[Cite as *Beaver Excavating Co. v. Levin,* 2011-Ohio-3649.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Beaver Excavating Company et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 10AP-581 (C.P.C. No. 08CVH-03-3921)
Richard A. Levin, Tax Commissioner of Ohio,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on July 26, 2011

Vorys, Sater, Seymour and Pease LLP, Thomas B. Ridgley, Anthony L. Ehler, Jeffrey Allen Miller and *Robert J. Krummen*, for appellants.

Michael DeWine, Attorney General, *Barton A. Hubbard* and *Julie E. Brigner*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} This case is a challenge to the constitutionality of R.C. 5751 et seq., the Ohio Commercial Activity Tax (the "CAT"). The appellants have sought to prove that the CAT is unconstitutional to the extent that moneys derived from the CAT that relate to sales of motor vehicle fuel are not being expended for the purposes enumerated in

Section 5(a), Article XII, Ohio Constitution ("Section 5a"). For the reasons that follow, we affirm the judgment of the Franklin County Court of Common Pleas.

Background of Section 5a and the CAT

{¶2} The relevant constitutional provisions are Article XII, Sections 5 and 5a that provide as follows:

> *LEVYING OF TAXES.*
>
> §5 No tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied. (1851).
>
> *Use of Motor Vehicle License and Fuel Taxes Restricted.*
>
> §5a No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways. (1947)

(Emphasis sic.)

{¶3} Section 5a is an amendment to the Ohio Constitution passed in 1947 by the citizens of Ohio by means of an initiative petition. The history of Section 5a shows that prior to the amendment, moneys from motor vehicle related taxes had been used to meet general needs, such as help for the poor during the Great Depression. Citizens and highway interest groups wanted moneys obtained through taxes, fees, and licenses relating to motor vehicle operation and fuel to be expended exclusively for road projects

and highway improvement. Doing so would allow state road money to tie in with the federal highway program and would include many city streets and rural roads. See Ohio Atty.Gen.Ops. No. 82-084 (citing Ohio Secretary of State's officially prepared and published pamphlet setting forth pro and con arguments for Section 5a). Opponents contended that the amendment was unnecessary and handicapped the legislature's ability to apply revenue where it was needed by the state. Id.

{¶4} After the amendment passed, the General Assembly repealed the 1¢/gal. liquid fuel tax. The revenue from the liquid fuel tax had been used to pay general obligations of the state. The General Assembly then raised the motor vehicle fuel tax by 1¢ as its revenues were allocated to highway purposes. The tax burden remained the same, but all the funds were now allocated to highway purposes in accordance with Section 5a.

{¶5} Even after the passage of Section 5a, motor fuel dealers were still subject to Ohio's Corporate Franchise Tax for the privilege of doing business in Ohio. However, at that time, the tax was measured by the value of corporate stock, not gross receipts as is done under the CAT.

{¶6} Beginning in 2005, Ohio's General Assembly imposed the Commercial Activity Tax as one of a series of tax revisions designed to lessen the burden of taxation on Ohio businesses. *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, ¶6. The CAT was designed to be phased in over five years beginning in 2005. Id. Meanwhile, the corporate franchise tax was to be phased out, along with the tangible

personal property tax. Motor fuel was temporarily exempt from the CAT until July 1, 2007. Ohio Adm.Code 5703-29-12 (effective March 5, 2006).

{¶7} The CAT is levied "on each person with taxable gross receipts for the privilege of doing business in this state." R.C. 5751.02(A). The value of that privilege is measured differently from the corporate franchise tax. The CAT uses gross receipts to measure the tax. Id. at ¶1. Gross receipts means the "total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person, including the fair market value of any property and any services received, and any debt transferred or forgiven as consideration." R.C. 5751.01(F).

{¶8} The CAT proceeds are allocated to the general revenue fund, the school district tangible property tax fund, and the local government tangible personal property tax repayment fund. R.C. 5751.20.

THE PARTIES

{¶9} Appellants fall into two main groups: contractors and county engineers. Beaver Excavating Company is one of a group of companies who, in the course of their business, generate gross receipts derived from motor vehicle fuel. Since July 1, 2007, these businesses have been subject to the CAT and have paid the CAT, measured in part, by gross receipts from motor vehicle fuel sales. The county engineers for Ashland and Highland Counties have alleged that their county budgets for infrastructure projects depend, in part, on money derived from taxes relating to motor vehicle fuel. They claim that because the CAT does not appropriate the moneys derived from the gross receipts of

motor vehicle fuel to highway purposes as set forth in Section 5a, the engineers are deprived of funds they should receive for road projects.

{¶10} Appellee, Richard A. Levin, is the Tax Commissioner of Ohio, and has argued that the imposition of the CAT does not violate the Ohio Constitution and is therefore valid.

TRIAL COURT ACTION

{¶11} On July 6, 2010, appellants filed an action in the Franklin County Court of Common Pleas seeking a declaratory judgment that the CAT violated Section 5a. They also asked for an injunction preventing the tax commissioner from levying, enforcing, or collecting the CAT as it relates to motor vehicle fuel.

{¶12} Both parties filed motions for summary judgment. The trial court ruled in favor of the tax commissioner, granting summary judgment on May 19, 2010. The trial court based its analysis on a case that had been recently decided by the Ohio Supreme Court in *Ohio Grocers Assn. Ohio Grocers Assn.* involved the question of whether the CAT violated the Ohio Constitution's prohibition of sales or other excise taxes on food. Sections 3(C) and 13, Article XII, Ohio Constitution. The Ohio Supreme Court held that the CAT was not a tax on the sale or purchase of food as contemplated by the constitution, and therefore did not violate the constitutional prohibitions against sales or excise taxes on food. Id.

{¶13} In this case, the trial court acknowledged the history and genesis of Section 5a. It also recognized the argument that the motor vehicle fuel language in Section 5a may be broader in scope than the constitutional provisions regarding excise taxes on the

sale of food. Nevertheless, the trial court came to the conclusion that if one were to substitute excises on fuels (used for propelling vehicles on public highways) for excises on food, the Ohio Supreme Court would hold, as it did in *Ohio Grocers Assn.*, that the CAT tax was constitutional.

ASSIGNMENTS OF ERROR

{¶14} On appeal, appellants raise the following three assignments of error:

> [I.] The trial court erred in failing to hold that the moneys derived from the Ohio Commercial Activity Tax (the "CAT"), Ohio Revised Code Chapter 5751.01 et seq., to the extent that the CAT is applied to gross receipts from sales of "fuels used for propelling [vehicles on public highways]" ("Motor Vehicle Fuel"), relate to Motor Vehicle Fuel under Article XII, Section 5a ("Section 5a") of the Ohio Constitution.
>
> [II.] The trial court erred in failing to conclude that moneys derived from the CAT relating to Motor Vehicle Fuel are not appropriated as mandated by Section 5a.
>
> [III.] The trial court erred in failing to declare the CAT is unconstitutional under Article XII, Sections 5 and 5a to the extent that moneys derived from the CAT relating to Motor Vehicle Fuel are not appropriated for the specific objects permitted under Section 5a.

STANDARD OF REVIEW

{¶15} This court applies a de novo standard of review on an appeal from summary judgment. *Comer v. Risko,* 106 Ohio St.3d 185, 2005-Ohio-4559, ¶8; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's

determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown* at 711. Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶16} In assignment of error one, appellants argue first that the CAT is an excise tax, and second, that moneys derived from the CAT relate, in part, to motor vehicle fuel. The pertinent language of Section 5a, Article XII, reads as follows:

> No moneys derived from * * * excises * * * relating to * * * fuels used for propelling * * * vehicles [on public highways], shall be expended for other than costs of * * * construction, reconstruction, maintenance and repair of public highways * * *.

{¶17} The Ohio Supreme Court has declared that a franchise tax is a kind of excise tax. *Ohio Grocers Assn.* at ¶30. Appellants contend that, unlike the constitutional amendments at issue in *Ohio Grocers Assn.*, Section 5a's broadly worded language includes all excise taxes including a tax on the privilege of doing business in Ohio. In support of their argument, they cite to *Ohio Grocers Assn.* in which the court stated that if

drafters had intended to affect excises of "every stripe," they would simply use the term "excise taxes." Id. at ¶29. Here, Section 5a reads "excises." Thus, appellants argue that the plain language of Section 5a requires a determination that the CAT moneys derived from gross sales of motor vehicle fuel must be expended solely for Section 5a purposes.

{¶18} The tax commissioner argues that whether revenue generated by the CAT is subject to Section 5a's expenditure restriction turns on whether the CAT is a general tax or a special tax. The commissioner looks to the taxes in effect at the time Section 5a was adopted, such as the liquid fuel tax, and the motor vehicle fuel tax. The commissioner suggests that highway user taxes imposed on the users of public highways for the privilege of using the highways and earmarked for maintaining highways are special taxes, unlike the corporate franchise tax which is a general tax.

{¶19} The commissioner further notes that diversion of these special taxes took place around the country for relief for the poor during the Great Depression. He contends that Ohio and many states enacted anti-diversion amendments like Section 5a to enable states to receive federal highway funds under the Hayden-Cartwright Act, as states could not receive federal funds unless their highway-related taxes were applied to highway purposes.

{¶20} The commissioner argues that we must narrowly construe the "relating to" language of the amendment, for to do otherwise, would lead to absurd results. The commissioner states that it is untenable to think corporate tax revenues received from auto manufacturers, dealers, repair shops, parts dealers, financing businesses, and insurers must be dedicated to highway purposes because those taxes relate to the use

and operation of motor vehicles. The commissioner urges that this court interpret the amendment to apply only to special taxes imposed on those who use the public highways for the express purpose of maintaining the highways and not general taxes such as the CAT.

{¶21} Any constitutional analysis must begin with the presumption of constitutionality enjoyed by all legislation. *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶25. Before a court may declare unconstitutional an enactment of the legislative branch, " 'it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.' " Id., quoting *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus. When a statute is challenged on the ground that it is unconstitutional as applied to a particular set of facts, the party making the challenge bears the burden of presenting clear and convincing evidence of a presently existing set of facts that make the statute unconstitutional and void when applied to those facts. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶38.

{¶22} When the courts construe a statute or constitutional provision, "the object of the people in adopting it should be given effect; the polestar in the construction of constitutional, as well as legislative, provisions is the intention of the makers and adopters thereof." *Castleberry v. Evatt* (1946), 147 Ohio St. 30, paragraph one of the syllabus. The Ohio Supreme Court has described how to construe a constitutional amendment adopted by initiative petition as follows: " 'This is the simple language of the plain people and it is to receive such meaning as they usually give to it in political discussions and

arguments.' " *State ex rel. Keller v. Forney* (1923), 108 Ohio St. 463, 466, quoting *State ex rel. Greenlund v. Fulton* (1919), 99 Ohio St. 168, 200. Technical hair-splitting distinctions are not favored when applying the common words of the people. Id. at 201.

{¶23} "The first step in determining the meaning of a constitutional provision is to look at the language of the provision itself." *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513, 520, 1994-Ohio-496. "Words used in the Constitution that are not defined therein must be taken in their usual, normal, or customary meaning." *State ex rel. Taft v. Franklin Cty. Court of Common Pleas,* 81 Ohio St.3d 480, 481, 1998-Ohio-333.

{¶24} "If the meaning of the constitutional provision is clear on its face, courts will not look beyond the provision in an attempt to divine what the drafters intended it to mean." *Gough v. Triner*, 7th Dist. No. 05 CO 33, 2006-Ohio-3522, ¶15, citing *Sheward* at 520. However, if the meaning of the constitutional provision cannot be ascertained by its plain language, courts may look to the purpose of the amendment to determine its meaning. Id. Courts can look to the history of the time when it was passed, the circumstances at the time of its adoption, the need for the provision, the mischief sought to be avoided, and the remedy intended to be afforded. Id., citing *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, ¶14; *Cleveland v. Bd. of Tax Appeals* (1950), 153 Ohio St. 97, 103.

{¶25} Here, the plain language of Section 5a states that fees, excise taxes, and license taxes relating to motor vehicle fuel, must be expended exclusively for specific purposes contained in the amendment.

{¶26} The "related to" language of Section 5a can only be described as ambiguous. Taken to the broadest possible extent, everything is related in some way to everything else. See *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.* (1997), 519 U.S. 316, 335-36, 117 S.Ct. 832 (Justice Scalia concurring). An extremely broad construction of the "related to" language could lead to absurd results such as those posited by the tax commissioner. However, a narrow rendering could thwart the intention of the citizens of Ohio when they voted for Section 5a. In the Employee Retirement Income Security Act ("ERISA") preemption context the United States Supreme Court has stated: "[w]e simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* (1995), 514 U.S. 645, 656, 115 S.Ct. 1671.

{¶27} As touched on briefly above, at the time Section 5a was submitted to the voters for their approval, the Ohio Secretary of State prepared and published, in accordance with Section 1g, Article II, Ohio Constitution and G.C. 4785-180b, an official publicity pamphlet, setting forth the arguments in favor of, and the arguments in opposition to, the proposed amendment. Ohio Atty.Gen.Ops. No. 82-084.

{¶28} The argument in favor stated, in pertinent part:

> This Amendment simply says you want your automobile license and gas tax money to go for better roads and streets.
> Many Ohio highways are behind the times, and must be improved for post-war traffic.
> Many streets are dangerous traffic bottle-necks.

> We are disgusted with slow moving traffic in congested areas, dusty, winter mired-in roads in rural districts, and alarmed at the traffic toll on narrow roads and bridges with death inviting curves.
> . . . .
> Ohio originally promised that automobile license and gas tax funds would go for roads, streets, and related purposes. But temptation was too great and millions of these special tax dollars have been and are being spent for other purposes. This is your chance to correct these conditions.
> The same thing happened in other states, but nineteen states, including Michigan, Pennsylvania, Texas, Iowa, California, Minnesota, Oregon and Kentucky, have acted to protect their road funds by amending their constitutions. Ohio now has this opportunity.
> . . . .
> Road and street improvement costs have increased. Ohio needs road money to tie-in with the promised federal highway program which will include many city streets and rural roads. It is imperative that motor vehicle taxes be used exclusively for roads and streets.
> Remember, this Amendment does not increase the rate of any tax nor place restrictions on the allocation of revenues by the Legislature. It is your insurance for better roads and streets.
> Vote "YES" for the "Better Roads and Streets Amendment" and put Ohio on the honor roll of progressive states."

{¶29} The opponents argued as follows:

> NO TAX REDUCTION. This amendment holds no promise of a tax reduction. If revenues thus provided for road purposes without specific appropriations exceed the actual needs for the roads, unnecessary expenditures and misuse of the excess funds will be encouraged.
> . . . .
> BAD POLICY. This amendment places the Legislature in a strait-jacket and severely handicaps it in applying the revenue of the state to the needs of the state. The Legislature could not use highway revenues for emergency purposes and the revenues from such taxes will have to be spent for roads and streets and for no other purpose.

> NOT NEEDED. Taxes levied upon automobile owners allocated by law for the construction and maintenance of roads and streets are the 3¢ motor vehicle fuel tax and motor vehicle license fees. The 1¢ per gallon liquid fuel tax is used to pay general governmental obligations. Liquid fuel tax revenues add approximately $15,000,000 annually to the state general revenue fund. Appropriations are now made by the Legislature from this fund to the Department of Highways and political sub-divisions. Since the Legislature can and has appropriated this money for highway purposes, there is no need for this amendment.

{¶30} In 1972, the Ohio Constitutional Revision Committee Finance and Taxation Committee created a report containing information about the history and background of Section 5a, and how those types of "good roads" amendments have been interpreted in other states. The report summarized the purpose of Section 5a as requiring "that all of the revenues derived from the registration of motor vehicles and from the taxes imposed on the purchase of fuels for motor vehicles be expended on the requirements of the state's highway system." Ohio Constitutional Revision Commission Finance and Taxation Committee, 1755 (Vol. 4, Sept. 22, 1972). The report summarized three major earmarked taxes on the operation of motor vehicles and the use of the highways in the state. The taxes were the gasoline or motor vehicle fuel tax, the highway use tax, and the motor vehicle license or registration tax. A fourth tax, the transportation tax, was levied upon common and contract carriers. Id. at 1758.

{¶31} A review of this background and history shows that the objective of Section 5a was and is to prevent taxes collected from the motoring public from being diverted to non-highway purposes. Without the constitutional amendment, the legislature was free to divert moneys for emergencies or other priorities. The question thus becomes whether

the CAT, as applied to appellants, is related to motor vehicle fuel in such a way that Section 5a's prohibition on where such moneys may be spent is triggered.

{¶32} The Ohio Supreme Court in *Ohio Grocers Assn.* has determined that the CAT is a privilege of doing business tax, sometimes known as a franchise tax. A franchise tax "*is* a kind of excise tax." Id. at ¶30. We recognize that *Ohio Grocers Assn.* focused on an alleged unconstitutional imposition of a tax on food, while the present case involves an alleged unconstitutional expenditure of revenue derived from the CAT. Nevertheless, the following principles that are relevant to the instant case may be gleaned from the *Ohio Grocers Assn.* decision.

{¶33} A franchise tax, or a tax upon the privilege of doing business, is a kind of excise tax. Id. at ¶30. It is permissible to tax the privilege of doing business, and to do so, the privilege must be valued. Id. at ¶16. The value of the privilege of doing business, may be determined by using various factors, including gross receipts. Id. There is a distinction between a tax upon a certain factor and a tax upon a privilege measured by that factor. Id. at ¶17, 23. The only purpose of the franchise tax formula is to determine by uniform rules the value of the corporate franchise in the state, and the employment of various factors is not an indication that the subjects of such factors are being taxed. Rather, the factors are used to compose a measuring stick. Id. In the same way Ohio's corporate franchise tax operates, the CAT is levied on the exercise of a privilege and not on receipts. See *Bank One Dayton, N.A. v. Limbach* (1990), 50 Ohio St.3d 163, 167 (discussing the nature and operation of the corporate franchise tax).

{¶34} Applying these principles, as the Ohio Supreme Court did in *Ohio Grocers Assn.,* we must conclude that Ohio's CAT measured by gross receipts, including receipts from the sale of motor vehicle fuel, is not a tax upon motor vehicle fuel. Whether the CAT relates to the sale of motor vehicle fuel is not supported by the background and history of Section 5a which historically has been interpreted to apply to the specific taxes set forth above and not to general taxes. While in a sense one could say that the CAT as applied to these appellants has some relation to motor vehicle fuel, the relationship is too attenuated to find that the statutory allocation of the CAT moneys violates Section 5a. Appellants have not been able to show beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.

{¶35} Assignment of error one is overruled.

{¶36} Having overruled assignment of error number one, appellants' second and third assignments of error must fail also. Having found CAT's mechanism of valuing a privilege based in part on gross sales of motor vehicle fuel bears little to no relationship to a tax upon motor vehicle fuel, the remaining assignments of error are overruled as well.

{¶37} Based on the foregoing, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

CONNOR, J., concurs.
DORRIAN, J., concurs separately.

DORRIAN, J., concurring separately.

{¶38} I concur with the majority's affirmation of the trial court's judgment, but conclude that Section 5a, Article XII, of the Ohio Constitution ("Section 5a") was intended

to restrict the use of revenues from taxes and fees *targeted at* users of the public roads, irrespective of whether they were classified as general or specific taxes. The Ohio Commercial Activity Tax (the "CAT") is a tax on the privilege of doing business, not a tax on the privilege of using the public roads or a tax targeted at users of the public roads, and, therefore, applying the CAT to businesses engaged in the sale of motor vehicle fuel (hereinafter "gasoline") does not violate Section 5a.

{¶39} As the majority explains, a constitutional amendment adopted by initiative petition must be given " 'such meaning as [the people] usually give to it in political discussions and arguments.' " *State ex rel. Keller v. Forney* (1923), 108 Ohio St. 463, 466, quoting *State ex rel. Greenlund v. Fulton* (1919), 99 Ohio St. 168, 200. Thus, the phrase "fees, excises, or license taxes relating to * * * fuels used for propelling such vehicles" in Section 5a must be understood in the context of the time it was enacted.

{¶40} Two types of taxes were specifically mentioned in the parties' discussion of the history of Section 5a: the motor vehicle fuel tax and the liquid fuel tax.[1] A review of the history and circumstances of each of these taxes demonstrates that they were targeted at users of the public roads. Thus, it is appropriate to view Section 5a as a restriction on the use of revenues from such targeted fees or taxes.

{¶41} The liquid fuel tax, which appellant suggests was a general tax, was enacted in 1933 and imposed a one-cent-per-gallon tax on liquid fuel used, distributed, or sold in the state. G.C. 5542-2, Am.Sub.S.B. No. 354, 115 Ohio Laws 631, 632-33. The

[1] Ohio also imposed a motor vehicle license tax at the time Section 5a was adopted and continues to impose this tax. The motor vehicle license tax was and is clearly targeted at users of the public roads, as it is "levied upon the operation of motor vehicles on the public roads or highways," and must be paid when the owner registers a motor vehicle. R.C. 4503.02; 4503.11.

law defined "liquid fuel" as "any volatile or inflammable liquid * * *, which is used or usable, either alone or when mixed or compounded, for the purposes of generating light, heat or power, or for any purpose whatsoever; * * * includ[ing] gasoline, kerosene and all other like substances." G.C. 5542-1, Am.Sub.S.B. No. 354, 115 Ohio Laws 631. A portion of the revenue from the liquid fuel tax was placed into a rotary fund to be used for paying refunds of the tax, and the remainder of the revenue was placed into a state public school fund. G.C. 5542-18, Am.Sub.S.B. No. 354, 115 Ohio Laws 631, 641. Subsequently, in 1939, the General Assembly amended the law to provide that revenue from the liquid fuel tax beyond the amount needed to fund the rotary fund was to be placed in the state's general revenue fund. G.C. 5542-18, Sub.H.B. No. 1, 118 Ohio Laws 7, 9.

{¶42} The liquid fuel tax was imposed on dealers of liquid fuel. G.C. 5542-2, Am.Sub.S.B. No. 354, 115 Ohio Laws 631, 632-33. However, as discussed below, gasoline dealers adopted the practice of passing the motor vehicle fuel tax on to customers in the price of gasoline, and there is no reason to believe that liquid fuel dealers did not adopt the same approach. Although the statutory definition of liquid fuel encompassed more than gasoline for use in propelling vehicles on the public roads, the history of the enactment of the liquid fuel tax indicates it was primarily targeted at users of the public roads. At the beginning of 1933, the motor vehicle fuel tax was imposed at a

rate of four cents per gallon.[2] On June 30, 1933, the General Assembly passed a bill reducing the existing motor vehicle fuel tax to three cents per gallon. H.B. No. 62, 115 Ohio Laws 629, 631. The very next day, July 1, 1933, the General Assembly passed the measure creating the one-cent-per-gallon liquid fuel tax. Am.Sub.S.B. No. 354, 115 Ohio Laws 631, 642. The effect of this change was to re-appropriate a portion of the revenue from the motor vehicle fuel tax, which by statute was required to be used for maintaining and improving public roads, to other uses. This intent is further demonstrated by the fact that, after Section 5a was adopted, the General Assembly repealed the liquid fuel tax and restored the motor vehicle fuel tax rate to four cents per gallon on the same day. Am.S.B. No. 358, 122 Ohio Laws 807 (repealing the liquid fuel tax); H.B. No. 500, 122 Ohio Laws 809, 809-11 (increasing rate of motor vehicle fuel tax).

{¶43} Moreover, historical revenue data establish that the liquid fuel tax essentially replaced the one-cent reduction in the motor vehicle fuel tax. In 1930, the state received gross revenue of $39 million from the four-cents-per-gallon motor vehicle fuel tax. The following year, the tax brought in $41.2 million in gross revenue. In 1932, the state received $36.1 million in gross revenue from the motor vehicle fuel tax. In 1933, the year that the General Assembly reduced the motor vehicle fuel tax and enacted the liquid fuel tax, the state received combined gross revenue from both taxes of $35.7 million. In 1934 and 1935, the two taxes brought in combined gross revenue of $38.9 million and $41.2 million, respectively. Ohio Department of Taxation Annual Report for

[2] The four-cents-per-gallon tax on motor vehicle fuel in effect at the beginning of 1933 was composed of a two-cents-per-gallon tax under G.C. 5527 and an additional two-cents-per-gallon tax under G.C. 5541-1. G.C. 5527, H.B. No. 44, 111 Ohio Laws 294, 295; G.C. 5541-1, H.B. No. 335, 113 Ohio Laws 70, 71.

the Year Ending December 31, 1947, at 9-10 (appellant's reply brief, Exhibit B). The fact that the state's revenues were essentially unchanged when the motor vehicle fuel tax was reduced and the liquid fuel tax was implemented demonstrates that the burden of the liquid fuel tax largely fell on the same individuals who bore the burden of the motor vehicle fuel tax; i.e., those using gasoline to propel vehicles on public roads.

{¶44} Appellants concede that the motor vehicle fuel tax, also known as the gasoline tax, is a "special tax" because revenue from the tax is directed to a specific purpose. The gasoline tax is collected from gasoline dealers, rather than purchasers of gasoline. R.C. 5735.05; 5735.25; 5735.29; 5735.30; *Cincinnati v. Cincinnati Oil Works Co.* (1931), 123 Ohio St. 448, 450 ("The state gasoline tax is imposed by the state upon the business of the owner of the filling station, and not upon the consumer of the gasoline.") However, since the earliest days of the gasoline tax, dealers have added the cost of the tax to the price of gasoline; as a result, purchasers of gasoline ultimately bear the burden of the tax as a cost for the privilege of using public roads. *State ex rel. Janes v. Brown* (1925), 112 Ohio St. 590, 596 ("The [gasoline] tax is upon the enjoyment of the privilege of using motor vehicle fuel in traveling upon the highways and streets of the state."); *State ex rel. Bettman v. Canfield Oil Co.* (1929), 34 Ohio App. 267, 273 ("A dealer is charged with the collection of the [gasoline] tax for administrative purposes only. The tax is upon the enjoyment of the privilege of using motor vehicle fuel. The various gasoline dealers of Ohio adopted a system whereby the amount of the tax was added to the cost and normal of the tax gasoline, and was paid by the consumer with the

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The additional tax was originally levied as a one-cent-per-gallon tax in 1927 and was increased to two cents per gallon in 1929. H.B. No. 206, 112 Ohio Laws 508, 509; H.B. No. 335, 113 Ohio Laws 70, 71.

understanding that the amount added to the cost and normal profit for tax was collected by the dealer for the state of Ohio.") (internal citation omitted); *Hickok Oil Corp. v. Evatt* (1943), 141 Ohio St. 644, 653 ("As the ultimate consumer pays a price enhanced by the tax, the burden is spread upon those who use the privilege of driving motor vehicles on the highways and streets of the state."). This "pass through" structure means that the gasoline tax is effectively a tax targeted at drivers, notwithstanding the fact that the tax is collected from dealers.

{¶45} The General Assembly ensured that the gasoline tax would be targeted at automobile drivers by providing a refund of the tax for users of gasoline engaged in activities that do not involve driving on the public roads. R.C. 5735.14(A) provides that "[a]ny person who uses any motor fuel, on which the [gasoline tax] * * * has been paid" for various specified purposes that do not involve propelling a vehicle on the public roads, "shall be reimbursed in the amount of the tax so paid on such motor fuel." See also *Shafer v. Glander* (1950), 153 Ohio St. 483, paragraph one of syllabus ("The use of motor vehicle fuel is taxable only where such fuel is used for the purpose of generating power for the propulsion of motor vehicles on the public highways."). The refund provision was included as part of the original enactment of the gasoline tax law. G.C. 5534; H.B. No. 44, 111 Ohio Laws 294, 298. Granting a refund to the *user* of the gas, rather than the dealer from whom the gasoline tax is collected, effectively recognizes that the user bears the burden of the tax. Refunding the gasoline tax to those who use gasoline for purposes other than driving on the public roads ensures that the gasoline tax burden will fall on drivers.

{¶46} Moreover, the language used by proponents and opponents of Section 5a when it was on the ballot in 1947 demonstrates that people at that time understood the gasoline tax to be targeted at drivers. The official ballot argument in favor of Section 5a stated that the amendment "simply says you want *your* automobile license and gas tax money to go for better roads and streets." (Emphasis added.) (Appellee's brief, Exhibit 2.) Likewise, the ballot argument in opposition to Section 5a referred to both the gasoline tax and motor vehicle license fees as "[t]axes levied upon automobile owners." (Appellee's brief, Exhibit 2.) Viewed in this light, the logic behind the amendment is clear—revenues from taxes and fees paid as a cost of using the public roads should accrue to the benefit of those taxpayers by financing maintenance and improvement of the public roads.

{¶47} The General Assembly also recognized that the burden of the gasoline tax falls on drivers by exempting most gasoline sales from the sales tax. R.C. 5739.02(B)(6). The Supreme Court of Ohio has recognized that this exemption exists because the gasoline tax is analogous to the sales tax. In *Haefner v. Youngstown* (1946), 147 Ohio St. 58, the Supreme Court stated that "the exemptions provided for in [the sales tax law] are in keeping with a legislative policy of excepting from the sales tax proper sales already taxed in the same or a similar way, namely, sales of motor vehicle fuel." Id. at 64, overruled on other grounds by *Cincinnati Bell Tel. Co. v. Cincinnati* (1998), 81 Ohio St.3d 599, 607-08. As with the gasoline tax, the burden of the sales tax ultimately falls on the consumer. See *Buddies Lunch System, Inc. v. Bowers* (1960), 170 Ohio St. 410, 413 ("The primary intent of the Sales Tax Act is, of course, to collect the tax from the

consummer [sic]."); *ERB Lumber Co. v. L&J Hardwood Flooring, Inc.* (1997), 118 Ohio App.3d 421, 424 ("The Ohio statutory scheme puts the burden of collecting the sales tax on the vendor and the burden of paying the sales tax on the consumer."). Thus, applying the sales tax to gasoline would effectively be double taxation on drivers.[3]

{¶48} The ballot language advocating passage of Section 5a also referred to the fact that 19 states that had passed anti-diversion amendments. It is instructive to consider the experience of one state, Maine, which passed an anti-diversion amendment containing language similar to Section 5a only a few years before Ohio. In 1944, the voters of Maine adopted an amendment to that state's constitution providing that "[a]ll revenues derived from fees, excises and license taxes *relating to* registration, operation and use of vehicles on public highways, *and to fuels used for propulsion of such vehicles*" must be expended for highway purposes. (Emphasis added.) Section 19, Article IX, Maine Constitution. This provision closely mirrors Ohio's anti-diversion amendment, which restricts the use of "moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles." Section 5a, Article XII, Ohio Constitution. Both of these provisions restrict the use of revenues from fees and taxes "relating to" gasoline.

{¶49} In 1973, the Supreme Judicial Court of Maine decided a case involving the scope of that state's anti-diversion amendment. *Portland Pipe Line Corp. v.*

[3] Appellants argue that, under appellee's reasoning, the General Assembly could levy a sales tax on gasoline and direct the revenues from that tax into the general fund. Appellants argue that this would be a clear violation of Section 5a. That is not the case before this court and addressing that argument would result in an advisory opinion, which we lack the constitutional or statutory authorization to issue. *Siders v. Reynoldsburg School Dist.* (1994), 99 Ohio App.3d 173, 193. Nevertheless, I note that a change to the longstanding exemption from the sales tax for gasoline sales would likely present a different case from the circumstances surrounding the application of the CAT to businesses involved in the sale of gasoline.

Environmental Improvement Comm. (Me.1973), 307 A.2d 1. The plaintiffs in the *Portland Pipe Line* case challenged the legislature's imposition of a fee of one-half cent per barrel of petroleum products transported over water during a specified period. Id. at 9. The fee was imposed against "oil terminal facilities." Id. at 9-10. The proceeds of the fee were used to fund the state's Coastal Protection Fund. Id. The plaintiffs argued that revenues from the licensing fee constituted " 'revenues derived from fees, excises, and license taxes relating * * * to fuels used for the propulsion' of vehicles on public highways," and that the anti-diversion amendment required those revenues to be used for highway purposes. Id. at 12. The court traced the history of the Maine motor gasoline tax, finding that "[t]he plan of the 'gasoline tax' was to focus on those who derived benefits as users of the highway system as the class subject to the tax." Id. at 13. The court then considered the history of the anti-diversion amendment, concluding that "[t]he Legislature and the people had been accustomed since 1923 to the 'gasoline tax,' a tax imposed on highway users. It was this revenue that was protected from diversion to non-highway uses." Id. Because the challenged license fee was not imposed on highway users but, rather, on "those engaged in over-water transfers of petroleum products," the court concluded that revenues from that fee were not " 'derived from fees, excises and license taxes relating to fuels used for the propulsion of * * *' motor vehicles" and therefore not within the scope of the constitutional restriction. Id. at 14.

{¶50} I find the Maine court's reasoning persuasive, particularly in light of the historical similarities between Maine and Ohio's gasoline taxes and anti-diversion amendments. In both states, at the time the motor vehicle fuel tax was enacted, there

was no state sales tax. Ohio first enacted a motor vehicle fuel tax in 1925. H.B. No. 44, 111 Ohio Laws 294; *Caldwell v. State* (1926), 115 Ohio St. 458, syllabus. The Ohio sales tax was not enacted until 1934 and the use tax until 1935. *Gen. Motors Corp. v. Wilkins*, 102 Ohio St.3d 33, 2004-Ohio-1869, ¶37 (citing H.B. No. 134, 115 Ohio Laws, Part II, 306, and H.B. No. 590, 116 Ohio Laws, Part II, 101). Maine enacted its first motor vehicle fuel tax in 1923 but did not enact a sales and use tax until 1951. *Portland Pipe Line* at 13; *Harold MacQuinn, Inc. v. Halperin* (Me.1980), 415 A.2d 818, 821. Thus, in both states, at the time the gasoline tax was enacted, there was no method for directly collecting motor vehicle fuel taxes from the consumer. Imposing the gasoline tax on dealers or distributors was a method of streamlining the tax collection process, but the ultimate burden of the tax fell on drivers. *Bettman* at 273; *Portland Pipe Line* at 13.

{¶51} Finally, appellants cite to the *Hickok Oil* decision and argue that both the liquid fuel tax and the gasoline tax are or were taxes on the privilege of doing business and that, because Section 5a was intended to limit those taxes, it also limits the CAT because the CAT is a tax on the privilege of doing business. Admittedly, in *Hickok Oil*, the Supreme Court of Ohio referred to the motor vehicle fuel tax as a "tax levied against the dealer for the privilege of doing business as a dealer * * * measured by the amount of business done." Id. at 653. However, in following sentence, the Supreme Court acknowledged that the cost of the tax was passed along to the consumer and, thus, the burden fell on those who used gasoline for driving on the highways and streets. Id. As set forth above, I believe it is more appropriate to view the liquid fuel tax and the motor vehicle fuel tax as measures targeted at users of the public roads. The CAT, by contrast,

is a broad-based tax applicable to most businesses in the state. Furthermore, there is no indication that the cost of the CAT paid by appellants is passed along to users of public roads or even to the subcontractors to whom appellants sell gasoline.

{¶52} For all of these reasons, it is clear that the voters who adopted Section 5a would have understood the gasoline tax as a tax targeted at purchasers of gasoline who use that gasoline to drive on the public roads. Section 5a was designed to ensure that the revenues from this tax and other fees and taxes paid by drivers were used for roadway improvements and were not diverted into the general fund. Thus, the phrase "fees, excises, or license taxes relating to * * * fuels used for propelling such vehicles" should be understood as taxes targeted at users of the public roads.

{¶53} Construed in this manner, I believe the Supreme Court of Ohio's decision in *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, determines the outcome of this appeal. The Supreme Court found that it was "far from clear * * * that [the CAT] falls upon the sale or purchase of food." Id. at ¶56. Likewise, here, it is far from clear that the CAT falls upon drivers using the public roads. It is clear, however, that the CAT is not targeted at drivers using the public roads. Therefore, I agree with the majority's conclusion that appellants have not proven by clear and convincing evidence that the CAT, as applied to appellants, is unconstitutional and void.

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