items excluded from federal gross income pursuant to *section 107 of the Internal Revenue Code*;

(8) On and after January 1, 2001, compensation paid to a nonresident individual to the extent prohibited under *section 718.011 of the Revised Code*;

(9) (a) Except as provided in division (H)(9)(b) and (c) of this section, an S corporation shareholder's distributive share of net profits of the S corporation, other than any part of the distributive share of net profits that represents wages as defined in *section 3121(a) of the Internal Revenue Code* or net earnings from self-employment as defined in *section 1402(a) of the Internal Revenue Code*.

(b) If, pursuant to division (H) of former *section **718.01** of the Revised Code* as it existed before March 11, 2004, a majority of the electors of a municipal corporation voted in favor of the question at an election held on November 4, 2003, the municipal corporation may continue after 2002 to tax an S corporation shareholder's distributive share of net profits of an S corporation.

(c) If, on December 6, 2002, a municipal corporation was imposing, assessing, and collecting a tax on an S corporation shareholder's distributive share of net profits of the S corporation to the extent the distributive share would be allocated or apportioned to this state under divisions (B)(1) and (2) of *section 5733.05 of the Revised Code* if the S corporation were a corporation subject to taxes imposed under Chapter 5733. of the Revised Code, the municipal corporation may continue to impose the tax on such distributive shares to the extent such shares would be so allocated or apportioned to this state only until December 31, 2004, unless a majority of the electors of the municipal corporation voting on the question of continuing to tax such shares after that date vote in favor of that question at an election held November 2, 2004. If a majority of those electors vote in favor of the question, the municipal corporation may continue after December 31, 2004, to impose the tax on such distributive shares only to the extent such shares would be so allocated or apportioned to this state.

(d) For the purposes of division (D) of *section 718.14 of the Revised Code*, a municipal corporation shall be deemed to have elected to tax S corporation shareholders' distributive shares of net profits of the S corporation in the hands of the shareholders if a majority of the electors of a municipal corporation vote in favor of a question at an election held under division (H)(9)(b) or (c) of this section. The municipal corporation shall specify by ordinance or rule that the tax applies to the distributive share of a shareholder of an S corporation in the hands of the shareholder of the S corporation.

(10) Employee compensation that is not "qualifying wages" as defined in *section 718.03 of the Revised Code*;

(11) Beginning August 1, 2007, compensation paid to a person employed within the boundaries of a United States air force base under the jurisdiction of the United States air force that is used for the housing of members of the United States air force and is a center for air force operations, unless the person is subject to taxation because of residence or domicile. If the compensation is subject to taxation because of residence or domicile, municipal income tax shall be payable only to the municipal corporation of residence or domicile.

(I) Any municipal corporation that taxes any type of intangible income on March 29, 1988, pursuant to Section 3 of Amended Substitute Senate Bill No. 238 of the 116th general assembly, may continue to tax that type of income after 1988 if a majority of the electors of the municipal corporation voting on the question of whether to permit the taxation of that type of intangible income after 1988 vote in favor thereof at an election held on November 8, 1988.

(J) Nothing 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 or shall require a municipal corporation to allow a deduction from taxable income for losses incurred from a sole proprietorship or partnership.

(K) (1) Nothing in this chapter prohibits a municipal corporation from allowing, by resolution or ordinance, a net operating loss carryforward.

(2) Nothing in this chapter requires a municipal corporation to allow a net operating loss carryforward.

(L) (1) A single member limited liability company that is a disregarded entity for federal tax purposes may elect to be a separate taxpayer from its single member in all Ohio municipal corporations in which it either filed as a separate taxpayer or did not file for its taxable year ending in 2003, if all of the following conditions are met:

(a) The limited liability company's single member is also a limited liability company;

(b) The limited liability company and its single member were formed and doing business in one or more Ohio municipal corporations for at least five years before January 1, 2004;

(c) Not later than December 31, 2004, the limited liability company and its single member each make an election to be treated as a separate taxpayer under division (L) of this section;

(d) The limited liability company was not formed for the purpose of evading or reducing Ohio municipal corporation income tax liability of the limited liability company or its single member;

(e) The Ohio municipal corporation that is the primary place of business of the sole member of the limited liability company consents to the election.

(2) For purposes of division (L)(1)(e) of this section, a municipal corporation is the primary place of business of a limited liability company if, for the limited liability company's taxable year ending in 2003, its income tax liability is greater in that municipal corporation than in any other municipal corporation in Ohio, and that tax liability to that municipal corporation for its taxable year ending in 2003 is at least four hundred thousand dollars.

HISTORY:

127 v 91 (Eff 9-17-57); 129 v 582 (Eff 1-10-61); 132 v S 500 (Eff 6-5-68); 135 v S 44 (Eff 9-11-73); 135 v H 916 (Eff 9-13-74); 136 v H 1 (Eff 6-13-75); 138 v H 1062 (Eff 3-23-81); 139 v H 65 (Eff 2-11-82); 141 v S 238 (Eff 5-23-86); 142 v S 386 (Eff 3-29-88); 146 v H 555 (Eff 3-6-96); 147 v H 215 (Eff 9-29-97); 147 v S 130 (Eff 9-18-97); 147 v H 770 (Eff 9-16-98); 148 v S 3 (Eff 7-6-99); 148 v H 283 (Eff 9-29-99); 148 v H 477 (Eff 7-26-2000); 148 v H 483 (Eff 1-1-2002); 148 v S 287, § 9 (Eff 12-21-2000); 149 v S 180. Eff 4-9-2003; 150 v H 95, § 1, eff. 6-26-03; 150 v H 127, § 1, eff. 3-11-04; 150 v H 362, § 1, eff. 12-30-04; 152 v H 119, § 101.01, eff. 6-30-07; 152 v H 24, § 1, eff. 12-21-07; 153 v H 48, § 1, eff. 7-2-10; 2011 HB 153, § 101.01, eff. Sept. 29, 2011.

Article XVIII: Municipal Corporations

Classification of cities and villages.

§1 Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law.

(1912)

General laws for incorporation and government of municipalities; additional laws; referendum.

§2 General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.

(1912)

Municipal powers of local self-government.

§3 Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

(1912)

Acquisition of public utility; contract for service; condemnation.

§4 Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

(1912)

Referendum on acquiring or operating municipal utility.

§5 Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of section 8 of this article as to the submission of the question of choosing a charter commission.

(1912)

Sale of surplus product of municipal utility.

§6 Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants,