

ORIGINAL

IN THE SUPREME COURT OF OHIO

PANTHER II TRANSPORTATION, INC., :

Case No. 2012-1589

Case No. 2012-1592

(Consolidated)

Plaintiff/Appellee,

On Appeal from the Ninth District
Court of Appeals, Medina County, Ohio

v.

VILLAGE OF SEVILLE BOARD OF
INCOME TAX REVIEW, ET AL.

Court of Appeals
Case Nos. 11CA0092-M
11CA0093-M

Defendants/Appellants.

BRIEF OF AMICUS CURIAE
THE OHIO MUNICIPAL LEAGUE
IN SUPPORT OF THE DEFENDANTS-APPELLANTS
VILLAGE OF SEVILLE BOARD OF INCOME TAX REVIEW
AND
NASSIM M. LYNCH AND THE CENTRAL COLLECTION AGENCY

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INTRODUCTION

The Ohio Municipal League (“League”), an amicus curiae on behalf of the Village of Seville Board of Income Tax Review (“Board of Income Tax Review”) and Nassim M. Lynch and the Central Collection Agency (“Central Collection Agency”), urges this Court to reverse the decision of the Ninth District Court of Appeals in *Panther II Transportation Inc. v. Village of Seville Board of Income Tax Review, et al*, 2012-Ohio-3525. In this decision, the Ninth District, contrary to the Ohio Constitution and this Court’s holding in *Cincinnati Bell Telephone Company v. City of Cincinnati*, 81 Ohio St.3d 599, 693 N.E.2d 212 (1998), held that the implied municipal taxation prohibition in former R.C. 4921.25¹ preempts the taxing authority of a municipal corporation.

Article XVIII, Section 3, of the Ohio Constitution grants municipal corporations the “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.”

Article XVIII, Section 13, of the Ohio Constitution provides that “[l]aws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes.”

In *Cincinnati Bell Telephone Company*, this Court held that the taxing powers of municipal corporations, granted by the Ohio Constitution, can only be limited if the General Assembly **expressly** acts to preempt municipal taxation. Municipal taxation cannot be preempted by implication.

R.C. 4921.25 prohibits local authorities from assessing, charging, fixing, or extracting funds for a license or registration fee that is *similar* to the certificate of public convenience and

¹ On June 11, 2012, certain provisions of Sub. H.B. 487 became effective, including the provision repealing former R.C. 4921.25 and renumbering it as R.C. 4921.19(J). Any references to R.C. 4921.25 in this *Brief of Amicus Curiae* are to former R.C. 4921.25, in effect prior to June 11, 2012.

necessity, required by R.C. 4921.18, and from assessing, charging, fixing, or extracting funds for a tax upon each motor propelled vehicle. R.C. 4921.25 does not expressly preempt a municipal corporation from taxing the net profits of a motor transportation company.

The Ninth District incorrectly concluded that “R.C. 4921.25 prohibits the Village of Seville from taxing Panther II’s net profits under the doctrine of express preemption.” *Panther* at ¶ 11.

Therefore, this Court should reverse the decision of the Ninth District.

STATEMENT OF AMICUS INTEREST

The Ohio Municipal League (“League”) is a non-profit Ohio corporation composed of a membership of more than 700 Ohio cities and villages. The League and its members have an interest in ensuring that the taxing power of municipal corporations is not preempted in the absence of an express act of preemption by the General Assembly.

STATEMENT OF THE CASE AND FACTS

The League hereby adopts, in its entirety, and incorporates by reference, the statement of the case and facts contained within the Merit Brief of the Board of Income Tax Review.

ARGUMENT

Proposition of Law No. 1: Municipal taxation can only be prohibited by an express act of the General Assembly, prohibition by implication is insufficient. R.C. 4921.25 does not expressly preempt the income tax authority of a municipal corporation.

Preemption of Municipal Taxation Requires An Express Act of the General Assembly

In *Cincinnati Bell Telephone Company*, this Court noted that given the “general, broad grant of power that municipalities enjoy under Article XVIII, of the Ohio Constitution requires that the provisions allowing the General Assembly to limit municipal taxing power be interpreted

in a manner consistent with the purpose of home rule.” *Cincinnati Bell Telephone Company* at 217.

This Court then concluded that “it is evident that a proper exercise of this limiting power requires an express act of restriction by the General Assembly.” *Cincinnati Bell Telephone Company* at 217. (Emphasis added.) Express is defined as “clearly and unmistakably communicated; directly stated.” *Black’s Law Dictionary* (9th edition 2009) Therefore, a municipal income tax is valid unless the General Assembly has clearly and unmistakably communicated and/or directly stated that the tax is preempted.

Preemption by Implication is Insufficient

In *Cincinnati Bell Telephone Company*, this Court held that there is no constitutional basis for implied preemption and overruled prior case law inconsistent with this holding. In reaching this holding, this Court concluded that “[t]he mere enactment of state legislation that results in an occupation of a field of taxation is not sufficient to constitute an exercise of the General Assembly’s constitutional power to limit municipal taxation” and that municipal taxation is valid “unless the General Assembly has acted affirmatively by exercising its constitutional prerogative.” *Cincinnati Bell Telephone Company* at 217. (Emphasis added.) Affirmative is defined as “[t]hat which declares positively.” *Black’s Law Dictionary* (6th edition 1990).

Therefore, in order to preempt municipal taxation, the General Assembly must act in an express and an affirmative manner. In other words, legislation enacted by the General Assembly that is preempting municipal taxation must clearly and unmistakably communicate the preemption in a positive declaration – there can be no doubt what the General Assembly intended to do.

The General Assembly Has Acted in An Express and Affirmative Manner
to Preempt Certain Municipal Income Taxes

As this Court noted in *Cincinnati Bell Telephone*, the General Assembly is aware of how to exercise its power limiting municipal taxation as it enacted R.C. 718.01(H),² the statute expressly and affirmatively communicating that certain pay and income are not subject to municipal taxation. *Cincinnati Bell Telephone* at 217. The express municipal income tax prohibitions set forth in R.C. 718.01(H) do not include the imposition of an income tax on the profits of a motor transportation company.

In response to *Cincinnati Bell Telephone* and this Court's holding that municipal taxation cannot be preempted by implication, the General Assembly enacted R.C. 715.013. R.C. 715.013 expressly and affirmatively prohibits municipal corporations from levying a tax that is the same as or similar to a tax levied under RC Chapter 322, 3734, 3769, 4123, 4141, 4301, 4303, 4305, 4307, 4309, 5707, 5725, 5726, 5727, 5728, 5729, 5731, 5735, 5737, 5739, 5741, 5743, or 5749. There is no reference to Chapter 4921 in R.C. 715.013.

The bill enacting R.C. 715.013 stated "to the extent authorized by the Ohio Constitution, the General Assembly hereby prohibits municipal corporations from assessing or collecting any tax levied by municipal corporations that had not been assessed prior to May 13, 1998, against subjects that are the same as or similar to those that are subject to the taxes enumerated in section 715.013 of the Revised Code." 1998 HB 770, § 18.

There is no doubt that the General Assembly intended to expressly and affirmatively preempt certain types of municipal income taxation set forth in R.C. 718.01(H) and R.C. 715.013.

² R.C. 718.01(H) was previously numbered R.C. 718.01(F).

R.C. 4921.25 Does Not Expressly and Affirmatively Preempt
The Income Tax Authority of a Municipal Corporation

R.C. 4921.25 provides in part:

The fees and charges provided under section 4921.18 of the Revised Code shall be in addition to taxes, fees, and charges fixed and exacted by other sections of the Revised Code, 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.

Former R.C. 4921.18 required each motor transportation company operating in the State of Ohio, at the time of the issuance of a certificate of public convenience and necessity by the Public Utilities Commission of Ohio, to pay an annual tax or fee of twenty or thirty dollars, depending on the type of vehicle.

The Appellee argues that R.C. 4921.25 exempts motor transportation companies from municipal income taxation. This argument is erroneous because while R.C. 4921.25 prohibits a municipal corporation from levying a tax or fee relating to the licensing, registration, or regulation of vehicles used by motor transportation companies, it does not expressly and affirmatively exempt motor transportation companies from municipal income taxation.

Revised Code Chapter 4921

Revised Code Chapter 4921 pertains to the licensing, registration, and regulation of motor transportation companies. It does not pertain to or regulate the taxation of motor transportation companies.

R.C. 4921.25 relates to *fees* and *charges* related to such licensing, registration, and regulation and prohibits local authorities from assessing, charging, fixing, or extracting funds for a license or registration fee that is *similar* to the certificate of public convenience and necessity,

required by R.C. 4921.18, and from assessing, charging, fixing, or extracting funds for a tax upon each motor propelled vehicle. The imposition of a municipal income tax on the net profits of a motor transportation company is not similar to the fees and charges issued for a certificate of public convenience and necessity and it is not a tax on a motor propelled vehicle. It is a tax on the net profits of a motor transportation company and such tax is not expressly preempted by R.C. 4921.25.

The Use of the Word "Taxes"

The word "taxes" is used in a broad manner in R.C. 4921.25 and does not specifically refer to the levying of a municipal income tax on the annual profits of business pursuits. Ohio courts have recognized that a license may include a tax and that an assessment can be in the form and nature of a tax. *Mays v. Cincinnati*, 1 Ohio St. 268, 1853 Ohio LEXIS 258 (1853); *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N.E. 672 (1886). Therefore, the general use of the word "taxes" may include fees, licenses, and assessments.

If the General Assembly intended to include a municipal income tax prohibition in R.C. 4921.25, it could have done so by including words that expressly and affirmatively communicated the prohibition. It did not do so.

Legislative Intent In The Statute's Enactment

This Court has held that the "paramount concern in statutory construction is the legislative intent in the statute's enactment, and to discern this intent, we read words and phrases in context according to the rules of grammar and common usage." *Wilson et al. v. Kasich, Governor, et al.*, 134 Ohio St.3d 211, 225, 981 N.E.2d 814 (2012), citing *State ex rel. Mager v. State Teachers Retirement System of Ohio*, 123 Ohio St.3d 195, 915 N.E.2d 320 (2009).

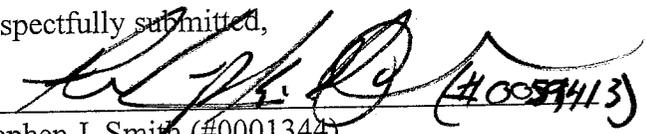
As previously discussed, the use of the word ‘taxes’ may include fees, licenses, and assessments. In this instance, the word ‘taxes’ cannot be interpreted to mean municipal income taxes because municipal income taxes did not exist in 1923 when R.C. 4921.25 was enacted. Furthermore, the power of municipalities to levy and collect income taxes was not recognized by this Court until 1950.³

Therefore, there can be no legislative intent for the word ‘taxes’ in R.C. 4921.25 to include municipal income taxes.

CONCLUSION

Based upon the foregoing, the League respectfully requests this Court to reverse the Ninth District’s judgment.

Respectfully submitted,



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³ The first city income tax in Ohio was enacted in 1946 by the City of Toledo and, in *Angell v. City of Toledo*, 153 Ohio St. 179, 91 N.E.2d 250, this Court recognized that Ohio municipalities have the power to levy and collect income taxes.

CERTIFICATE OF SERVICE

A copy of the foregoing *Brief of Amicus Curiae The Ohio Municipal League in Support of the Defendants-Appellants Village of Seville Board of Income Tax Review and Nassim M. Lynch and the Central Collection Agency* has been sent via regular U.S. mail, postage pre-paid this 6th day of May, 2013 to:

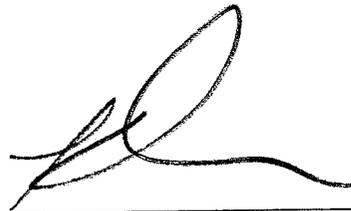
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