

## Publications

### **State and Local Tax Alert: Vorys Wins Ohio Tax Case for Clients, Ohio Supreme Court Issues Decision in *Beaver Excavating Co. v. Testa*, \$140 Million in Annual Gross Receipts Tax Proceeds Derived From Sales of Motor Vehicle Fuel Must be Spent**

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#### **CLIENT ALERT | 12.18.2012**

On December 7, 2012, the Supreme Court of Ohio ruled in favor of a coalition of businesses and county engineers that Ohio commercial activity tax (CAT) revenue derived from sales of gasoline and other motor vehicle fuels must be spent for highway purposes such as bridges, roads, and administration of traffic laws as required by Article XII, Section 5a of the Ohio Constitution. *Beaver Excavating Co. v. Testa*, Slip Opinion No. 2012-Ohio-5776. The Court accepted that its decision be applied prospectively, and that the state would not be required to make refunds to taxpayers, or catch up the underpayment of highway purpose spending for prior years. On a going forward basis, however, tax revenue from the protected motor fuel excise tax base must be spent in furtherance of highway purposes. Because there is no existing appropriation of Ohio CAT revenue for those purposes, the Court ruled that the protected tax revenue, from December 7, 2012 forward, could not be spent at all until the Ohio General Assembly enacted the necessary appropriating legislation.

Thomas B. Ridgley, Anthony L. Ehler, Jeffrey Allen Miller, and Robert J. Krummen formed the team of Vorys litigators and tax attorneys that overturned the decision of the 10<sup>th</sup> District Court of Appeals which had upheld the existing CAT revenue spending scheme. Lead counsel Anthony L. Ehler, argued the case before the Court.

Article XII, Section 5a was added to the constitution by the state's voters through a 1947 initiative petition. It states

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.

We argued on behalf of Plaintiffs-Appellants that the phrase "relating to" must be interpreted broadly, and that application of the CAT to gross receipts of motor vehicle fuel sales without appropriation of that tax revenue to highway purposes violated the excise tax structure that had been in place for more than sixty years. For all intents and purposes, the CAT was directly competing with the Ohio motor fuel tax and thereby impinging on that protected tax base. We argued that in order to preserve the tax structure intended under Article XII, Section 5a, the CAT must be deemed to "relate to" "fuel" used for propelling motor vehicles to the extent its revenue was derived from sales of such fuel. The Court agreed.

The Court's decision shifts responsibility to the General Assembly to enact legislation that would conform the CAT to Article XII, Section 5a requirements. Given that a sizable amount of CAT revenue is now barred from being spent and is accumulating daily, the General Assembly can be expected to act soon. Accordingly, parties interested in highway purpose spending should be prepared to act and make their voices heard in that legislative process.

Additionally, for those Vorys clients situated outside Ohio, it must be noted that 28 states have similar amendments in their state Constitutions protecting excise tax revenue derived from sales of motor vehicle fuel.<sup>[1]</sup> With budgetary shortfalls of recent years, states already have or are increasingly tempted to tap that sizable tax base for non-highway purpose spending (i.e., road and bridge construction and repair). Accordingly, for those clients who have an interest in ensuring that highway purpose spending is protected, it may be worth exploring whether your own state's constitutionally mandated tax or spending scheme may have been violated. There are many types of state taxes. For some of those, their relationship to motor fuel may require those tax revenues to be spent on roads. Whether in conforming current taxes or in the context of discussions on tax reform, these constitutional mandates can serve as powerful weapons to achieve targeted highway spending goals. In Ohio, Vorys found 140 million reasons annually proving why that question is worth exploring.

If you have questions regarding this article or its subject matter, please contact Anthony L. Ehler, Esq. at 614.464.8282, email: [tlehler@vorys.com](mailto:tlehler@vorys.com) or Jeffrey Allen Miller, Esq. at 614.464.5495, email: [jamiller2@vorys.com](mailto:jamiller2@vorys.com).

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<sup>[1]</sup> Ala. Const. art. IV, §111.06 (amendment 93); Ariz. Const. art. IX, §14; Calif. Const. art. XIX, §1, replacing art. XXVI; Colo. Const. art. X, §18; Fla. Const. art. XII, §9(c), replacing art. IX, §16 of the Constitution of 1885; Ga. Const. art. III, §IX, ¶VI(b); Idaho Const. art. VII, § 17; Iowa Const. art. VII, §8; Kansas Const. art. 11, §10; Ky. Const. §230; La. Const. art. VI, §23; Me. Const. art. IX, §19; Mass. Const. art. 78; Mich. Const. art. IX, §9, replacing §22; Minn. Const. art. XIV, §§5, 9 & 10; Mo. Const. art. IV, §30(a) & (b); Mont. Const. art. VIII, §6; Nev. Const. art. 9, §5; N.H. Const. Pt. Second, Art. 6-a; N.D. Const. art. X, §11; N.J. Const. art. VIII, §11, ¶14; Ore. Const. art. IX, §3a, replacing art. IX, §3; Pa. Const. art. 8, §11(a); S.D. Const. art. XI, §8; Tex. Const. art. VIII, §7-a; Utah Const. art. XIII, §13; Wash. Const. art. II, §40; W. Va. Const. art. XI, §52; Wyo. Const. art. 15, § 16).