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

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REPLY TO APPELLEE'S ARGUMENT

More than seventy-five years ago, this Court declared as follows: "Words contained in a legislative enactment are given their plain, usual, and ordinarily accepted meaning, unless and until it is made manifest that a different meaning was intended by the enacting body. This proposition is fundamental and needs no citatory authority." *City of Cleveland v. Public Utilities Commission of Ohio*, 130 Ohio St. 503, 510, 200 N.E. 765, 769 (1936). Today, a motor transportation company and others seeking to profit are asking the Court to ignore this fundamental rule and allow them to escape paying their fair share of municipal income taxes. Tax systems however depend on all citizens—individuals and businesses—paying their proportional share of taxes to support government and public needs. Further "[t]his [C]ourt has repeatedly 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).

In its merit brief, Appellee, Panther II Transportation, Inc. ("Panther") seeks to avoid the required conclusion that it is subject to a local jurisdiction's net profits income tax by relying extensively on the fact that motor transportation companies are purportedly regulated by the Public Utilities Commission of Ohio ("PUCO"). And although Panther has always previously paid a net profits tax it now argues that subjecting it to such a tax will "increas[e] the cost to public utility customers." As shown below, these arguments, like others made by Panther, are to no avail.

A. Panther's Attempt To Equate The Power To Regulate As Being Synonymous With The Power To Tax Must Fail.

Panther would like the Court to assume that the power to tax is dependent upon the power to regulate. However, as Appellants, the Central Collection Agency and its Tax Administrator, Nassim M. Lynch, noted in their merit brief, the power to regulate and the power to tax are distinct powers. What's more, the power to tax is not only distinct from the power to regulate, it is not subordinate to it either.

Long ago, in *Wiggins Ferry Co. v. City of East St. Louis*, 107 U.S. 365, 374 (1883), the United States Supreme Court discussed the power to tax and the power to regulate when it said: "In *Gibbons v. Ogden* [22 U.S. 1 (1824)] it was settled that the clause of the constitution conferring on congress the power to tax, and the clause regulating and restraining taxation, are separate and distinct from the clause granting the power to congress to regulate commerce." Later, in *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939), that Court upheld the validity of a state tax/fee rejecting the claim that the exclusive power of congress to regulate interstate commerce prevented the imposition of said tax/fee. It would also be noted that the Motor Carrier Act of 1935, Pub.L. No. 74-255, 49 Stat. 543, initiated federal regulation of the trucking industry and provided for extensive federal regulation.[1] That fact however did not mean that

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[1] The Act "empowered the Interstate Commerce Commission to classify carriers, regulate entry, control rates, approve or disapprove mergers, require that common carriers provide reasonably adequate service and prescribe territories, routes, and products carried." Note, *Federal Regulation of Trucking: The Emerging Critique*, 63 Colum. L. Rev. 460, 464-65 (1963).

trucking companies were not subject to state franchise or income tax in states where such companies were located or conducted business.

The power to tax in this appeal—the municipal power to tax—is among the preeminent Home Rule powers given to Ohio municipalities. *State ex rel. Zielonka v. Carrel*, 99 Ohio St. 220, 222, 124 N.E. 134 (1919). And there is no question as to the power of Ohio municipalities to levy an income tax. While the state of Ohio may regulate motor transportation companies this does not divest local authorities of the power to tax the income of such companies just like all other businesses and individuals.

B. Panther's Alleged Concerns About "Increasing The Cost To Public Utility Customers" Is Wholly Overemphasized.

Although R.C. 4921.25 is clearly designed to prevent local authorities from imposing different requirements on motor transportation companies relating to licensing, registering or regulation, Panther would nevertheless like to suggest to the Court that another primary purpose of this statute is to "bar[] political subdivisions from increasing the cost to public utility customers for motor carrier services[.]" Panther's Merit Brief at 4. For a number of reasons, Panther's reliance on that proposition is not worthy of credence or at least overemphasized.

First, Panther cites to no authority for its proposition that R.C. 4921.25 "bars political subdivisions from increasing the cost to public utility customers for motor carrier services[.]" Panther cites no authority because there is none.

Second, rates for any public utility is based on the utility's cost of service which includes necessary operating expenses such as income taxes (federal state and local).

Municipal income taxes are one of the costs of service that would be considered in setting rates for public utilities.

Third, "[a]lmost any tax will achieve an ancillary regulatory effect by increasing the costs of the taxed activities for individuals or corporations." L. Tribe, *American Constitutional Law* 319 (2nd ed. 1988). So since all businesses within a municipality are subject to the net profits income tax this would be true for all of their customers as well and not just customers of motor transportation companies.

Panther's alleged concern about "increased cost" to its customers is clearly a nonissue.

C. Panther's Red-Herring About "Statewide Public Utility Regulation Of Motor Transportation Companies."

The title heading to Panther's argument on page 15 of its merit brief is "Appellants Fail to Recognize That R.C. § 4921.25 Supports Statewide Public Utility Regulation of Motor Transportation Companies." Panther also observes that "[b]ecause Chapter 4921 is a general law providing for state-wide regulation of motor transportation companies ... preempting municipal police powers is consistent with Section 3, Art. XVIII, of the Ohio Constitution [the Home Rule Amendment]." Panther's Merit Brief at p. 15 n.7. That R.C. Chapter 4921 is a general law providing for statewide *regulation* of motor transportation companies may be true hardly means that it takes precedence over a municipal income tax ordinance. This is because a municipal income tax ordinance is clearly an exercise of local self-government, rather than the police power.

Because the ordinance involved in this case is an exercise of local self-government, the three-part test this Court formulated in *Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶ 9, to determine when a local ordinance conflicts with a state statue would not be applicable here. The ordinance must clearly be an exercise of the police power in order for it to yield to a general law of the state.

Panther's emphasis that R.C. Chapter 4921 is a general law providing for statewide *regulation* of motor transportation companies as controlling or supporting an exemption from the municipal income tax ordinance in this case is, therefore, a red-herring. And this isn't even considering two important facts: (i) state regulation of the trucking industry has been subservient to federal regulation under federalism principles since the 1935 Motor Carrier Act, *see Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954) (explaining that the Federal Motor Carrier Act "adopted a comprehensive plan" that "was so all-embracing that former power of states over interstate motor carriers was greatly reduced"); and (ii) beginning in 1994 "the federal government, has through various enactments, deregulated the motor carrier industry[.]"[2] *City of Cleveland v. State of Ohio*, 2012-Ohio-3572, 974 N.E.2d 123 ¶27 *appeal allowed* 134 Ohio St.3d 1417 (Jan. 23, 2013).

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[2] As one federal appeals court noted "Congress enacted the [Federal Aviation Administration Authorization Act (FAAAA), 49 U.S.C. §14501 et seq.] in 1994 to prevent States from undermining federal deregulation of interstate trucking." *American Trucking Ass'ns., Inc. v. City of Los Angeles*, 660 F.3d 384, 395 (9th Cir. 2011) (citing *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008) and *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1048 (9th Cir. 2000)). The FAAAA provides in pertinent part that a State "may not enact or enforce a law ... related to a price, route, or service of any motor carrier ... with respect to the transportation of property." 49 U.S.C. §14501(c)(1); *Rowe*, 552 U.S. at 368.

D. The Court's Task In This Case Is Clearly To "Give Effect To The Intent" of the General Assembly.

On page 17 of its merit brief, Panther quotes the following statements from this Court's decision in *Tomasik v. Tomasik*, 111 Ohio St.3d 481, 2006-Ohio-6109, 857 N.E.2d 127, ¶ 14 (quoting *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph two of the syllabus): "The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for consideration." The Court, however, was clearly referring to the situation where a statute is unambiguous and "need not [be] interpet[ed] []; [but] must simply [be] appl[ied][.]"[3] *Tomasik*, 2006-Ohio 6109, at ¶ 15. The word "taxes" is a noun and, as explained in the section following, the meaning of said term can vary depending upon the context in which it is used. As a result, the statute at issue in the instant case (R.C. 4921.25) is not unambiguous and is certainly susceptible of more than one meaning. Consequently, as this Court explained in *Tomasik*:

> 'The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it.' *Slingluff v. Weaver* (1902), 66 Ohio St. 621, 64 N.E. 574, paragraph one of the syllabus. This [C]ourt may engage in statutory interpretation when the statute under review is ambiguous.

Tomasik, 2006-Ohio 6109, at ¶ 13. The Court's task in this case is clearly to "give effect to the intent" of the General Assembly that enacted R.C. 4921.25.

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[3] In *Tomasik*, this Court refused to apply the will contest statute of limitations to a contestant who had not received actual notice of the admission of the will to probate due to deficiencies in Ohio's post-death notice statutes.

E. R.C. 4921.25 Is Plainly Referring To Regulatory And Not Revenue Taxes As Being "Illegal And [] Superseded."

Panther's position on whether R.C. 4921.25 encompasses a municipal net profits income tax is clear.[4] Panther asserts that "R.C. § 4921.25 plainly states that all taxes, except the general property tax ... 'are illegal and are superseded by' Ohio's state-wide regulation of motor carriers." Panther's Merit Brief at 5 (emphasis original). For Panther, "'all taxes' [] mean[s] 'all taxes[.]'" *Id.* This approach, however, is far too simplistic.

R.C. 4921.25 does not simply state "all taxes" as Panther would have one believe. It 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, 4905.03 and 4921.02 to 4921.32[.]" One must look at this language to determine the meaning of the term "taxes" in that statute. *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513, 520, 644 N.E.2d 369, 375 (1994). That is what this Court did in the recent case of *Ohio Trucking Assn. v. Charles*, 134 Ohio St.3d 502, 2012-Ohio-5679, 983 N.E.2d 1262, where the Court held that the fees charged by the

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[4] As these Appellants' noted in their initial brief, 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. With one exception, references to Chapters 4921 and 4923 and the statutes therein in this Reply Brief are as they existed prior to June 11, 2012.

With respect to the new legislation, it would be noted that it changes the term "motor transportation company" to "for-hire motor carrier." The two statutes at issue in this case—R.C. 4921.18 and R.C. 4921.25—have been merged into a new R.C. 4921.19. The "illegal [and] superseded" language of former R.C. 4921.25 is now set forth in division (J) of the new R.C. 4921.19.

registrar of motor vehicles for the production of certified abstracts of driving records were not "related to" the registration, operation or use of vehicles on public highways within the meaning of the Ohio Constitution, Article XII, Section 5a.

The meaning of the term "taxes" in R.C. 4921.25 is obvious even after only a cursory review of that statute. In that regard, it is important to note that there is a "distinction between revenue [taxes] and regulatory taxes[.]" L. Tribe, *American Constitutional Law* 320 (2nd ed. 1988). And, as one state supreme court noted: "It is [] well recognized that the general term 'taxes' is often used indiscriminately in statutes and in state Constitutions to mean either revenue taxes or regulatory taxes or both." *State ex rel. State Aeronautics Commission v. Board of Examiners of State*, 121 Mont. 402, 436, 194 P.2d 633, 650 (Mont. 1948) (citing 51 Am. Jur. Taxation § 13; 33 Am. Jur. Licenses §§ 2 and 3). In looking at "the objectives of the statute" here, *see Ohio Trucking Assn.*, 134 Ohio St.3d 502, 2012-Ohio-5697, 983 N.E.2d 1262 at ¶11 (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers*, 514 U.S. 645, 656 (1994)), it is clear the term means regulatory taxes.

F. The Fact That The General Property Tax Was Excluded Shows That R.C. 4921.25 Does Not Apply To Revenue Taxes.

Apparently Panther is concerned about the theory of its case (that "R.C. 4921.25 bars political subdivisions from increasing the cost to public utility customers for motor carrier services by imposing any type of tax ... on motor transportation companies") as it relates to Appellants' position that specific reference was made to the general property tax in R.C. 4921.25 so that it was understood that the vehicles used by the motor transportation companies, which were subject to the R.C. 4121.18 tax, could still

nevertheless be subject to any general property tax. In response, Panther argues for the first time on appeal to this Court "that the General Assembly [could not have] left a loophole for municipalities ... to impose a personal property tax on the vehicles of motor transportation companies ... [and that] [t]he reference to 'general property tax' can only mean the real property tax." Panther's Merit Brief at 14. Again, however, Panther cites no authority to support its proposition.

Was this a "loophole" as phrased by Panther or did the General Assembly want to make clear that motor transportation companies were subject to any general property tax just like everyone else. Also, doesn't a tax on real estate owned by a motor transportation company increase the costs to motor transportation customers just as one would on their vehicles and other personal property. The property tax was exempted because it was the general source of revenue for municipalities at that time.

Again, when the Ohio Motor Transportation Act was enacted in 1923, there was no municipal income tax; the first Ohio city to enact an income tax was Toledo in 1946. See Note, *Municipal Personal Income Taxation of Nonresidents*, 31 Ohio St.L.J. 770, 785 (1970). At that time, property taxes (real property and tangible personal property) were the sources of revenue for municipal governments. *See generally*, Gotherman, Babbit & Lang, *Baldwin's Ohio Practice*, 1 Local Government Law—Municipal (1st ed. 2004 with 2012 supplement update) 439, § 12.5. *See* Swann's *Revised Statutes, Taxation*, Chapter 113 (1854). The Ohio General Assembly clearly intended for motor transportation companies to fully share in the tax burden in that regard. This too

clearly supports the fact that R.C. 4921.25 was not intended to shied motor transportation companies from paying their proportional share of a municipal income or net profits tax imposed on all others in or doing business in said locality.

G. Would "Private Motor Carriers" and Towing Entities Also Be Exempt From Municipal Income Tax?

Based on Panther's logic would "private motor carriers" also be exempt from municipal income tax? At all relevant times here, "private motor carriers" were regulated by the PUCO in R.C. Chapter 4923 which had two statutes that operated just like R.C. 4921.18 and R.C. 4921.25 in Chapter 4921.

R.C. 4923.13 was titled "Fees and charges" and stated as follows:

> The fees and charges provided under section 4923.11 of the Revised Code shall be in addition to taxes, fees, and charges fixed and exacted by other general laws of this state, except the assessments required by section 4905.10 of the Revised Code and the taxes imposed by section 4921.18 of the Revised Code, but all fees, license fees, annual payments, license taxes, taxes, or other money exactions assessed, charged, fixed, or exacted by local authorities, such as municipal corporations, townships, counties, or other local boards, or by the officers of such subdivisions, are deemed illegal and superseded by sections 4921.18, 4921.32, and 4923.02 to 4923.17 of the Revised Code. Upon compliance by such private motor carrier with sections 4921.18, 4921.32, and 4923.02 to 4923.17 of the Revised Code, all local ordinances, resolutions, bylaws, and rules in force shall cease to be operative as to such carrier, except that such local subdivisions may make reasonable local police regulations within their respective boundaries not inconsistent with such sections.

(Appx. 1.) R.C. 4923.11 (which is referenced in R.C. 4923.13) was titled "Taxes" and stated, in pertinent part, that:

> (A) Every private motor carrier or contract carrier by motor vehicle operating in this state shall, at the time of the issuance of its permit, and annually thereafter on or between the first and 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, multiply the normal number of passengers that can be seated at one time in each such vehicle by four 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;
>
> (4) For each motor-propelled vehicle used for transporting both persons and property simultaneously, the tax shall be computed on the basis of either property transportation or passenger capacity, and the basis which yields the greater revenue shall apply.
>
> ****

(Appx. 2-3.)

Clearly, if R.C. 4921.25 is an express provision preempting a municipality's right to tax the income of motor transportation companies (although it is not), the same would be true of R.C. 4923.13 with respect to private motor carriers. In fact, the history of the Ohio Motor Transportation Act should be mentioned. The Act as originally passed in 1923 purported to regulate both private motor carriers as well as motor transportation companies ("public carriers"). This Court, however, in *Hissem v. Guran*, 112 Ohio St. 59, 146 N.E. 508 (1925) held that private motor carriers could not be

regulated in such fashion.[5] The fact that the General Assembly had included private motor carriers in the original Act is further evidence that the predecessor to R.C. 4921.25 was not designed to give the companies regulated a "free pass" with regard to any type of general revenue tax.[6]

And what about towing entities? The new R.C. 4921.25 now provides as follows with respect to such entities:

> Any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, that is engaged in the towing of motor vehicles is subject to regulation by the public utilities commission as a for-hire motor carrier under this chapter. Such an entity is not subject to any ordinance, rule, or resolution of a municipal corporation, county, or township that provides for the licensing, registering, or regulation of entities that tow motor vehicles.

(Appx. 4.) If towing entities are a "for-hire motor carrier" under R.C. Chapter 4921, are they too supposedly exempt from municipal income tax? In an ironic twist, the new R.C. 4921.25 makes clear the fact that the General Assembly is only concerned about

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5 In *Hissem*, a motor transportation company sought to enjoin a private motor carrier from operating trucks over its route without first obtaining a certificate of authority from the PUCO. The Court's holding: "A motor transportation company holding a certificate of convenience and necessity under the provision of the act regulating motor transportation is not entitled to protection from competition as against owners of such privately operated motor vehicles over the same routes covered by such certificate." 112 Ohio St. 59, 146 N.E. 808, syllabus at paragraph three.

6 Of course, after the Court's ruling in *Hissem*, the General Assembly later enacted R.C. Chapter 4923, regulating Private Motor Carriers in 1933. 115 Ohio Laws 256 (S.B. 47, eff. Sept. 8, 1933).

preventing municipal requirements dealing with "the licensing, registering, or regulation" of these entities.

H. Panther's Attempted Sleight-Of-Hand With Respect To This Court's *Angell v. City of Toledo* Case.

With respect to its discussion of *Angell v. City of Toledo*, 153 Ohio St. 179, 91 N.E. 250 (1950), Panther properly begins the discussion by noting as follows:

> In *Angell*, this Court held that the General Assembly had not preempted the field of income taxation and had not, under authority of Section 13 of Article XVIII or Section 6 of Article XIII of the Constitution, passed any law limiting the power of municipal corporations to levy and collect income taxes.

Panther's Merit Brief at 18-19. However, Panther then immediately turns around and qualifies its remarks by arguing as follows:

> When *Angell* was decided, the General Assembly had not limited the authority of municipalities to levy and collect taxes generally on personal income, but the Court was well aware that the General Assembly had declared through G.C. 614-98 that any local fee, tax or other money exaction imposed specifically on motor transportation companies was illegal. *See City of Cleveland*, 130 Ohio St. at 512; *Cleveland Ry. Co.*, 130 Ohio St. at 148. Thus, the Second Appellate District noted in a decision the same year as *Angell* that municipalities are preempted from imposing an income tax on motor carriers. *Krichbaum*, 88 Ohio App. at 330-31.

Panther's Merit Brief at 19. This sleight-of-hand maneuver must be rejected.

The Court's holding in the syllabus of *Angell* is clear: "[T]he General Assembly has not, under authority of Section 13 of Article XVIII or Section 6 of Article XIII of the Constitution, passed any law limiting the power of municipal corporations to levy and collect income taxes." The holding in *Angell* is not qualified as being limited to "personal income" as Panther would have one believe.

The reason for Panther's sleight-of-hand is, of course, that *Angell* is directly at odds with its contention that the predecessor to R.C. 4921.25 (Gen. Code 614-98) was enacted to limit the power of municipal corporations to levy and collect income taxes.

Incidentally, neither of this Court's other two cases cited by Panther—*City of Cleveland v. Public Utilities Commission of Ohio*, 130 Ohio St. 503, 200 N.E. 765 (1936) nor *Cleveland Ry. Co. v. Village of North Olmsted*, 130 Ohio St. 144, 198 N.E. 41 (1935)—involved any type of tax, fee or other extaction. In *City of Cleveland*, this Court held that the PUCO had jurisdiction to grant a certificate of convenience and necessity to a motor transportation company for a certain route because said route did not fall within the "immediately contiguous" exception which would have required the consent of the affected jurisdictions. In *Cleveland Ry. Co.*, this Court held that operation of a governmentally owned transit system is a proprietary and not governmental function and therefore such transit system is subject to reasonable police regulations of another municipality when it enters into that jurisdiction.

Neither of this Court's two cases cited by Panther assist it as it claims. The same is true of the appellate court case *City of Springfield v. Krichbaum*, 88 Ohio App. 329, 100 N.E.2d 281 (1950), which Panther cites for the proposition "that municipalities are preempted from imposing an income tax on motor carriers." Panther's Merit Brief at 19.

In *Krichbaum*, two individual taxpayers claimed discrimination in that they were required to pay municipal tax but that such tax was not levied "on income from intangible property and on income of common carriers and insurance companies." 88

Ohio App. at 330, 100 N.E.2d at 282. So the question of whether motor transportation companies were subject to a municipal income tax was not actually being challenged in that case and the court's observation in that regard that the power to levy a tax on common carriers "has been preempted" technically amounts to *dicta*. More importantly, it is crucial to understand that *Krichbaum* was decided before this Court rejected the doctrine of implied preemption in *Cincinnati Bell Telephone Co. v. Cincinnati*, 81 Ohio St.3d 599, 693 N.E.2d 212 (1981). Prior to such rejection, Ohio tribunals could find that a municipality's taxing power was impliedly preempted simply through the state's occupation of a field of taxation. The fact that the appellate court in *Krichbaum* cites to General Code 614-94, *see* 88 Ohio App. at 331, 100 N.E.2d at 282, the predecessor to R.C. 4921.18 (which imposes the fee or tax) and not General Code 614-98, the predecessor to R.C. 4921.25 (making illegal all other "fees, license fees, annual payments, license taxes, or taxes or other money exactions") clearly suggest that the court's comment was based on the doctrine of implied preemption as opposed to any type of express preemption.

Panther simply cannot reconcile or avoid this Court's *Angell* decision (try as it might).

I. Panther's Other Attempted Sleight-Of-Hand Deals With Revised Code Sections 718.01 And 715.013.

Panther's other sleight–of-hand involves R.C. 718.01 and R.C. 715.013. As these Appellants have noted, the General Assembly amended R.C. 718.01 and enacted R.C. 715.013 in response to this Court's *Cincinnati Bell* case where the doctrine of state implied preemption was struck down.

Appellants cited R.C. 718.01 as an example of an express statutory provision preempting the municipal income taxing power. The pertinent language cited to reads as follows: "A municipal corporation shall not tax any of the following: ... [t]he income of a public utility when that public utility is subject to the public utilities excise tax under Section 5727.24 or 5727.30 of the Revised Code[.]" R.C. 718.01(H). Panther simply ignores the express preemption example in R.C. 718.01 altogether.

Appellants cited R.C. 715.013 not only as an example of an express statutory provision preempting the municipal income taxing power but also as evidence that the General Assembly did not preempt such taxing power as it pertains to motor transportation companies. This statute reads as follows:

> (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.

While Panther addresses R.C. 715.013, it contends that the statute "has no application here" explaining as follows:

> R.C. § 715.013 lists several chapters of the Ohio Revised Code that adopt state taxes that cannot be duplicated in any manner at the local level. There was no reason for the General Assembly to include the state income tax chapter in this list because municipal income taxes are not entirely preempted.

Panther's Merit Brief at 18. What does the "*state income tax chapter*" have to do with anything? The issue clearly is why *Chapter 4921* was not included in the list of chapters found in R.C. 715.013(A). Panther obviously has no answer.

J. Panther's Position In This Case Is Not Supported By A Well-Known Treatise On Ohio Municipal Law.

Counsel for Panther is one of the authors of a well-known treatise on Ohio municipal law—*Baldwin's Ohio Practice, Local Government Law—Municipal.* Gotherman, Babbit & Lang, Baldwin's Ohio Practice, 1 Local Government Law—Municipal (1st ed. 2004 with 2012 supplement update). Chapter 12 is devoted to "Taxation." *Id.* at 449-50. Section 12:13 of that Chapter is titled "Exempt Income" and reads as follows:

> § 12:13 Exempt Income
>
> The military pay or allowances of members of the armed forces of the United States and members of their reserve components, including the Ohio National Guard, and the income of religious, fraternal, scientific, literary, or educational institutions, to the extent that such income is derived from tax-exempt real estate, tax-exempt tangible or intangible property, tax-exempt activities, intangible income as defined at RC 718.01(A)(5), and items excluded from federal gross income pursuant to section 107 of the Internal Revenue Code, are not subject to municipal income taxation. Also not subject to taxation is compensation up to $1,000 paid to precinct election officials and, in certain circumstances, compensation paid to transit authority employees. *The income of a public utility that is subject to the excise tax levied under RC 5727.24 or RC 5727.30 is not subject to tax, but the income of an electric or telephone*

company may be tax, subject to the provisions of RC Chapter 5745. Also not subject to taxation is employee compensation that is not 'qualifying wages' as defined in R.C. 718.03, and compensation paid to employees within the boundaries of a United States Air Force base and is a center for Air Force operations, unless the person is subject to taxation because of residence or domicile. The exemption related to an Air Force base is constitutional. Moreover, compensation paid to a non-resident individual for personal services performed within the municipal corporation for no more than twelve days per calendar year (excluding professional entertainers or professional athletes) generally is not subject to municipal taxation.

The exemptions in a municipal income tax ordinance of compensation for personal services of individuals over eighteen years of age or *the net profits from a business or profession are prohibited,* but lawful deductions may be prescribed in any such ordinance.

The distributive share of the earnings of an S corporation does not constitute intangible income, and is therefore, not exempt from municipal income taxation pursuant to R.C. 718.01(H)(3), except when the income received from the S corporation itself is intangible. However, a tax on an S corporation shareholder's distributive share of net profits must be approved by a vote of electors of the municipal corporation. Although a stock option is intangible property, it properly may be taxed as compensation when received by an employee as compensation. Where a company employee receives stock options from his employer upon leaving employment in exchange for his agreement not to compete against the company, the gain derived from the sale of these options is intangible property not subject to taxation.

Intangible income that is exempt from municipal taxation includes, among other things, capital gains, intellectual property, investments in REITs and regulated investment companies, and appreciation on deferred compensation. Intangible income does not include lottery winnings or winnings from other games of chance. However, lottery winnings must fall within a municipal ordinance's definition of 'taxable income' in order to be subject to taxation. Lottery winnings cannot be taxed pursuant to a municipal

> ordinance that defines 'taxable income' as wages, salaries, and other compensation paid by an employer and/or the net profits from the operation of a business, profession, or other enterprise or activity (unless the winners derive their livelihood from gambling).

Gotherman, Babbit & Lang at 449-50, § 12.13 (emphasis added) (footnotes omitted).

Despite this detailed description of income that is exempt from Ohio municipal tax, there is nothing in *Baldwin's Ohio Practice, Local Government Law—Municipal* about motor transportation companies being exempt from municipal income tax. A motor transportation company is also clearly not a public utility *that is subject to the excise tax levied under RC 5727.24 or RC 5727.30.* Panther's argument in this case that its income is exempt from municipal tax is therefore against his own counsel's authority. Further, this same authority makes clear that the net profits from a business *must* be taxed by the municipality.

K. Business Model Or Not—Panther's Position In This Case Defies Both Logic And Common Sense.

On page 20 of its merit brief, Panther acknowledges that under its "business model [] it may require its [independent] contractors to reimburse [it] for taxes [it] paid." Panther's position is clearly that this is irrelevant. But the independent contractors that ultimately pay the tax for Panther are not exempt from municipal income tax. Does this make any sense? Is that logical?

CONCLUSION

The critical question in this case is whether the General Assembly intended the income of a motor transportation company to be exempt from a municipal income tax. Resolving that issue is dependent on the meaning of the word "taxes" in R.C. 4921.25.

As noted herein, use of said term can mean either revenue taxes, regulatory taxes or both. However, in looking at the objective of the statute, it clearly appears to mean regulatory taxes. In fact, in the context of this statute the word "taxes" only makes sense if the General Assembly intended to preclude special taxes on motor transportation companies or their vehicles. As these Appellants noted in their initial brief, a review of this language ("all fees, license fees, annual payments, license taxes, or taxes or other money exactions") shows that it has five separable parts: (i) "fees"; (ii) "license fees"; (iii) "annual payments"; (iv) "license taxes"; and (v) "or taxes or other money exactions." The word "exactions" is an adjective qualifying the word taxes in R.C. 4921.25.[7] As this Court noted 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 general municipal income tax is not an "exaction." Further, is there any reason why this tax would be "illegal" and "superseded" by the statute?

There is a good reason why Panther had always previously paid the net profits tax: it is obligated to do so just like all other individuals and businesses within the local taxing jurisdiction. The decision below must be reversed.

Respectfully submitted,
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Director of Law

By: _____
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Assistant Director of Law

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[7] This is because there are two "ors" in "or taxes or other many exactions." The first is used in its usual disjunctive sense, the second in a conjunctive sense.

CERTIFICATE OF SERVICE

I certify that a copy of this Reply 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; 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., 175 South Third Street, Suite 510, Columbus, Ohio 43215-7100; Ohio Trucking Association, John L. Alden, Esq. and Anthony E. Palmer, Esq., AldenLaw, One East Livingston Avenue, Columbus, Ohio 43215; The Dump Truck Carriers Conference, Michael M. Briley, Esq., Shumaker, Loop & Kendrick, LLP, 1000 Jackson Street, Toledo, Ohio 43604; Con-way Freight, Inc., Marc S. Blubaugh, Esq., Benesch, Friedlander, Coplan & Aronoff LLP, 41 South High Street – 26th Floor, Columbus, Ohio 43215; and United Parcel Service, Inc., Richard C. Farrin, Esq., Zaino Hall & Farrin, LLC, 41 South High Street – Suite 3600, Columbus, Ohio 43215 and Richard D. Birns, Esq., Birns & Goff, PC, 1604 Locust Street – 4th Floor, Philadelphia, Pennsylvania 19103 on this 11th day of July 2013.

Linda L. Bickerstaff,
Assistant Director of Law
COUNSEL FOR APPELLANTS,
NASSIM M. LYNCH AND THE
CENTRAL COLLECTION AGENCY

APPENDIX

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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 49. PUBLIC UTILITIES
CHAPTER 4923. PUBLIC UTILITIES COMMISSION -- PRIVATE MOTOR CARRIERS

ORC Ann. *4923.13* (2011)

§ **4923.13.** Fees and charges; local ordinances

The fees and charges provided under *section 4923.11 of the Revised Code* shall be in addition to taxes, fees, and charges fixed and exacted by other general laws of this state, except the assessments required by *section 4905.10 of the Revised Code* and the taxes imposed by *section 4921.18 of the Revised Code*, but all fees, license fees, annual payments, license taxes, taxes, or other money exactions assessed, charged, fixed, or exacted by local authorities, such as municipal corporations, townships, counties, or other local boards, or by the officers of such subdivisions, are deemed illegal and superseded by *sections 4921.18*, *4921.32*, and *4923.02* to *4923.17 of the Revised Code*. Upon compliance by such private motor carrier with *sections 4921.18*, *4921.32*, and *4923.02* to *4923.17 of the Revised Code*, all local ordinances, resolutions, bylaws, and rules in force shall cease to be operative as to such carrier, except that such local subdivisions may make reasonable local police regulations within their respective boundaries not inconsistent with such sections.

HISTORY:

GC § 614-114; 115 v 262; Bureau of Code Revision, 10-1-53; 143 v S 382. Eff 12-31-90.

NOTES:

LexisNexis 50 State Surveys, Legislation & Regulations

Motor Carriers

Case Notes & OAGs

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TITLE 49. PUBLIC UTILITIES
CHAPTER 4923. PUBLIC UTILITIES COMMISSION -- PRIVATE MOTOR CARRIERS

ORC Ann. ***4923.11*** (2011)

§ **4923.11.** Taxes

(A) Every private motor carrier or contract carrier by motor vehicle operating in this state shall, at the time of the issuance of its permit, and annually thereafter on or between the first and 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 private motor carrier or contract 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 from agricultural commodities requires a temporary and seasonal use of vehicular equipment for a period of not more than ninety days. In that 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 a motor transportation company or common carrier, or by another private motor carrier or contract carrier, without further payment of the tax imposed by this section or by

section 4921.18 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 permit to any private motor carrier or contract carrier by motor vehicle shall be reckoned as from the beginning of the quarter in which such permit is issued or the use of equipment under any existing permit began.

HISTORY:

GC § 614-112; 115 v 261; 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, 241 (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.

NOTES:

Section Notes

The effective date is set by section 204 of HB 94.

Related Statutes & Rules

Cross-References to Related Statutes

Additional fees and charges, *RC § 4923.13.*

Disposition of taxes, fees and forfeitures, *RC § 4923.12.*

Violation, *RC § 4923.17.*

Ohio Constitution

Authorizing bond issue or other obligations for highway construction, OConst art I, § 2g.

Capital improvement bonds, OConst art VIII, § 2i.

OH Administrative Code

Motor carrier tax receipts. *OAC 4901:2-1-04.*

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TITLE 49. PUBLIC UTILITIES
CHAPTER 4921. FOR-HIRE MOTOR VEHICLE CARRIERS

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ORC Ann. ***4921.25*** (2013)

§ **4921.25.** Entities engaged in towing of motor vehicles subject to regulation as for-hire motor carrier

Any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, that is engaged in the towing of motor vehicles is subject to regulation by the public utilities commission as a for-hire motor carrier under this chapter. Such an entity is not subject to any ordinance, rule, or resolution of a municipal corporation, county, or township that provides for the licensing, registering, or regulation of entities that tow motor vehicles.

HISTORY:

2012 HB 487, § 101.01, eff. June 11, 2012.

NOTES:

Section Notes

Editor's Notes

Former § **4921.25** [GC § 614-98; 110 v 211; Bureau of Code Revision. Eff 10-1-53.], concerning fees and charges, was repealed by 2012 HB 487, § 105.01, effective June 11, 2012.