

ORIGINAL

IN THE SUPREME COURT OF OHIO

PANTHER II TRANSPORTATION)
INC.)

CASE NO. 2012-1589)
and 2012-1592)

APPEAL FROM THE MEDINA)
COUNTY COURT OF APPEALS)
NINTH JUDICIAL DISTRICT)
CASE NOS. 11CA0092-M,)
11CA0093-M)

Appellee,)

vs.)

VILLAGE OF SEVILLE BOARD)
OF INCOME TAX REVIEW)

and)

INCOME TAX ADMINISTRATOR)
NASSIM M. LYNCH)
AND THE CENTRAL COLLECTION)
AGENCY)

Appellants)

REPLY BRIEF OF APPELLANT VILLAGE OF SEVILLE BOARD OF
INCOME TAX REVIEW

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ARGUMENT

PROPOSITION OF LAW NO. I:

FORMER R.C. 4921.25 DOES NOT PREEMPT THE IMPOSITION OF MUNICIPAL NET PROFITS TAX UPON A MOTOR TRANSPORTATION COMPANY

A. REPLY TO PANTHER II TRANSPORTATION, INC. MERIT BRIEF

The Village of Seville, Ohio's ("Seville") concedes that the creation of the Public Utilities Commission of Ohio ("PUCO") in 1923 provided for statewide PUCO regulation of Motor Transportation Companies ("MTC") such as Panther II Transportation, Inc. ("Panther").

1923 Am H.B. 474. The preamble to *1923 Am H.B. 474* provides in the relevant part:

To amend...and enact...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 provisions of this act and for the punishment of violations thereof, and providing for the taxing of motor propelled vehicles. (Emphasis added).

The general purpose of the statewide regulation is to prohibit local municipal regulation of MTCs and for the taxation of motor propelled vehicles. However, PUCO regulation does not automatically preempt local municipal regulation pursuant to constitutionally guaranteed municipal Home Rule powers, unless the action of the local municipality is expressly preempted by PUCO regulation.

The issue before the Court is whether the Medina County Court of Appeals' and the Ohio Board of Tax Appeals' ("Board") decisions were reasonable and lawful in determining that *R.C. 4921.25* expressly preempts Seville's ability pursuant to its Home Rule powers to impose a net profits tax upon a MTC such as Panther.

Municipalities have power to levy excise taxes to raise revenue for purely local purposes. *Haefner v. City of Youngstown*, 147 Ohio St. 58, 68 N.E. 2d 64 (1946), paragraph three of the syllabus. There is no constitutional provision that directly prohibits both the state and municipalities from occupying the same area of taxation at the same time. *Cincinnati Bell Telephone Co. v. City of Cincinnati*, 81 Ohio St. 3d 599, 607, 693 N.E.2d 212 (1998). Rather, the Constitution presumes that both the state and municipalities may exercise full taxing powers, unless the Ohio General Assembly has acted expressly to preempt municipal taxation. *Id.* See, also, *S.B. Carts v. Village of Put-In-Bay*, 161 Ohio App. 3d 691,694, 2005 Ohio 3065; 831 N.E.2d 1052 (6th Dist.).

R.C. 4921.25 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, all local ordinances, resolutions, by laws, and rules in force shall cease to be operative as to the persons in compliance, except that such local subdivisions may make reasonable local police regulations within their respective boundaries not inconsistent with sections 4503.04 and 4905.03 and Chapter 4921 of the Revised Code. (Emphasis added)¹

Panther obviously seeks to obfuscate by dividing *R.C. 4921.25* into three sections, while dismissing the reference to *R.C. 4921.18* and ignoring the clear legislative history of *1923 Am H.B. 474*. *R.C. 4921.25* and *R.C. 4921.18* are to be interpreted *in para materia*, and clearly the general assembly intended to prohibit municipalities from imposing fees and charges upon

¹ On June 11, 2012, former *R.C.4921.25* was repealed and replaced with *R.C. 4921.19* (J). The change to this section with regard to this issue was that the term “charges” in the first sentence was replaced by the term “taxes”. References to *R.C. 4921.25* will be to *R.C. 4921.25* in effect prior to June 11, 2012.

MTCs for each vehicle operated by an MTC. The purpose of *R.C. 4921.25* is to prohibit a municipality from imposing a similar “fees and charges” upon each motor propelled vehicle with the exception of personal property tax. This includes locally imposed fees, license fees, annual payments, licenses taxes, or taxes or other money exactions upon these motor propelled vehicles. *See, R.C. 4921.25*. This does not include municipal income and net profits tax imposed upon a MTC.

R.C. 4921.18 provides in the relevant part:

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. . . . (Emphasis added)²

R.C. 4921.25 provides no express prohibition of a municipal income and net profits tax upon a MTC. Imposing such a prohibition by implication is not reasonable and lawful, and is a violation of the constitutional Home Rule powers granted to municipalities.

In interpreting a statute, ‘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’. *Tomasik v. Tomasik*, 111 Ohio St. 3d 481, 2006-Ohio-6109, 857 N.E. 127 ¶ 13, quoting *Slingsluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph one of the syllabus. This court may engage in statutory interpretation when the statute under review is ambiguous. *Id.* ‘But the intent of the law-makers is to be sought first of all in the language employed, and if the words be free

² On June 11, 2012, former *R.C.4921.18* was repealed and replaced with *R.C. 4921.19* to which no substantial changes were made with regard to the current issue. References to *R.C. 4921.18* will be to *R.C. 4921.18* in effect prior to June 11, 2012.

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. *Tomasik* at ¶ 14. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. *Id.* That body should be held to mean what it has plainly expressed, and hence no room is left for construction.’ *Id.*

Panther concludes that the phrase ‘all fees, license fees, annual payments, license taxes, or taxes or other money exactions, except the general property tax’ set forth in *R.C. 4921.25* plainly prohibits municipalities from imposing net profits taxes on MTCs. However, Panther neglects to observe that *R.C. 4921.25* refers to *R.C. 4921.18* when the word ‘taxes’ is employed in the statute. *R.C. 4921.18* provides for the taxing of motor propelled vehicles and does not expressly refer to a net profits tax. Moreover, the preamble of *1923 Am H.B. 474* unambiguously states that the ‘taxes’ referred to in the act relate to the taxing of motor propelled vehicles.

*R.C. 4921.25*³ can not be interpreted to mean all ‘future’ taxes including a municipal net profits tax. Municipal income tax did not exist in Ohio or in any of the United States in 1923. The imposition of municipal income tax was in fact illegal in Ohio in 1923. *See, State ex rel. Zielonka v. Carrel*, 99 Ohio St. 220, 228, 124 N.E. 134 (1919). In ‘ascertaining and giving effect to the intent of the law-making body’ which enacted *R.C. 4921.25* it would be illogical to conclude that the legislature enacted *R.C. 4921.25* to prohibit municipal net profits taxes that were already determined to be illegal under Ohio law.

Panther also cites *R.C. 1.48* and *Desenco, Inc. v. Akron*, 84 Ohio St. 3d 535, 542-543, 706 N.E. 2d 323 (1999) for the proposition that statutes may apply to future circumstances not

³ The language in *G.C. 614-94* formerly *G.C. 614-98* in *1923 Am H.B. 474* is identical to the language in *R.C. 4921.18* and *R.C. 4921.25* as codified in 1953. The language did not change from the first enactment in 1923 until the modifications in the 2012 amendment.

present at the time of enactment. However, *R.C. 1.48* merely provides that statutes are not to operate retroactively unless expressly provided in the statute. In addition, *Desenco, supra*, discusses the uniform operation of statutes throughout the state.

Panther further contends that *R.C. 715.013* has no application in the case *sub judice*, as *R.C. 715.013* prohibits municipal taxes that are the same or similar to several categories of state taxes.

In response to *Cincinnati Bell, supra*, the Ohio General Assembly amended *R.C. 718.01*⁴ and enacted *R.C. 715.013* expressly prohibiting municipalities from enacting tax legislation in various areas. This included municipal taxation of net income of electric companies and telephone companies under certain circumstances. Both of these industries, like MTCs, are regulated by the PUCO. Conspicuously absent from these statutes is a provision prohibiting the taxing of the net income of a MTC.

Panther asserts that there are numerous preemptions not included in *R.C. 718.01* and *718.013*, however Panther fails to cite any preemption outside of the prohibited municipal taxes set forth in *R.C. 718.01* and *718.013* other than the preemption Panther claims in *R.C. 4921.25*.

Panther also claims that *Angell v. City of Toledo*, 153 Ohio St. 179, 184, 91 N.E.2d 250, 253 (1950) has no application as *Angell, supra*, only applied to personal income tax; and yet, Panther continues to rely upon the *obiter dicta* in *City of Springfield v. Krichbaum*, 88 Ohio App. 329, 330-331, 100 N.E. 2d 281 (1950).

In *Angell, supra*, the Supreme Court held that the General Assembly has not, under authority of Section 13 of Article XVIII or Section 6 of Article XIII of the Constitution, passed

⁴ On December 21, 2007, former *R.C. 718.01(F)* was recodified into *R.C. 718.01(H)*. Former *R.C. 718.01(F)* is applicable to the instant case.

any law limiting the power of municipal corporations to levy and collect income taxes”. Id. at paragraph two of the syllabus.

When *Angell, supra*, was decided, *R.C. 4921.25* was in existence for 27 years. The Supreme Court held that the State of Ohio had not passed any law that limited municipal corporations from levying and collecting income taxes.

In *Krichbaum, supra*, the issue was whether a municipality could tax wages of a resident earned outside the municipality. Id. at 330. The Court issued the *obiter dicta* in *Krichbaum, supra*, when *Haefner, supra*, was in force and preemption by implication flowing from state legislation which pre-empts the field was permissible. Since that time *Cincinnati Bell, supra*, held that municipal income tax could only be preempted by express state legislation. Id. at 607.

R.C. 4921.25 does not expressly prohibit municipal imposition of net profits tax upon an MTC.

B. REPLY TO THE BRIEFS AMICUS CURIAE

Despite the claims of many of Panther’s supporters *Amicus Curiae*, Seville is not attempting to circumvent existing law and public policy by taxing the net profits of Panther, nor is the Seville Income Tax Ordinance a draconian or punitive scheme.

The Seville Income Tax Ordinance was first enacted in 1976. The original Ordinance contained the provisions imposing a net profits tax upon all businesses within the Village of Seville pursuant to *R.C. 718.01* and it did not exclude MTCs. (Panther Supp. 27).

Panther, as a resident corporation in Seville, paid the net profits tax in 2005 and 2006 and chose to request a refund in 2007. (Supp. 1).

Section 2:05(A) of the Village of Seville Income Tax Ordinance provides in part:

In the case of corporations, ... whether or not such corporations have an office or place of business in Seville, there is imposed an annual tax on the net profits earned and accrued during the effective period of the Ordinance determined by a method of allocation provided in Chapter 3:00 hereof, derived from sales made, work done, services performed or rendered, and business or other activities conducted in Seville. (Panther Supp. 42).

However, *Section 3:02(A) of the Village of Seville Income Tax Ordinance* also provides:

In the event a just and equitable result cannot be obtained under the formula, the Administrator, upon his own initiative or upon application of the taxpayer, may substitute other factors in the formula or prescribe other methods of allocating net income calculated to effect fair and proper allocation. (Panther Supp. 47).

The briefs *Amicus Curiae* raise concerns that net profits taxes may be levied on non-resident corporations having property in Seville such as a “drop box”⁵, or upon property or personnel passing through Seville. However, through the use of *Section 3:02(A) of the Village of Seville Income Tax Ordinance*, Seville has never imposed a net profits tax upon any corporation that is not a resident corporation within the corporation limits of Seville.

Accordingly, the opening of the “Pandora’s box” feared by Panther and Panther’s supporters is unfounded.

C. CONCLUSION

It is clear that the decisions of the Medina County Court of Appeals and the Board are unreasonable and unlawful and in violation of Seville’s Home Rule powers under the Ohio Constitution. These decisions hold that *R.C. 4921.25* expressly preempts Seville’s ability to impose an income and net profits tax upon Panther. *R.C. 4921.25*, originally enacted in 1923, does not expressly prohibit net income and profits tax upon a MTC. In 1923, there was no municipal income tax in existence in Ohio or the United States. In addition, the Supreme Court

⁵ The property alleged by United Parcel Service, Inc. to be in Seville at the Pilot Truck Center is not within the corporation limits of Seville.

previously held that municipal income and net profits tax was unconstitutional. Therefore, it was impossible for the Ohio General Assembly to expressly prohibit municipal income and net profits taxes upon a MTC, as municipal income and net profits taxes were not in the contemplation of the Ohio General Assembly at the time *R.C. 4921.25* was enacted.

Furthermore, a clear and unambiguous reading of *R.C. 4921.18*, *R.C. 4921.25*, and the legislative history of *1923 Am H.B. 474*, clearly show that *R.C. 4921.25* was enacted to preempt a municipalities' ability to tax motor propelled vehicles and not a MTC's income and net profits. Absent a clear and express act of the Ohio General Assembly preempting MTCs from municipal income and net profits taxes, Panther is subject to Seville's net profits tax pursuant to *R.C. 718.01(D)(1)*. Accordingly, the decision of the Board and the Medina County Court of Appeals must be reversed.

Respectfully submitted,



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