ARIZONA COURT OF APPEALS

DIVISION ONE

SABAN RENT-A-CAR, LLC, et al., Plaintiffs/Appellees/Cross-Appellants, v. ARIZONA DEPARTMENT OF REVENUE, Defendant/Appellant/Appellee/Cross-Appellee,	Court of Appeals Division One No. 1 CA-TX 16-0007 Maricopa County Superior Court No. TX2010-001089
TOURISM AND SPORTS AUTHORITY, Defendant/Appellant/Appellee/Cross-Appellee.	

DEFENDANT/APPELLANT/APPELLEE/CROSS-APPELLEE'S COMBINED OPENING BRIEF AND APPENDIX

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INTRODUCTION

This is a case about a group of rental car companies who hope to land a massive multi-million dollar windfall at the State's and its taxpayers' expense with respect to a tax that the State neither levied nor received. For nearly eighty years, Arizona has imposed transaction privilege taxes on businesses that sell, lease, or rent motor vehicles. For over fifteen years, the Arizona Sports and Tourism Authority ("AzSTA") has used monies collected from a county-voter-approved transaction privilege tax on the "the business of leasing or renting . . . motor vehicles," A.R.S. § 5-839 (the "AzSTA tax"). Arizona cities and counties have adopted similar transaction privilege taxes to fund a variety of important projects.

During the entirety of these eighty years, federal law, state law, or both required that road-user taxes like those identified in Article IX, § 14 of the Arizona Constitution—"taxes relating to registration, operation, or use of vehicles"—go toward specific road purposes. Yet no one (until recently) has even hinted that transaction privilege taxes on the business of leasing or renting vehicles somehow qualify as Article IX, § 14 road-user taxes.

But in 2009, the named Plaintiffs in this case asked for a "refund" of the voter-approved AzSTA tax, and they did so even though they charged

the tax to their customers and were out nothing. They persuaded the superior court to shift millions into their pockets by convincing it to focus on the underlying activity of the taxed businesses' customers (i.e., "the use of vehicles" or driving), rather than on the taxable event itself.

Contrary to the court's ruling, however, the AzSTA tax cannot be a tax that relates to the "registration, operation, or use of vehicles on the public highways." Its plain terms state it is a tax on the "*business of*" leasing or renting. Whether the underlying rental product is a car, RV, or boat is irrelevant to whether the tax relates to the "registration, operation, or use of vehicles." To conclude otherwise would take Article IX, § 14 well beyond its intended scope. Indeed, if that were the correct analysis it would mean that transaction privilege taxes on everything from standard auto leases, car sales, and auto parts sales arguably would fall within Article IX, § 14's scope—an absurd result that would wreak havoc throughout the State.

The court's order granting refunds also misapprehends and misapplies the law regarding prospective relief, and its order obligating the State to pay refunds of the AzSTA tax lacks any support in law or reason. Even if the Court affirms on the merits, it should reverse these rulings.

STATEMENT OF FACTS AND CASE*

I. Pertinent background to Article IX, § 14.

A. Arizona voters passed Article IX, § 14 to preserve eligibility for federal highway funds.

For the last hundred years, the federal government has provided states money to build, improve, and maintain roads and highways. *See* Federal Aid Road Act, ch. 241, 39 Stat. 355 (1916) (attached at APP098). In 1934, Congress enacted the Hayden-Cartwright Act, which limited that federal highway aid "to those States that use at least the amounts now provided by law for such purposes in each State from State motor vehicle registration fees, licenses, gasoline taxes, and other special taxes on motor-vehicle owners and operators[.]" Ch. 586, § 12, 48 Stat. 993, 995 (1934) (attached at APP103).

In response to that Act, states began enacting anti-diversion laws to protect their entitlement to federal money. In 1952, Arizona voters enacted Arizona's anti-diversion law, the Better Roads Amendment, which became

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* Selected statutory, legislative history materials, and record items are included in the attached Appendix, cited by pages that match the PDF page numbers and function as clickable links (e.g., APP083). Other record items are cited by record number (e.g., IR-1). Page numbers in record citations refer to the PDF page number regardless of the document's internal page numbering.

Article IX, § 14. In keeping with the Hayden-Cartwright Act, Arizona's provision specifies that revenues from road-user fees and revenues from certain motor fuels could be used only for highway and street purposes:

> No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on the public highways or streets or to fuels or any other energy source used for the propulsion of vehicles on the public highways or streets, shall be expended for other than highway and street purposes . . . .

Ariz. Const. art. IX, § 14.

The pamphlet for the Better Roads Amendment emphasized that the amendment would preserve the status quo, because Arizona "is not now diverting its road user taxes." *State of Ariz. Initiative & Referendum Publicity Pamphlet, Proposed Amendment to the Constitution* (1952) (attached at APP086). Passing the provision "will entail no change in the source or expenditure of highway revenues." [APP090.] At that time, Arizona had for more than fifteen years imposed a transaction privilege tax on rental car and car sales companies. (*See* Argument § I.C.2, below.) The funds from these transaction privilege taxes were never restricted to highway purposes, and the publicity pamphlet did not reference those taxes as being implicated by the proposed constitutional amendment.

B. Arizona implemented Article IX, § 14 through A.R.S. Article 28.

Arizona implemented Article IX, § 14 through several statutes. In particular, A.R.S. § 28-6501 defines "highway user revenues" as the monies authorized by the following chapters and sections of Title 28 (which includes both the constitutionally required monies and additional funding sources):

- Chapter 2 ("Administration")
- Chapter 7 ("Certificate of Title and Registration," except for donations and special plate administration fees)
- Chapter 8 ("Motor Vehicle Driver Licenses")
- Chapter 10 ("Vehicle Dealers, Automotive Recyclers and Transporters")
- Chapter 11 ("Abandoned, Seized and Junk Vehicles")
- Chapter 15 ("Fees," which includes "Gross Weight Fees," "Highway Use Fees," and "Light Motor Vehicle Fee")
- Chapter 16, articles 1 ("Motor Fuel Taxes"), 2 ("Interstate User Fuel Tax Responsibilities"), and 4 ("Motor Carrier Fee"), with exceptions
- Section 28-1177 ("Off-highway vehicle user fee")

The funds from these fees and fuel taxes must be deposited in the highway fund. *See* A.R.S. § 28-6533(A) ("[T]he officer collecting all highway user revenues, as defined in section 28-6501 and in article IX, section 14,

Constitution of Arizona . . . shall transfer the revenues to the department [of transportation]."). After making specified deductions, "the department shall immediately deposit . . . the revenues in a fund designated as the Arizona highway user revenue fund." *Id.* The next statutory subsection further limits the use of those funds: "The revenues in the Arizona highway user revenue fund shall only be spent for the purposes prescribed in article IX, section 14, Constitution of Arizona." A.R.S. § 28-6533(B).

II. Pertinent background to the AzSTA tax.

The legislature created AzSTA in 2000 to promote sports and tourism within Maricopa County. *See* 2000 Ariz. Sess. Laws 2427, ch. 372. By statute, AzSTA is a corporate and political body with the general rights, powers and immunities of municipal corporations. A.R.S. § 5-802(B). Its boundaries are defined as "any county that has a population of more than two million persons." A.R.S. § 5-802(A). (Presently only Maricopa County meets that population threshold.) In carrying out its purposes, AzSTA is regarded as performing a governmental function. A.R.S. § 5-802(D). Although AzSTA and its board of directors do not have the power to levy any tax, the legislature gave Maricopa County voters the authority to impose transaction privilege taxes on rental car and hotel businesses to

fund AzSTA's operations. *See*, respectively, A.R.S. §§ 5-839, 5-840. In late 2000 voters approved both taxes in Proposition 302. [IR-1 at 5, ¶ 7.]

In this lawsuit, Plaintiffs Saban Rent-a-Car, LLC; DS Rentco, Inc.; and PTNK (collectively, and with the class, "Saban" or "the Plaintiffs") challenge the AzSTA tax, a tax on "the business of leasing or renting for less than one year motor vehicles . . . that are designed to operate on the streets and highways of this state." A.R.S. § 5-839(C). The tax is the higher of either $2.50/rental or 3.25% of the gross proceeds from the business. A.R.S. § 5-839(B)(1). The statute also provides for a flat $2.50/rental tax for "a temporary replacement motor vehicle." A.R.S. § 5-839(B)(2). However, as the superior court found, in practice "the car rental companies are charging the same rate to all customers regardless of their reason for renting." [IR-161 at 4 (APP131); *see also* IR-122 at 4 (APP142) (response to Interrogatory No. 2(a)).]

The revenues from the AzSTA tax, although paid to the State by rental car companies, are not state revenues. Instead, the State Treasurer monthly disburses such revenues to AzSTA and the county stadium district. A.R.S. § 5-839(G). AzSTA uses that revenue to fund the University of Phoenix Stadium, Cactus League spring training facilities, youth and

amateur sports programs, and tourism promotion in Maricopa County. A.R.S. § 5-835.

III. The previous failed challenges involving AzSTA.

This Court has twice rejected challenges to AzSTA or the AzSTA tax. In 2002, the Court rejected several constitutional challenges to the legislation creating and implementing AzSTA. *See Long v. Napolitano*, 203 Ariz. 247, 266, ¶ 72 (App. 2002). In 2007, a hotel and rental car customer challenged the AzSTA tax and related hotel tax on similar grounds as urged in this case. *See Karbal v. ADOR*, No. TX 2005-050091 (Maricopa Cty. Super. Ct. 2005), *aff'd* 215 Ariz. 114 (App. 2007). *Karbal* held the customer lacked standing to challenge the taxes because the legal incidence of the taxes falls on the hotels and rental car companies; the customer "is not the actual taxpayer." *Karbal*, 215 Ariz. at 117, ¶ 11. In reaching that holding, the Court concluded that "[t]he two taxes are akin to transaction privilege taxes." *Id.* at 116, ¶¶ 8-9. A transaction privilege tax is "paid by the business providing the service," and is "not a tax upon the sale itself." *Id.* at 116, ¶ 10 (citation and quotation marks omitted). As a result, the car renter or hotel guest "is not the actual taxpayer," even if the business

passes the tax along to its customers. *Id.* at 117, ¶ 11. The court dismissed the case without reaching the merits.

IV. Saban's challenge to the constitutionality of the AzSTA tax.

Having failed in *Karbal*, the same attorneys then initiated this proceeding by challenging the AzSTA tax on behalf of a class of rental car companies. Saban requested a refund from the Department of Revenue. After losing in the administrative proceedings, Saban appealed to the superior court. [IR-1.] The Complaint sought a declaration that the AzSTA tax violated the U.S. and Arizona Constitutions, sought an order enjoining the Department from collecting such taxes, and requested refunds for paid taxes. [IR-1 at 15.] AzSTA moved to intervene, stating that "AzSTA, as the beneficiary of the Taxes, has a substantial, legally protectable interest in the outcome of this case and should therefore be permitted to become a party to the action." [IR-8 at 5.] Further, AzSTA stated that "[t]he Department and its Director . . . will be financially unaffected by a decision regarding the constitutionality of the Taxes—any finding by the Court will only serve to determine whether the hotel and rental car companies must continue to pay the Taxes and whether the Department must continue to collect the Taxes from the hotel companies and rental car companies." [IR-8 at 7.] The

superior court thereafter certified a class, essentially consisting of anyone who had paid the AzSTA tax during a specific period. [IR-78.] Saban asserted that the AzSTA tax violates (1) the dormant Commerce Clause of the U.S. Constitution, and (2) Article IX, § 14 of the Arizona Constitution. In this case alone, Plaintiffs claim they are entitled to refunds exceeding $22 million.

V. The superior court's rulings.

On cross-motions for summary judgment, the superior court held that the AzSTA tax does not violate the dormant Commerce Clause, but does violate Article IX, § 14. [IR-161 (APP128).] AzSTA and the Department filed motions for reconsideration challenging the latter ruling [IR-168 to IR-172], which the superior court denied. [IR-180 (APP133).]

In addition to addressing those core constitutional issues, the superior court also held, over objections, that its ruling should be applied retroactively, i.e., it ordered refunds. [IR-214 (APP136).] It further held that the Department must pay these massive refunds to the class—i.e., if the ruling is affirmed, not only will the AzSTA tax stop prospectively, but the Department, not AzSTA, will have to refund millions of dollars to Saban. [*Id.*] The superior court also held that after the Department pays

the refunds, it could thereafter retain future tax revenues that it collects on behalf of AzSTA to make itself whole. [*Id.*] Finally, on the Department's motion, the court entered an interlocutory judgment under A.R.S. § 12-2101(A)(6) before ruling on the amount of the refund due, which effectively stayed proceedings on that issue until after this appeal. [IR-254.]

The Department and AzSTA appealed from that interlocutory judgment; Saban cross-appealed. [IR-256 to IR-258, IR-261.]

VI. Other pending cases.

Saban has filed two more lawsuits raising identical refund claims for subsequent periods: *Saban Rent-A-Car, LLC v. ADOR*, No. TX2013-000093 (tax period 3/2008-1/2012); and *Saban Rent-A-Car, LLC v. ADOR*, No. TX2016-000126 (2/2012-12/2014). Other companies opted out of the class in the present case and sued on their own: *Enterprise Leasing Co. v. ADOR*, No. TX2012-000358. Saban has also challenged other taxes on the same or similar grounds. *E.g.*, *Saban Rent-A-Car v. ADOR*, No. TX2013-000092

(concerning A.R.S. § 48-4234).[1] These cases are awaiting resolution of this appeal.

ISSUES

1. Article IX, § 14 applies only to taxes "relating to registration, operation, or use of vehicles." By contrast, the AzSTA tax taxes only the privilege of conducting the business of renting or leasing a car; it imposes no tax on the registration, operation, or use of vehicles. Is the AzSTA tax unconstitutional under Article IX, § 14?

2. If the AzSTA tax is unconstitutional, did the superior court err by ordering refunds of taxes, rather than prospective-only relief, given that nothing foreshadowed this decision, refunds will not go to the highway fund, and paying refunds to companies who passed the tax onto their customers would be inequitable?

3. The Department neither levied the AzSTA tax nor received funds from the tax. In light of that, did the superior court err in holding that the Department must pay the refunds initially, with the right to reduce the amount otherwise distributable to AzSTA?

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[1] Still other related cases challenge other taxes. *E.g.*, *Ramada Ltd. v. ADOR*, No. TX2016-001225 (concerning A.R.S. § 5-840); *Apache Hotel, LLC v. ADOR*, TX2013-000650 (same).

STANDARD OF REVIEW

Because this case was decided on summary judgment and presents questions of law, the Court reviews the issues de novo. *See Maycock v. Asilomar Dev., Inc.*, 207 Ariz. 495, 498, ¶ 14 (App. 2004) (summary judgment); *id.* at 500, ¶ 24 (issues of law).

ARGUMENT

I. The AzSTA tax does not violate Article IX, § 14.

To determine whether a transaction privilege tax "relat[es] to" the "registration, operation, or use" of a vehicle and thus falls under Article IX, § 14, the Court should look at the taxable event—i.e., what economic activity triggers the tax.[2] Here, because the AzSTA tax is a transaction privilege tax that taxes only "the *business of* leasing or renting," A.R.S. § 5-839(C) (emphasis added), it does not "relat[e] to" the "registration, operation, or use" of vehicles under Article IX, § 14. Moreover, even the underlying business activities of leasing or renting—if the Court looks that far—do not fall within Article IX, § 14. (Argument §§ I.A-I.B.)

[2] These issues were briefed at IR-15, 21, 24, 32, 168-170, 171-172, 175, 178-179.

The history and purposes of Article IX, § 14 confirm this is so, as do several other considerations. (Argument §§ I.C-I.D.) But the superior court erroneously rejected this straightforward approach. It instead went well beyond the taxable event, and even beyond the relevant underlying business activities by instead looking at the activities of the business's customers. It did so even though neither the customers nor the customers' activities trigger the tax. Not only is that approach contrary to the fundamental nature of the tax, but analyzing "relating to" under Article IX, § 14 in this manner would lead to absurd results in a variety of cases. (Argument § I.E.)

A. When interpreting constitutional provisions and statutes, the Court looks to the text, history, purpose, and other considerations.

In interpreting the Arizona Constitution, the Court looks first to "the text and the intent of the framers." *AFL-CIO v. City of Phoenix*, 213 Ariz. 358, 363, ¶ 15 (App. 2006) (quotation marks omitted). If there is more than one reasonable interpretation of the text, the Court "may look to the context, subject matter, historical background, effects, consequences, spirit, and purpose of the law." *Id.*

The same analysis applies to statutes. *See, e.g.*, *Bentley v. Bldg. Our Future*, 217 Ariz. 265, 270, ¶¶ 12-13 (App. 2007) (the "starting point is the language of the statute itself"; if there is more than one reasonable interpretation of the text, the Court may "consider the statute's context; its language, subject matter, and historical background; its effects and consequences; and its spirit and purpose" (quotation marks omitted)).

In addition, Arizona courts "presume [a] statute is constitutional and will uphold it unless it clearly is not." *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 5, ¶ 11 (2013). The Department incorporates by reference the portions of AzSTA's brief discussing the important presumption of constitutionality. (*See* Opening Brief filed by AzSTA, at Argument § 11.A (Feb. 16, 2017).)

Here, voters directly approved both provisions at issue—with state voters adopting the constitutional provision and county voters the AzSTA tax. The central question, then, is whether the voters in 1952 intended to prohibit future voters and various tax-levying entities from choosing where to direct funds from a tax on rental car companies. The history, text, and structure of both provisions say no.

B. The AzSTA tax does not violate the plain text of Article IX, § 14 because the tax does not relate to the registration, operation, or use of vehicles.

1. The AzSTA tax imposes a transaction privilege tax on *the business of* leasing or renting, not on leases or rentals themselves.

The AzSTA tax does not tax individual vehicle drivers. It also does not tax the operation or use of a vehicle. It does not even tax the business activities of leasing or renting. Instead, it taxes only the rental car company, and then only for the privilege of conducting business in Arizona. Arizona courts honor the precise details of tax laws. For that reason, the Court should look at what the AzSTA tax actually taxes, rather than improperly looking several levels below the tax. When evaluated at this proper level of inquiry, the plain text of the AzSTA tax does not fall within the scope of Article IX, § 14.

(a) The AzSTA tax is a transaction privilege tax.

Arizona has long distinguished between sales or use taxes and transaction privilege taxes. A sales or use tax applies directly to the sale or use of the good or service. By contrast, a transaction privilege tax applies to the activity of *doing business* within the state. Specifically, a transaction privilege tax is "an excise on the privilege or right to engage in particular

businesses within the taxing jurisdiction." *Karbal*, 215 Ariz. at 116, ¶ 9 (quoting *US West Commc'ns, Inc. v. City of Tucson*, 198 Ariz. 515, 523, ¶ 24 (App. 2000)); *see also Tower Plaza Investments Ltd. v. DeWitt*, 109 Ariz. 248, 250 (1973) (explaining that transaction privilege tax "is not upon sales, as such, but upon the privilege or right to engage in business in the State, although measured by the gross volume of business activity conducted within the State").

The distinction between different types of taxes has come up repeatedly in Arizona. The answer has always been the same: transaction privilege taxes relate to conducting business in the state. *See Indus. Uranium Co. v. State Tax Comm'n*, 95 Ariz. 130, 132 (1963) ("We have stated the nature of this tax repeatedly. It is not a tax upon sales. It is purely an excise tax upon the privilege or right to engage in business in Arizona measured by the gross volume of business conducted within the state."); *see also State Tax Comm'n v. Garrett Corp.*, 79 Ariz. 389, 391 (1955) (collecting cases and stating that "[i]n view of such positive unequivocal statements repeated over a period encompassing two decades, it would seem that a question *so well settled* is not now open to further argument." (emphasis added).

The AzSTA tax unquestionably is a transaction privilege tax. It does not directly tax car leases or car rentals. Instead, under the plain text of the statute, it "applies to the *business of* leasing or renting." A.R.S. § 5-839(C) (emphasis added).

That point is not in dispute. Saban adopted that classification. [IR-21 at 29 ("First, the rental car tax is a transaction privilege tax and therefore constitutes an 'excise' tax under Arizona law.").] Accordingly, the superior court assumed that the AzSTA tax is a transaction privilege tax. [IR-180 at 1 (APP133).] In addition, this Court previously held that this specific tax is "akin to [a] transaction privilege tax[]." *Karbal*, 215 Ariz. at 116, ¶ 9.

(b) Because a transaction privilege tax is analyzed as to what it actually taxes, not the underlying transaction or what the end user does, the AzSTA tax does not fall within the scope of Article IX, § 14.

Arizona courts have concluded that for transaction privilege taxes, "[t]he taxable event is the engaging in the business of [a particular business activity] in Arizona." *Uranium*, 95 Ariz. at 132. Moreover, the Court has already held that the AzSTA tax does not fall on the individuals who rent cars. *See Karbal*, 215 Ariz. at 117, ¶ 11 (holding that individual renter lacked standing to challenge AzSTA tax). Accordingly, the AzSTA tax should be

viewed as taxing the activity of *doing business* within the state (the taxable event), rather than looking at what the end consumer does after the transaction facilitated by the business activity.

Arizona courts generally do not probe the underlying economic effects of a transaction privilege tax when addressing legal implications for the tax. For example, a company may be entitled to offset bad debt from its transaction privilege tax obligation in certain circumstances. *See Home Depot USA, Inc. v. ADOR*, 230 Ariz. 498, 500, ¶ 9 (App. 2012) (citing regulation). Accordingly, a retailer like a home-improvement store that directly finances its customers' purchases may take advantage of that offset if the customers default. But if a retailer contracts with a third party to provide the financing, the retailer may not claim a bad debt offset. *See id.* at 502, ¶ 16. That result holds even if the retailer pays a service fee to compensate the third party for bad debts. *See id.* at 503, ¶ 24. The economic effect does not matter. *Cf. Karbal*, 215 Ariz. at 118, ¶ 16 (citing with approval a case that refused to engage in the "'daunting' inquiry into economic realities" of taxes).

Similarly, even though the law generally prohibits a state from taxing the federal government, Arizona may assess a transaction privilege tax on

the business of contracting and may demand payment of that tax from contractors of the federal government. *See Tucson Mech. Contracting, Inc. v. ADOR*, 175 Ariz. 176, 179-80 (App. 1992) ("Because Arizona's tax does not fall directly on the federal government and the statutory scheme does not compel the prime contractor to shift the legal incidence of the tax to its purchaser, we conclude the tax does not violate intergovernmental tax immunity."). Because the contractor has the option of absorbing the tax or passing it along to the end customer (e.g., the federal government), the tax does not violate the prohibition regardless of where the economic effect of the tax falls. *Id.* at 180.

Arizona courts thus take a strict approach to determining what a transaction privilege tax actually taxes. Courts must respect the legislative decision to establish a transaction privilege tax when it comes time to answer questions about the tax. The details matter, and Arizona law on this point is settled: a transaction privilege tax applies to the engaging in the business of a particular activity in Arizona.

Because the AzSTA tax applies "to the business of leasing or renting," A.R.S. § 5-839(C), the taxable event is operating a business of leasing or renting. The *business of* leasing or renting does not relate "to registration,

operation, or use of vehicles." Ariz. Const. art. IX, § 14. Consequently, the tax does not fall within Article IX, § 14's scope.

2. In addition, the activities of leasing or renting are not related to the registration, operation, or use of vehicles.

Moreover, even if the Court looks beyond the taxable event and instead examines the particular activities of the business to determine whether the AzSTA tax is related to vehicle "registration, operation, or use," doing so confirms the tax is unrelated to those activities. The underlying business activities of the AzSTA tax are *leasing* and *renting* vehicles. Article IX, § 14 does not say taxes relating to the activities of "leasing or renting vehicles." Instead, its plain terms apply only to taxes related to other specific *activities*: registration, operation, or use of a vehicle—i.e., to road-user fees.

Rental agencies must pay fees that trigger Article IX, § 14. To operate lawfully, their cars must be registered. If registered in Arizona, the rental car company must pay the necessary registration fees, which go to the highway fund under Article IX, § 14. Similarly, when rental car companies gas up their fleets, the fuel price includes a tax that goes to the highway fund under Article IX, § 14. *See, e.g.*, A.R.S. § 28-5606(A) (18¢/gallon fuel

tax); *cf. Knight Transp., Inc. v. Ariz. Dep't of Transp.*, 203 Ariz. 447, 451 n.3 (App. 2002) ("To operate a motor vehicle in Arizona, the vehicle must be registered and the necessary registration, license tax, gross weight, or highway use fees must be paid. . . ."). In other words, for the types of fees and taxes that fall within the proper scope of Article IX, § 14, money collected from the rental agencies already flows to the highway fund, as it should.

Moreover, the State, counties, and cities impose other transaction privilege taxes on the business of leasing or renting motor vehicles. Tellingly, these taxes have been around for decades. *See* ADOR, *Ariz. State County & City Transaction Privilege & Other Tax Rate Tables* (Nov. 2016), https://www.azdor.gov/Portals/0/TPTRates/12012016RateTable.pdf. Yet, to the Department's knowledge, not once since the enactment of Article IX, § 14 has anyone ever contended that the transaction privilege taxes collected on standard vehicle leases must go to the highway fund. There is, however, no material difference in terms of relating to the registration, operation, or use of vehicles between the transaction privilege tax on a standard vehicle lease and the AzSTA tax. Consequently, the

AzSTA tax likewise cannot relate to the registration, operation, or use of vehicles.

In sum, even looking at the underlying business activity (rather than just the taxable event) cannot make the activities that trigger the AzSTA tax "relat[ed] to" the activities covered by Article IX, § 14.

C. The history and purpose of Article IX, § 14 confirm that it does not apply to the AzSTA tax.

Arizona voters adopted Article IX, § 14 to comply with a federal statute, and both that federal statute and the publicity materials for the constitutional amendment show that Article IX, § 14 has always been limited to the road-user taxes motorists pay to lawfully drive. Consequently, at the time of the amendment, no one intended it to cover either transaction privilege taxes or any tax on car rentals.

1. Arizona created Article IX, § 14 to satisfy the requirements of the Hayden-Cartwright Act.

In 1916, Congress enacted the Federal Aid Road Act (which later became the Federal-Aid Highway Act), legislation that provided states monies for the construction, improvement, and maintenance of roads and highways. Ch. 241, 39 Stat. 355 (attached at APP098). In 1934, as part of the Hayden-Cartwright Act, Congress amended that Act to reduce federal

aid to states that used monies from various state road-user taxes for purposes other than road construction, improvement, and maintenance:

> Since it is unfair and unjust to tax motor-vehicle transportation unless the proceeds of such taxation are applied to the construction, improvement, or maintenance of highways, after June 30, 1935, Federal aid for highway construction shall be extended only to those States that use at least the amounts now provided by law for such purposes in each State *from State motor vehicle registration fees, licenses, gasoline taxes, and other special taxes on motor-vehicle owners and operators of all kinds* for the construction, improvement, and maintenance of highways and administrative expenses in connection therewith. . . .

Ch. 586, § 12, 48 Stat. 993, 995 (emphasis added) (APP105).

States subsequently adopted so-called anti-diversion laws to protect states' entitlement to federal aid. [*See* APP089 (noting this history).] In 1952, Arizona adopted its "Better Roads Amendment," which became Article IX, § 14. [APP089.] In line with the Hayden-Cartwright Act, Arizona's Better Roads Amendment obligated Arizona to use revenues from taxes relating to the "registration, operation, or use of vehicles on the public highways or streets"—road-user taxes—for highway and street purposes. Ariz. Const., art. IX, § 14.

2. Arizona had a transaction privilege tax for rental car businesses when Arizona enacted Article IX, § 14, but no one thought the amendment would cover those taxes.

Meanwhile, in 1933, the legislature enacted Arizona's first transaction privilege tax, which levied taxes upon every person engaged in the business of selling tangible personal property (including automobiles). *See State Tax Comm'n v. Marcus J. Lawrence Mem'l Hosp.*, 108 Ariz. 198, 198-99 (1972) (discussing the 1933 act). Then in 1935—*the year after Congress adopted the Hayden-Cartwright Act*—the Arizona legislature imposed a transaction privilege tax on those engaged in the business of "automobile rental services." 1935 Ariz. Sess. Laws 310, 319, ch. 77, art. 2, § 2(f)(2) (attached at APP097). Although the monies collected from this tax were not used for highway purposes, no one—including the federal government—even hinted that a transaction privilege tax on the business of car rentals was a tax covered by the Hayden-Cartwright Act.

3. The publicity pamphlet supporting the amendment shows that only road-user fees would be restricted and other existing taxes would be unaffected.

The publicity pamphlet for the Better Roads Amendment, upon which the Court may rely, *e.g.*, *Calik v. Kongable*, 195 Ariz. 496, 500, ¶¶ 16-18 (1999), emphasized that "the only way to be sure we have better roads is to

be sure of our revenue for roads."[3] [APP087.] Explicitly referencing the Hayden-Cartwright Act, the publicity pamphlet further emphasized that Arizona should not "jeopardize federal aid by allowing any diversion of road user taxes to other than road purposes." [APP090.]

Within that context, the Pamphlet explained the Amendment's "purpose is to insure the expenditure of all revenues derived from road users to road uses only." [APP088.] Echoing the Hayden-Cartwright Act, the Pamphlet further explained that "[i]f used for road purposes, the *road user taxes* are fair because they are based on benefits received by the taxpayer. *The user pays as he drives*." [APP089 (emphases added).]

The pamphlet further explained that the revenues *derived from road users* in Arizona "are derived from state gasoline and diesel taxes, registration fees, unladen weight fees on common and contract motor carriers, and motor carrier taxes based on gross receipts." [APP088.] It emphasized that "public policy in Arizona has consistently opposed diversion, although there have been constant threats to highway funds in bills introduced from time to time in the legislature." [APP090.] In other

[3] Capitalization in the publicity pamphlet has been removed throughout this brief.

words, those supporting the Better Roads Amendment were aware that the Amendment implicated only a specific category of taxes—road-user fees. They did not intend to preclude the legislature from using for other purposes the other tax monies that were then being collected. The voters were entitled to rely on these representations. *Calik*, 195 Ariz. at 500, ¶ 18 ("[T]he electorate was entitled to rely on this description of the intent or effect of the initiative proposal.").

For two reasons, this history shows the amendment does not apply to the AzSTA tax. First, the amendment expressly sought "to insure the expenditure of all revenues *derived from road users* to road uses only." [APP088 (emphasis added).] Simply put, rental car companies are not road users. Second, the amendment was designed to apply to those taxes and fees that motorists ordinarily must incur to drive lawfully. Ordinary motorists, however, may lawfully drive without paying the AzSTA tax. Again, the AzSTA tax is not the type of tax contemplated by Article IX, § 14.

Furthermore, when Arizona adopted its Better Roads Amendment in light of the Hayden-Cartwright Act, the publicity pamphlet (correctly) presupposed that Article IX, § 14 would not reach transaction privilege

taxes. The publicity pamphlet explained, "Arizona is in a particularly favorable position to adopt 100 Yes this year, because it is not now diverting its road user taxes." [APP090.] The then-existing transaction privilege tax on the business of renting cars was not dedicated to highway purposes; *i.e.*, it was being used for other purposes. Thus, for the pamphlet's statement to be true, the transaction privilege tax on rental car businesses must not have been a road-user tax under Article IX, § 14.

The publicity pamphlet confirmed that it would not change the status-quo by promising that passing the amendment "will entail no change in the source or expenditure of highway revenues." [APP090.] The Publicity Pamphlet, thus, makes clear the intent that the *only* revenues conceived to fall within this constitutional amendment were those paid by individuals that related to their use of the roads or purchasing gas to operate on the roads and highways—*i.e.* "road user taxes." By contrast, the then-existing transaction privilege tax and rental car tax would not trigger the new constitutional provision. Their modern-day equivalents, including the AzSTA tax, thus likewise do not trigger Article IX, § 14. *See, e.g.*, *McElhaney Cattle Co. v. Smith*, 132 Ariz. 286, 290 (1982) (relying on "the

publicity pamphlet and the actions of people after the enactment of the amendment" to determine the scope of a constitutional amendment).

D. Other considerations also confirm the superior court erred.

1. Article IX, § 14 has never been applied to a tax with this tenuous of a connection to the listed categories.

The taxes and fees dedicated to the state highway fund have entirely different characteristics than the AzSTA tax. Under Article IX, § 14, the highway fund receives money from the fuel tax (A.R.S. § 28-5606), as well as several fees that relate to the registration, operation, or use of a vehicle:

- Vehicle registration and title fee (A.R.S. § 28-2003)
- Driver license fee (A.R.S. § 28-3002)
- Commercial registration fee and gross weight fee (A.R.S. §§ 28-5432 to -5433)
- Highway use fee (A.R.S. § 28-5471)
- Light motor vehicle fee (A.R.S. § 28-5492)
- Motor carrier fee (A.R.S. §§ 28-5852, -5854)

These taxes and fees differ from the AzSTA tax in several ways. First, any owner or user who lawfully "regist[ers], operat[es], or use[s]" a "vehicle[] on the public highways or streets," Article IX, § 14, *must* have paid these taxes and fees. By contrast, any owner or user may lawfully

"regist[er], operat[e], or use" a "vehicle[] on the public highways or streets," Article IX, § 14, without ever triggering or paying the AzSTA tax.

Second, unlike the AzSTA tax, none of the listed taxes or fees is a transaction privilege tax—i.e., none imposes a tax or fee on the privilege of engaging in a certain line of business. For example, even though motor fuel taxes are collected by suppliers, by statute they are "conclusively presumed to be direct taxes on the consumer or user." A.R.S. § 28-5606(C).

Third, all of the listed fees (other than the fuel tax) are triggered by a transaction directly with the government, not a commercial transaction with a private party. For example, a driver's license fee involves obtaining a license directly from the government, and in turn tendering payment to the government in the form of a fee. By contrast, the AzSTA tax is triggered by purely private transactions between non-governmental entities. (Although the tax on fuels also typically involves private transactions, it is covered under a different clause of Article IX, § 14 and need not relate to registration, operation, or use. (*See* Argument § I.D.3, below.))

Fourth, the legislature has expressly defined "highway user revenues" in A.R.S. § 28-6501. Although the definition includes all of the

taxes and fees listed above, the legislature chose not to include any transaction privilege taxes, any taxes or fees outside Title 28, or any taxes or fees on private transactions (other than fuel taxes). Therefore, the legislature apparently does not interpret Article IX, § 14 to include those types of taxes and fees.

In sum, the real Article IX, § 14 taxes are very different from the AzSTA tax. Thus, in holding that Article IX, § 14 encompasses the AzSTA tax, the superior court erroneously expanded the scope of the constitutional provision.[4]

2. Out-of-state cases likewise confirm that Article IX, § 14 should not be stretched to cover the AzSTA tax.

Several other states have constitutional provisions similar to Article IX, § 14. The better reasoned decisions from these states likewise show that Article IX, § 14 does not reach the AzSTA tax.

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[4] In the superior court, Saban pointed to other fees that, by statute, flow to the highway fund but that do not necessarily fall within the scope of Article IX, § 14. [IR-175 at 11-12.] Those fees are irrelevant to the issue because the legislature is free to divert additional money to the fund, and it has clearly chosen to do so—sometimes (voluntarily) sending only part of the fee to the fund. *See, e.g.*, A.R.S. §§ 28-4302(A)(3) ($400 fee, only $100 to the highway fund), (A)(4) ($250 fee, only $100 to the highway fund). If the legislature thought Article IX, § 14 applied to these fees, it could not have chosen to send most of the proceeds to the general fund.

(a) Back-to-back Ohio cases confirm the correct scope of the constitutional provisions.

Ohio has a provision nearly identical to Arizona's.[5] In 2012 the Supreme Court of Ohio released two opinions, a day apart, interpreting Ohio's provision.

i. *Ohio Trucking* interprets the constitutional provision as applying only to taxes and fees that are necessary prerequisites for motorists to lawfully perform the activities identified in that provision.

In the first case, the court addressed the "fees charged for the production of certified abstracts of driving records." *Ohio Trucking Ass'n v. Charles*, 983 N.E.2d 1262 (Ohio 2012). Like Article IX, § 14, Ohio's constitutional provision includes the phrase "relating to." The court noted that the phrase could be interpreted extremely broadly: "At an extreme level, at 'the furthest stretch of its indeterminacy,' there is no doubt that

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[5] *Compare:*

Ohio Const. art. XII, § 5a	**Ariz. Const. art. IX, § 14.**
"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. . . ."	"No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on the public highways or streets or to fuels . . . used for the propulsion of vehicles. . . ."

fees for certified abstracts are related to the registration of vehicles on public highways." *Id.* at 1267, ¶ 15. But it rejected stretching that far, explaining that "[w]e are not convinced that this extreme view of 'relating to' is logical," and it "is not compelled by the language" or "objectives of the amendment." *Id.*

Instead of adopting that unreasonably broad approach, the court sensibly interpreted the pertinent text as not applying to driving-record fees. The court explained that although certain drivers need the certified driving records, "the general motoring public" does not. *Id.* at ¶ 16. In other words, "the vast majority of drivers and vehicles on the road are registered, operated, or used without the necessity of a certified abstract." *Id.* Furthermore, "the registration, operation, or use of a vehicle on the public highways" does not trigger the driving-record fees. *Id.*

In this respect, the court interpreted the constitutional provision as applying only to taxes and fees that motorists must pay to lawfully perform the activities of registering, operating, or using a vehicle. If motorists may perform those activities without "trigger[ing]" a particular tax or fee, then the constitutional provision does not apply. *Id.*

In Arizona, "the general motoring public," *id.*, may, of course, register, operate, and use a vehicle without paying the AzSTA tax. Under *Ohio Trucking*'s rationale, therefore, Article IX, § 14 does not apply to the AzSTA tax.

ii. *Beaver Excavating* applies the constitutional provision to fuel taxes.

The very next day, the same court issued *Beaver Excavating Co. v. Testa*, 983 N.E. 2d 1317 (Ohio 2012). In that case, the court held that Ohio's constitutional provision applies to revenue collected from the portion of a commercial activity tax that stems from the sale of motor-vehicle fuel.[6] *See id.* at 1326, ¶ 33. In particular, it held that "the close connection between the tax paid (moneys derived) and the source (excise on fuels used) of that tax revenue" rendered it subject to Ohio's constitutional provision. *See id.* In doing so the Ohio court looked below the commercial activity tax and considered the underlying sale (i.e., the approach outlined in Argument § I.B.2 above). In this case, however, that analysis does not bring the AzSTA tax within Article IX, § 14's reach. In *Beaver Excavating*, there was no question that the subject of the *underlying* transactions (motor-vehicle

[6] Although not identical, Ohio's commercial activity tax is similar to Arizona's transaction privilege taxes. *Cf.* Ohio Rev. Code § 5751.02.

fuel) fell within the constitutional provision. Ohio's constitutional provision, like Arizona's, expressly covers fuel taxes. So under *Beaver Excavating*'s rationale too, Article IX, § 14 would cover a transaction privilege tax on fuel, but not the AzSTA tax.

iii. Because the AzSTA tax covers activities not expressly named in the constitutional provision, *Ohio Trucking* applies.

These two cases, issued one day apart, address different questions. In *Ohio Trucking*, the court addressed how to determine whether a particular tax or fee for something not expressly identified in the constitutional provision nevertheless fell within the provision's scope because of the "relating to" clause. *Beaver Excavating* addressed whether a commercial activity tax fell within the provision's scope when the constitutional provision expressly identifies the underlying good (motor vehicle fuel).

At most, *Beaver Excavating* supports looking to the underlying business activity. But to then answer the next question (i.e., whether the underlying business activity falls within Article IX, § 14), the test from the case the day before (*Ohio Trucking*) applies. Under the *Ohio Trucking* test, because the vast majority of motorists "operate" or "use" a car without

triggering the AzSTA tax, the tax is not "relat[ed] to" the operation or use of cars for purposes of the constitutional provision. *See Ohio Trucking*, 983 N.E.2d at 1267, ¶ 16. In this way, both *Beaver Excavating* and *Ohio Trucking* comport with the approached discussed in Argument § I.B.2 above.

In this case, the superior court incorrectly reasoned that *Beaver Excavating* fits this case better than *Ohio Trucking*. [IR-180 at 2 (APP134).] It reached this conclusion by misstating the holding from *Ohio Trucking*, claiming that "the Ohio Supreme Court concluded reasonably that [driving-record fees] were more closely related to the hiring of drivers." [*Id.*] But that explanation is not actually in the opinion, and the superior court provided no citation. The superior court ignored the test the Ohio court announced in ¶ 16 of the opinion. *See Ohio Trucking*, 983 N.E.2d at 1267.

As for *Beaver Excavating*, the superior court failed to recognize that although the Arizona and Ohio constitutional provisions expressly cover taxes on motor-vehicle fuels, they do not expressly cover taxes on renting or leasing cars. To address that issue, the superior court should have looked to *Ohio Trucking*.

(b) Other states have reached similar results.

Two other cases have addressed similar issues. First, *Thrifty Rent-A-Car Sys., Inc. v. City of Denver*, 833 P.2d 852, 855 (Colo. App. 1992), addressed a transaction and privilege fee assessed for airport car rentals.[7] The rental car company essentially paid $6 per rental. *Id.* at 853-54. The court held that the "transaction fee" was assessed "for operating a business through the airport," and consequently was not for "the operation of a motor vehicle" and did not violate the constitutional provision. *Id.* at 856.

Wittenberg v. Mutton, 280 P.2d 359 (Or. 1955) also addressed a similar constitutional provision.[8] In that case, a city assessed a higher business license fee on businesses that operated "from vehicles who have no regular places of business in the City." *Id.* at 361. *Wittenberg* held that "the tax is not upon the ownership, operation or use of the motor vehicle, but an occupation tax based upon the privilege of carrying on a business." *Id.* at 362. Therefore, the constitutional provision does not apply because it

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[7] Colorado's provision applies to "proceeds from the imposition of any license, registration fee, or other charge with respect to the operation of any motor vehicle upon any public highway." Colo. Const. art. X, § 18.

[8] At the time, Oregon's provision applied to "proceeds from any tax or excise levied on the ownership, operation or use of motor vehicles." *Id.* at 362.

"cannot be construed to cover a tax upon a business sought to be carried on from a motor vehicle." *Id.*

These cases show that taxes and fees assessed on businesses for the privilege of operating a particular type of business do not trigger the constitutional provisions that restrict road-user fees. Moreover, no court has ever interpreted a similar constitutional provision to apply to the specific type of tax at issue here.

3. Motor fuel taxes are unique under Article IX, § 14.

Motor fuel taxes deserve a special discussion because they differ from the other user fees. First, because Article IX, § 14 sets motor fuel taxes off in a separate clause from the other user fees, fuel taxes need not relate to registration, operation, or use of vehicles. Second, fuel taxes apply to commercial transactions between private parties (the sale of fuel), whereas all other fees under Article IX, § 14 relate to transactions directly between the car owner/operator and the government. Third, and unlike other taxes, it does not matter who collects and pays fuel taxes. By statute, fuel taxes are "conclusively presumed to be direct taxes on the consumer or user." A.R.S. § 28-5606(C).

Below, Saban relied on *City of Phoenix v. Popkin*, 93 Ariz. 14 (1963), which applied Article IX, § 14 to a 2¢/gallon tax on fuel. [IR-21 at 36.] But the fuel tax in *Popkin* was not a transaction privilege tax; it directly taxed the fuel itself. *See* Phoenix City Ordinance G-485 § 2 (Oct. 1962) (imposing "an excise tax of two cents (2¢) per gallon on motor vehicle fuel") (copy attached at APP109). Consequently, the taxable event fell squarely within Article IX, § 14, which applies to taxes "relating to . . . fuels." Indeed, the Court noted that the tax was "patterned after the state motor vehicle fuel tax provided for in Arizona Revised Statutes, § 28-1501 et seq." *Popkin*, 93 Ariz. at 15. Thus *Popkin* does not address or support applying Article IX, § 14 to a transaction privilege tax on car rental businesses. Nor did it need to consider whether the tax related to "registration, operation, or use of vehicles" because fuel taxes are not part of that same clause in Article IX, § 14.

For similar reasons, the Ohio case *Beaver Excavating*, 983 N.E. 2d 1317, does not control the result here. (*See* Argument § I.D.2.a.ii.)

E. The superior court's supposed connection between the AzSTA tax and Article IX, § 14 should be rejected because it misconstrues the text and leads to absurd results.

1. The superior court misconstrued the AzSTA tax and the constitutional provision.

Rather than take the approach outlined in Argument §§ I.B.1 or I.B.2, the superior court took a third approach and concluded that Article IX, § 14 applies to the AzSTA tax. In so doing, the superior court made several fundamental legal errors.

(a) The superior court improperly declined to give weight to the taxable event.

The AzSTA tax's taxable event is the privilege of conducting "the business of leasing or renting." A.R.S. § 5-839. (*See also* Argument § I.B.1.a, above.) In its initial ruling, the superior court discussed the components of the AzSTA tax and the role of the $2.50 floor, suggesting that "the general rule governing pure transaction privilege taxes thus may not apply to" the AzSTA tax. [IR-161 at 3 (APP130).] But the court correctly concluded that "it does not affect the legal analysis" and did not base its ruling on that comment. [IR-161 at 2 (APP129).] The superior court instead confirmed it would treat the AzSTA tax as a transaction privilege tax. [IR-180 at 1

(APP133) ("Assuming that the AzSTA tax is a transaction privilege tax, *as the Court did in its ruling*, . . ." (emphasis added)).]

Nevertheless, although the superior court acknowledged the caselaw concerning transaction privilege taxes, it declined to give that concept the proper weight. [*See* IR-161 at 3 (APP130) ("The case law holding that transaction privilege tax is a tax not on the underlying sale but on the right to conduct the transaction does not hold that the tax is unrelated to the underlying sale.").] It used the word "relating" in Article IX, § 14 to stretch well beyond the taxable event (the approach discussed in Argument § I.B.1), and even went past looking to the underlying business activity (the approach discussed in Argument § I.B.2). It instead focused on the activities of the companies' customers. [*Id.*] It did so even though (1) the customers are not taxed, and (2) their expected activities are not taxed. The term "relating" may have some elasticity, but it cannot be stretched that far while still respecting the structure of Arizona tax law.

Focusing on the activities of the company's customers makes little sense here in part because a rental car company need not even pass the tax along to its customers. The AzSTA tax applies only to the company that exercises the privilege of transacting business in the state. The company

may decide to pass some or all of the tax along to its customers, but the terms of the tax do not require pass-through; the company may instead opt to absorb the tax itself. *See Karbal*, 215 Ariz. at 117, ¶ 11 (explaining that a company may pass tax on to customers). Because that decision rests solely in the discretion of the company subject to the tax, it makes no sense to focus on what the company's customers do. Indeed, the customers' activities do not trigger the tax, the customers do not directly pay the tax, and the government does not even require the company to pass the tax through to the customers at all.

That optional pass-through characteristic was dispositive in *Tucson Mechanical*, which held that a tax on contractors (including contractors for the federal government) did not violate the prohibition against directly taxing the federal government. *See* 175 Ariz. at 180. As that case explained, "[t]he Arizona transaction privilege taxation statutes create no economic compulsion to shift the tax to the purchaser, and no ground . . . exists for holding that the statutes manifest a legislative intent for the purchaser to pay the tax." *Id.*

(b) The superior court improperly expanded the constitutional provision to cover all taxes related to vehicles.

Second, the superior court improperly expanded the scope of Article IX, § 14 by characterizing it as applying broadly to "taxes relating to *vehicles*." [IR-161 at 3 (APP130) (emphasis added and removed).] That error permeated the court's search for a "nexus between the *motor vehicle* and the tax." [*Id.*] (emphasis added). But the text of Article IX, § 14 is not nearly that broad. Rather than broadly covering "taxes relating to vehicles," as the superior court would have it, a tax must in fact relate to the activities of "*registration, operation, or use* of vehicles" in order for the constitutional provision to apply. Article IX, § 14 (emphasis added). By ignoring the specific activities that trigger the constitutional provision, the superior court substantially and improperly expanded its scope.

2. The superior court's interpretation would lead to absurd results.

Moreover, the superior court's methodology for finding the supposed connection between the AzSTA tax and "vehicles" would lead to absurd results by potentially invalidating a wide variety of taxes. First, the State has imposed transaction privilege taxes on the businesses of selling tangible personal property at retail and leasing or renting tangible personal

property for decades. A.R.S. §§ 42-5061 and -5071. Arizona counties and cities impose similar transaction privilege taxes. *See, e.g.*, ADOR, *Ariz. State County & City Transaction Privilege & Other Tax Rate Tables* (Nov. 2016), https://www.azdor.gov/Portals/0/TPTRates/12012016RateTable.pdf. Tangible personal property includes not only vehicles but all sorts of goods that relate to vehicles. Under the superior court's holding, transaction privilege taxes on car dealerships, tire stores, car stereo companies, companies that sell vehicle parts and accessories (such as windshield wiper blades), and more all would trigger Article IX, § 14. But these taxes have not been interpreted as road-user fees for the past sixty-five years and doing so now would violate voter intent and lead to absurd results. The Court should reject the superior court's construction. *See, e.g.*, *Arnold Const. Co. v. Ariz. Bd. of Regents*, 109 Ariz. 495, 498 (1973) (applying construction to avoid absurd results); *Homebuilders Ass'n v. City of Scottsdale*, 186 Ariz. 642, 651 (App. 1996) (adopting construction to be consistent with constitutional and statutory provisions and avoid absurd results).

The superior court dismissed that concern, stating that it "need not, and does not, examine whether vehicle-related funds derived from a transaction privilege tax of general application must be somehow

earmarked for highway and street purposes." [IR-180 at 1-2 (APP133-34).] But it did not offer any explanation for how those other taxes would not likewise run afoul of Article IX, § 14 under its analysis. Even though this case challenges only one tax, the superior court's ruling could broadly apply to any "vehicle-related funds," thereby drawing into question transaction privilege and other taxes that relate in some way to "vehicles." If affirmed, that reasoning will create opportunities to severely disrupt the State's, counties' and cities' tax structures. These concerns are not speculative; Saban, for example, has already asserted claims against the City of Phoenix.

For all of these reasons, this Court should reverse the superior court's ruling that the AzSTA tax violates Article IX, § 14.

II. The superior court erred by ordering a refund.

In addition to erroneously ruling that the AzSTA tax violates Article IX, § 14, the superior court erroneously ruled that the Plaintiffs are entitled to a refund (i.e., that its ruling that the AzSTA tax is unconstitutional should apply retroactively to the benefit of the Plaintiffs who in fact suffered no loss). [IR-214 at 2 (APP136).] In so doing, the superior court erroneously believed that this Court's precedent took away

the discretion it would otherwise have to deny a refund. The Arizona Supreme Court, however, has made clear that whether a court should give a ruling "prospective application only is a policy question within this court's discretion." *Fain Land & Cattle Co. v. Hassell*, 163 Ariz. 587, 596 (1990). Under the correct legal analysis, the circumstances in this case compel prospective only relief. The superior court erred by ruling otherwise.[9]

A. To determine whether to order a refund of an illegal tax, Arizona courts examine the three factors pertinent to "prospective" only relief.

Although civil cases presumptively apply retroactively, Arizona courts may award prospective relief only, including in tax refund cases. *See, e.g., S. Pac. Co. v. Cochise Cty.*, 92 Ariz. 395, 407 (1963) ("Where judicial interpretations of taxing acts have been overruled resulting in hardship, we have not hesitated to direct the decision to the future only."). In tax cases, Arizona courts apply the same "three-part test" used in other civil cases to determine whether a "decision should be applied prospectively only."

[9] These issues were briefed at IR-183, 186-187, 190, 192-195, 206, 208-209.

Wilderness World, Inc. v. ADOR, 182 Ariz. 196, 201 (1995). This test focuses on three factors—reliance, purpose, and inequity:

> (1) Whether the decision establishes a new legal principle by overruling clear and reliable precedent or by deciding an issue whose resolution was not foreshadowed;
>
> (2) Whether retroactive application will further or retard operation of the rule, considering the prior history, purpose, and effect of the rule;
>
> (3) Whether retroactive application will produce substantially inequitable results.

Id.

After examining these factors, a court should "limit a new rule to prospective application if, on balance, these factors indicate that retroactive application would be unjust." *Lowing v. Allstate Ins. Co.*, 176 Ariz. 101, 108 (1993). Depending on the circumstances, even a single factor that "clearly weighs against retroactive application" may be sufficient to tip the scales in favor of prospective-only relief. *See id.* (making a ruling prospective-only when only one factor clearly weighed against retroactive application, one weighed in favor, and the third factor cut "both ways").

B. All three factors of the prospective relief test weigh against giving Plaintiffs any refund.

In this case, even if the AzSTA tax is illegal (and it is not), all three factors concerning prospective-only relief overwhelmingly weigh against any refund, especially from the State.

1. Reliance.

With respect to reliance, nothing alerted the voters, the Department, or AzSTA that the constitution (state or federal) somehow precluded the AzSTA tax. Before the superior court's ruling, no Arizona court had ever ruled that Article IX, § 14 precluded transaction privilege taxes on businesses that rent or lease vehicles. To the contrary, in 1962 the Arizona Supreme Court considered whether a transaction privilege tax on "automobile rental services" applied to a company that leased trucks and trailers to only one customer for one-year periods. *See Peterson v. Smith*, 92 Ariz. 340, 341 (1962). *Peterson* acknowledged (implicitly) the legality of the tax at issue, but for reasons not relevant here, held that the term "automobile rental services" did not apply to long-term business relationships like the one-year leases at issue. *Id.* at 343.

Thirty-six days later, the Arizona Supreme Court on its own initiative ruled that a City of Phoenix tax on motor fuels was unconstitutional under Article IX, § 14 because the State via Article IX, § 14 had preempted the field of motor vehicle fuels. *Popkin*, 93 Ariz. at 16. Other governmental units could thus not administer such taxes. *Id.* Importantly, although obviously aware of Article IX, § 14, the *Peterson* court did not invalidate as unconstitutional the transaction privilege tax on vehicle rental services.

More fundamentally, as explained above (Argument § I), before and after voters adopted Article IX, § 14, all branches of government had implemented transaction privilege taxes on car rental and sales businesses. All of them operated under the reasonable belief that Article IX, § 14 did not implicate such transaction privilege taxes. After all, that's what the publicity pamphlet told the voters when they enacted it. This decades-long reasonable reliance by various government entities weighs strongly against applying the superior court's ruling retroactively.

2. Purpose.

Giving the Plaintiffs a refund will also not further Article IX, § 14's purpose. That express "purpose is to insure the expenditure of all revenues derived from road users to road uses only." [APP088.] But

ordering a refund (retroactive application) would not add one dime to the highway fund. The second factor thus likewise strongly weighs against applying the superior court's ruling retroactively.

3. Inequity.

Lastly, a refund award will produce substantially inequitable results, especially if the State is responsible for any portion of the refund. The State received nothing from the AzSTA tax and thus has nothing of Plaintiffs' to refund. Ordering the State to refund monies that it never received is manifestly unjust and lacks any support in reason or in law.

In addition, as the superior court recognized, "retroactive application" of its ruling "will result in a windfall to the taxpayer." [IR-214 at 2 (APP136).] Giving them a refund does not remedy any inequity whatsoever. Consequently, and unlike many tax cases, a refund here is not required to remedy any unconstitutional deprivation. The Plaintiffs have been deprived of nothing because they passed the tax on to their customers. [IR-122 at 3 (APP141) (response to Interrogatory No. 1).]

Requiring a refund from the State would mean that a governmental entity that never levied nor benefitted from the tax must pay refunds to private companies that did not themselves pay the tax. The third factor

thus likewise strongly weighs against applying the superior court's ruling retroactively, more so than in almost any other type of tax case. Consequently, *all* equitable considerations in this matter warrant a prospective-only ruling.

C. The superior court erroneously concluded that this Court had foreclosed the possibility of denying Plaintiffs a refund.

Notwithstanding that all three factors concerning prospective-only relief overwhelmingly weigh in favor of not ordering a refund, the superior court concluded that it had no choice but to do so. Tellingly, the superior court acknowledged that the key case it relied on—*McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990)—expressly left "open the possibility that prospective only relief is appropriate in a case [like this one] where a tax is illegally collected, but the taxpayer is otherwise made whole by having passed the illegal tax on to its customers." [IR-214 at 2 (APP136).] However, citing *Tucson Electric Power Co. v. Apache County.*, 185 Ariz. 5 (App. 1995), and *Scottsdale Princess Partnership v. ADOR*, 191 Ariz. 499 (App. 1997), the superior court believed that "two different panels of the Arizona Court of Appeals both interpreted *McKesson* to require retroactive application of a holding that a tax is

illegal." [IR-214 at 2 (APP136).] In other words, the superior court believed that two panels of this Court had misinterpreted *McKesson*, and that it had to follow "[t]hose [erroneous] interpretations of *McKesson*." [*Id.*] The superior court erred, and this Court should reverse for several reasons.

1. *McKesson* did not require states to retroactively apply all holdings that a tax is illegal under all circumstances.

First, *McKesson* does not require retroactive application of all holdings that a tax is illegal under all circumstances. *McKesson* addressed the appropriate remedy for a Florida liquor tax scheme that violated the Commerce Clause by benefitting in-state suppliers over out-of-state suppliers. The Court held that if a state "relegates [a taxpayer] to a post-payment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." 496 U.S. at 31. The Court did not, however, announce some new rule under which refunds must be awarded in all cases where a tax is found to be unlawful.

To the contrary, the Court performed a lengthy twenty-page prospective-application analysis "rooted firmly in precedent dating back to

at least early this century." *Id.* at 32. It ultimately concluded that the blatantly discriminatory tax in that case required retroactive relief (refunds). *Id.* at 44-52 (relying in part on its opinion striking down another state's virtually identical tax scheme and rejecting windfall argument for lack of evidence).

Indeed, in deciding to award retroactive relief, the Supreme Court heavily relied on its determination that the favored taxpayers were commercial competitors of McKesson's, thereby putting McKesson at a distinct economic disadvantage:

> The tax injured petitioner not only because it left petitioner poorer in an absolute sense than before (*a problem that might be rectified to the extent petitioner passed on the economic incidence of the tax to others*), but also because it placed petitioner at a relative disadvantage in the marketplace vis-à-vis competitors distributing preferred local products.

Id. at 48 (emphasis added). In other words, although refunds may not be required if the tax has in fact been passed on to others, because the tax was discriminatory and put McKesson at a competitive disadvantage, McKesson should be put in the position that it would have been had no discrimination occurred.

On the same day the Supreme Court issued *McKesson* in 1990, it refused to retroactively apply a decision in an earlier tax case in which the Court held that unapportioned flat highway use taxes likewise violated the Commerce Clause. *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 183 (1990). *Smith* considered factors similar to Arizona's factors and concluded that "applying [the previous case] retroactively would produce substantial inequitable results." *Id.* at 179-83 (quotation marks omitted). The plurality also distinguished between federal constitutional questions and state law questions for purposes of determining the retroactivity of a decision, stating that "[w]hen questions of state law are at issue"—as in this case—"state courts generally have the authority to determine the retroactivity of their own decisions." *Id.* at 177.

Therefore, the Supreme Court did not in 1990 announce a new rule that precludes prospective-only relief in this case. Indeed, *McKesson* turned entirely on the federal Due Process Clause. Due process, state or federal, does not require a state to pay a refund when doing so merely provides one taxpayer a windfall at other taxpayers' expense. This is particularly true when, as in this case, any illegality comes not from *imposing* the tax itself, but rather from limitations on how the tax revenue may be *used*. For

all of these reasons, and regardless of what other panels may have done, this Court should not misconstrue *McKesson* as somehow supplanting the above three factors relevant to the refund inquiry. *Cf. State v. Patterson*, 222 Ariz. 574, 580, ¶ 19 (App. 2009) (noting that the Court need not follow prior panel decisions that "are based upon clearly erroneous principles").

2. Neither *Tucson Electric* nor *Scottsdale Princess* actually misconstrued *McKesson* as requiring retroactive application of a holding that a tax is illegal under all circumstances.

Second, and contrary to the superior court's conclusion, neither *Tucson Electric* nor *Scottsdale Princess* actually misinterpreted *McKesson* as "requir[ing] retroactive application of a holding that a tax is illegal" in all cases notwithstanding other relevant considerations. [IR-214 at 2 (APP136).]

In *Tucson Electric*, this Court awarded a partial refund of a property tax imposed pursuant to an unconstitutional statute that taxed mines and utilities at a higher rate than other types of property without any rational basis. 185 Ariz. at 20-22. In *Scottsdale Princess*, this Court found the taxpayer to be the victim of unconstitutional discrimination and ordered a

partial refund to make that hotel's "tax burden uniform with that of the unconstitutionally favored taxpayers." 191 Ariz. at 505.

In both cases, this Court ordered retroactive relief largely to remedy unequal and discriminatory treatment among competitors, not because *McKesson* requires retroactive application in all illegal tax cases. To the extent these decisions include statements that suggest otherwise, they are dicta.

3. Cases since *McKesson* confirm the ongoing viability of the above three-part test relevant to prospective relief in tax cases.

Third, even after *McKesson*, this Court and the Arizona Supreme Court have continued to engage in the longstanding three-part analysis to determine whether a tax decision should be prospective only. *See, e.g., Wilderness World*, 182 Ariz. at 201; *Copper Hills Enters., Ltd. v. ADOR*, 214 Ariz. 386, 391-92, ¶¶ 18-20 (App. 2007); *PCS, Inc. v. ADOR*, 186 Ariz. 539, 544-545 (1995), *abrogated on other grounds by Valencia Energy Co. v. ADOR*, 191 Ariz. 565 (1998).

As recently as 2007, this Court used the three-part analysis to determine whether to order a refund of taxes paid to Globe after finding that Globe lacked authority to levy the tax because of an invalid

annexation. *Copper Hills*, 214 Ariz. at 391. Although the Court ultimately decided that retroactive relief was appropriate under the circumstances, *id.*, the Court would not have undertaken the three-part analysis had *McKesson*, *Tucson Electric*, or *Scottsdale Princess* precluded the possibility of prospective only relief as the superior court found.

4. The merits of *Tucson Electric*, *Scottsdale Princess*, and *McKesson* do not support refunds here.

Finally, even though *Tucson Electric*, *Scottsdale Princess*, and *McKesson* ordered refunds, those cases confirm no refund should issue in this case. As noted above, both *Tucson Electric* and *Scottsdale Princess* denied prospective-only relief largely to rectify discriminatory treatment among similarly situated taxpayers. *Scottsdale Princess* even distinguished an earlier case involving the same party on that basis. *See* 191 Ariz. at 504 n.10 ("In *Scottsdale Princess*, we based our denial of a refund on the fact that the unconstitutional exemptions did not result in a discriminatory tax."). That rationale has nothing to do with this case, where all competitors were treated evenly and they all passed the tax through to their customers.

In *McKesson*, no party presented evidence that McKesson had passed the economic burden of the excise tax to others, and the Court "could not

refuse to provide a refund based on sheer speculation that a 'pass-on' occurred." 496 U.S. at 46-47 & n.30. Here, in contrast, it is undisputed that Plaintiffs passed that tax on to their customers. [IR-214 at 2 (APP136).]

A better analogue to this case for purposes of the refund issue is *Beaver Excavating*. In *Beaver Excavating*, a taxing entity diverted motor fuel taxes to non-roadway purposes in violation of the state constitution's anti-diversion provisions. 983 N.E. 2d at 1326, ¶ 33. On far less compelling facts, the Ohio Supreme Court denied refunds after applying a three-factor test similar to Arizona's. *Id*. at 1328, ¶ 43 (although the court noted that the parties did not request retroactive relief, the court nevertheless conducted the three-part analysis).

For all of these reasons, the superior court erred by ordering a refund.

III. The superior court erred in ordering the Department to pay the refund with the right to reduce the amount otherwise distributable to AZSTA under A.R.S. § 42-5029(G).

The superior court correctly ruled that AzSTA is ultimately liable for the refund of the AzSTA tax. [*See* IR-214 at 3 (APP137) ("[U]ltimate liability rests on the receiving entity.").] The superior court erred, however, in holding that the State must pay the refund to Plaintiffs, with

the State then having the right under A.R.S. § 42-5029(G) to recover the amount paid from AzSTA by retaining future tax monies otherwise distributable to AzSTA. [*Id.*] Section 42-5029(G), by its very terms, pertains only to revenue distributed under that statute. Because revenue from the AzSTA tax is not distributed under that section, subsection (G) does not apply. Moreover, there is no evidence that AzSTA will ever be able to repay the State now that the court has declared the AzSTA tax, AzSTA's main source of revenue, to be unconstitutional.[10]

A. The superior court correctly held that AzSTA, not the State, must ultimately pay the refund.

The government entity that levies and receives a tax is responsible for the payment of any court-ordered or other lawful refunds. *Copper Hills*, 214 Ariz. at 392, ¶ 24. No authority holds that the State bears refund liability for transaction privilege taxes levied and received by another governmental entity.

During the proceedings below, AzSTA argued that it should not be held liable for refunds because the AzSTA tax is a State-imposed tax. [*See* IR-189 at 7-9.] That is incorrect. The electors of Maricopa County imposed

[10] These issues were briefed at IR-181-182, 184-192, 195, 207, 210, 216.

the tax. Its proceeds go to AzSTA and the county stadium district. A.R.S. § 5-839(G). The State's only role is administrative—the Department collects the funds, and the State Treasurer distributes them. The Department thus serves merely as an intermediary between taxpayers and AzSTA. Because the State has no authority to keep or use the proceeds from the AzSTA tax, it is not a state tax.

Indeed, by statute the Department routinely collects taxes for many taxing authorities, including the transaction privilege taxes for cities and towns. *See* A.R.S. § 42-6001(A). But in that role, like here, the Department acts merely in a ministerial capacity as a collecting agent, much like an escrow agent in a private transaction that collects and holds monies for eventual distribution. Receiving and distributing a particular city's taxes does not transform the city tax into a state tax, or make the city's refund obligation the State's obligation.

It also does not matter that the legislature made the AzSTA tax possible under A.R.S. § 5-839. All local taxation power in Arizona is derived from a legislative grant. *City of Phoenix v. Ariz. Sash, Door & Glass Co.*, 80 Ariz. 100, 102 (1956) ("[T]he power of taxation under the constitution inheres in the sovereignty of the state and may be exercised

only by the legislature except where expressly delegated to political subdivisions of the state or to municipal corporations."). When the legislature grants the power to a local governmental entity or its electors to levy a tax, it may also specify how the tax revenues are to be distributed and used. For example, the legislature authorized certain counties to levy county general excise taxes and directed that any county that does so "shall use these revenues to support and enhance countywide services." A.R.S. § 42-6103. There, like here, the legislature did not levy a county tax, but rather delegated authority for counties to do so on their own, and only after a vote within the county. *See also* A.R.S. §§ 42-6105 to 42-6112 (other examples).

Here, the legislature delegated the power to tax to Maricopa County electors. By electing to levy the AzSTA tax, the Maricopa County electors did not, and could not, exercise the State's taxing power. The AzSTA tax is no more a state tax than any other county, municipal, or other local tax. Decisively, the AzSTA tax revenues do not belong to the State.

For these reasons, local taxing jurisdictions or their electors cannot create a state liability by electing to levy a tax. To hold otherwise would mean that the Maricopa County electors could externalize their liability

onto the other fourteen Arizona counties and their taxpayers. Or that the City of Yuma could levy an unconstitutional transaction privilege tax, but the State (including residents of Flagstaff and Bisbee) could be on the hook merely because the Department administers tax collection and distribution. Bluntly, local taxing jurisdictions or their electors cannot impose a liability on the State, and the superior court erred in holding otherwise.

Unsurprisingly, Arizona courts have routinely rejected externalizing a taxing entity's liability. This Court has held unequivocally that the Department's role as a collecting agent did not make it liable to refund a tax levied, received, and spent by a governmental entity other than the State. In *Copper Hills*, the City of Globe had levied a municipal transaction privilege tax that the Department collected on the City's behalf. 214 Ariz. at 392, ¶ 24. The Court found the City lacked authority to levy the tax, *id.* at 389, ¶ 10, and held that the City was the sole party responsible for the payment of any refunds, *id.* at 392, ¶ 24. Because payment to the agent (the Department) constituted payment to the principal (the City) as a matter of law, the City had in fact "received the disputed tax payments and is liable." *Id.* Not only did this Court not enter judgment against the Department for

the illegal locally-imposed taxes, it dismissed the Department entirely as a necessary party. *Id.* at ¶ 25.

Similarly, in *Riggins v. Maricopa Cty.*, 60 Ariz. 168 (1943), the applicable statute required that a vehicle license tax be paid to the county assessor, who then had a "duty to remit [the tax] to the state treasurer" for deposit into the general fund. *Id.* at 169. The county "had no control or right of control of the tax"; the county assessor merely received the funds and then remitted them to the state treasurer. *Id.* Once the statute was declared unconstitutional, the taxpayer sought a refund from the county to which he had paid his taxes. The Arizona Supreme Court held that the county was not liable for payment of the refund, properly recognizing that the tax revenues "did not belong to the county" and the county "had no power over [the tax revenue's] use or disposition." *Id.*

The superior court therefore correctly ruled that AzSTA ultimately is liable for the refund of the AzSTA tax. [*See* IR-214 at 3 (APP137).]

B. Contrary to the superior court's conclusion, no authority permitted it to require the State to fund the refund and then try and collect from AzSTA

Although the superior court should have ended its analysis by holding AzSTA liable for the refund, it went on to hold that the State must

first fund the refund (even though it did not receive the tax revenue), and could then attempt to get paid back over time by offsetting monies otherwise payable to AzSTA. [*See* IR-214 at 3 (APP137).] But no authority holds that the State must pay refunds of a tax that it neither levied nor received. The superior court's conclusion that A.R.S. §§ 42-1254(D) and 42-5029(G) allowed it to order this result lacks any support in law or reason.

Some version of A.R.S. § 42-1254(D), which addresses tax court appeals, has been in effect since 1935. [*See* IR-207 at Exhibit A.] Throughout its history, no court has ever interpreted this statute (or any other statute) to require the State to pay a refund of a transaction privilege tax found to be illegal where the State neither levied nor received the tax. As discussed above, the Department's mere collection of a locally imposed tax does not transform that tax into a state tax, which is subject to the provisions in A.R.S. § 42-1254(D)(5). *See Copper Hills*, 214 Ariz. at 392, ¶ 24.

The offset provisions of A.R.S. § 42-5029(G) are not authority to the contrary. Subsection (G) does not apply to the AzSTA tax because on its own terms that subsection applies only to "tax monies distributed under this section" (i.e., distributed under § 42-5029). The AzSTA tax is not

distributed under § 42-5029, so consequently subsection (G) does not apply at all.

Subsection 42-5029(G) thus has nothing to do with local taxes that the Department collects on behalf of local entities. As noted above, this Court held in *Copper Hills* that the City of Globe bore sole responsibility for refunding unlawful city taxes, and that the State had no liability whatsoever to pay the refunds notwithstanding that it had collected the taxes on the City's behalf. The superior court erred by extending a statute to matters not falling within its express provisions. *City of Phoenix v. Donofrio*, 99 Ariz. 130, 133 (1965) (explaining that courts may not so inflate, expand, or stretch statutes).

The superior court's erroneous holding has enormous implications for the State. Because the State currently collects all transaction privilege taxes levied by all Arizona cities and towns (*see* A.R.S. § 42-6001(A)), affirming the holding could leave all Arizona taxpayers on the hook for refunding taxes levied by only one local jurisdiction. That cannot be, and is not, the law.

C. The superior court also erroneously assumed, without any basis for so doing, that the State would be made whole.

The superior court seemed to take solace in its belief that the taxes that the Department collects going forward on behalf of AzSTA will be sufficient to make the State whole after it pays the court-ordered refunds. This assumption, however, overlooks that Saban has successfully challenged the constitutionality of the AzSTA tax. If this Court upholds the superior court's unconstitutionality ruling, AzSTA will collect no more AzSTA tax monies for the State to retain to make itself whole after paying the refunds.[11] The Court's ruling thus makes no sense.[12]

For all these reasons, if the Court denies prospective-only relief and orders that refunds be paid, it should reverse the superior court and order that AzSTA, as the recipient of the taxes, is solely responsible for payment of the refunds.

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[11] Although the Department collects a hotel tax under A.R.S. § 5-840 on behalf of AzSTA, this tax is also being challenged by Plaintiffs' counsel. *See Apache Hotel*, TX2013-000650 and *Ramada Ltd.*, TX2016-001225. It is possible that no additional monies will be collected from this tax.

[12] The Department filed a motion for reconsideration pointing out that the State would likely not be made whole because the court declared the AzSTA tax unconstitutional. [IR-216.] The court never acted on that motion.

REQUEST FOR COSTS

The Department requests costs incurred on appeal pursuant to ARCAP 21 and A.R.S. § 12-342.

CONCLUSION

The Court should hold that the AzSTA tax is constitutional, vacate the judgment, and remand with instructions for the superior court to enter judgment in the Department's favor. Even if the Court finds the AzSTA tax unconstitutional, it should reverse the superior court's order awarding Plaintiffs a refund. And if the Court affirms the court's refund order, it should reverse the superior court's order obligating the Department to pay the refund.

RESPECTFULLY SUBMITTED this 16th day of February, 2017.

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APPENDIX
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* The appendix page number matches the electronic PDF page number. Counsel has added emphasis to selected pages in this appendix using yellow highlighting.

** Excerpts only.

Arizona Constitution, art. IX, § 14

§ 14. Use and distribution of vehicle, user, and gasoline and diesel tax receipts

No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on the public highways or streets or to fuels or any other energy source used for the propulsion of vehicles on the public highways or streets, shall be expended for other than highway and street purposes including the cost of administering the state highway system and the laws creating such fees, excises, or license taxes, statutory refunds and adjustments provided by law, payment of principal and interest on highway and street bonds and obligations, expenses of state enforcement of traffic laws and state administration of traffic safety programs, payment of costs of publication and distribution of Arizona highways magazine, state costs of construction, reconstruction, maintenance or repair of public highways, streets or bridges, costs of rights of way acquisitions and expenses related thereto, roadside development, and for distribution to counties, incorporated cities and towns to be used by them solely for highway and street purposes including costs of rights of way acquisitions and expenses related thereto, construction, reconstruction, maintenance, repair, roadside development, of county, city and town roads, streets, and bridges and payment of principal and interest on highway and street bonds. As long as the total highway user revenues derived equals or exceeds the total derived in the fiscal year ending June 30, 1970, the state and any county shall not receive from such revenues for the use of each and for distribution to cities and towns, fewer dollars than were received and distributed in such fiscal year. This section shall not apply to moneys derived from the automobile license tax imposed under section 11 of article IX of the Constitution of Arizona. All moneys collected in accordance with this section shall be distributed as provided by law.

A.R.S. § 5-839

§ 5-839. Car rental surcharge

A. The qualified electors residing in the authority, by majority vote at an election held in the authority, may levy and, if levied, the department of revenue shall collect a car rental surcharge beginning on the first day of the first month beginning ninety days after the election to levy the surcharge. The surcharge shall be in effect for three hundred sixty months.

B. The rate of the surcharge is:

1. Three and one-fourth per cent of the gross proceeds or gross income from the business or two dollars fifty cents on each lease or rental, whichever is more.

2. In the case of a person who leases or rents the motor vehicle as a temporary replacement motor vehicle, two dollars fifty cents on each lease or rental. For the purposes of this paragraph, "temporary replacement motor vehicle" means a vehicle loaned by a motor vehicle repair facility or dealer or rented by a person temporarily to use while the vehicle that it is replacing is not in use because of breakdown, repair, service, damage or loss.

C. The surcharge applies to the business of leasing or renting for less than one year motor vehicles for hire without a driver, that are designed to operate on the streets and highways of this state and that are primarily intended to carry not more than fourteen passengers, regardless of whether the vehicle is registered or licensed in this state.

D. The surcharge does not apply to the lease or rental of a motor vehicle:

1. To an automobile dealership, a repair facility, an insurance company or any other person that provides that vehicle at no charge to a person whose own motor vehicle is being repaired, adjusted or serviced.

2. Used in an employee vanpool arrangement for a group of at least seven but not more than fourteen passengers including a driver who meets all of the following conditions:

(a) The driver operates the motor vehicle for the purpose of commuting between the driver's residence and place of employment.

(b) The driver operates the motor vehicle under a prearranged schedule for transporting the passengers between their residences and place of employment.

(c) The driver's operation of the motor vehicle is voluntary and not required as a work responsibility or condition of employment.

(d) The driver receives no compensation other than free transportation between the driver's residence and place of employment, plus limited personal use of the motor vehicle consisting of not more than twenty per cent of the mileage use of the motor vehicle for either:

(i) Purposes other than transporting passengers between their residences and place of employment.

(ii) Travel between the passengers' residences and place of employment in which passengers transported constitute less than one-half of the adult seating capacity of the motor vehicle, not including the driver.

E. The surcharge is not taxable under § 42-5071.

F. Unless the context otherwise requires, § 42-6102 governs the administration of a surcharge imposed under this section, which shall be reported on a form prescribed by the department of revenue. The department of revenue shall require a report of the number of lease or rental transactions and shall transmit that number to the state treasurer.

G. Each month the state treasurer shall distribute revenues collected pursuant to this section as follows:

1. Transmit an amount equal to two dollars fifty cents on each lease or rental transaction to the county stadium district established in the county in which the authority is located pursuant to title 48, chapter 261 for deposit in the county stadium district fund. The board of directors of the county stadium district may pledge all or part of these monies to secure district bonds or financial obligations under title 48, chapter 26.

2. Pay the remainder of the monies collected during the month to the authority for deposit in the tourism revenue clearing account established by § 5-835.

PLEASE READ CAREFULLY

STATE OF ARIZONA

INITIATIVE AND REFERENDUM

PUBLICITY PAMPHLET

1952

Containing a Copy of the

PROPOSED AMENDMENT TO THE CONSTITUTION

REFERENDUM

Referred to the People

by the Legislature

and

INITIATIVE MEASURES

Proposed by Initiative Petition of the People

To be Submitted to the Qualified Electors of the State of Arizona for their approval or rejection at the

REGULAR GENERAL ELECTION

to be held on

THE FOURTH DAY OF NOVEMBER, 1952

Together with the Arguments filed favoring certain of said measures

Compiled and Issued by

WESLEY BOLIN

Secretary of State

13

(Publication Authorized under Paragraph 60-107, Chapter 60, Article 1, Arizona Code Annotated, 1939)

To be submitted to the qualified electors of the State of Arizona for their approval or rejection at the

REGULAR GENERAL ELECTION

to be held

ON NOVEMBER 4, 1952

Referred to the People by the Legislature and filed in the office of the Secretary of State, March 14, 1952, and printed in pursuance of Paragraph 60-107, Chapter 60, Article 1, Arizona Code Annotated, 1939.

WESLEY BOLIN, Secretary of State

(On Official Ballot Nos.100-101)

HOUSE CONCURRENT RESOLUTION NO. 2

A CONCURRENT RESOLUTION PROPOSING AN AMENDMENT OF THE CONSTITUTION OF ARIZONA RELATING TO THE EXPENDITURE OF REVENUES FOR HIGHWAY PURPOSES.

Be it Resolved by the House of Representatives of the State of Arizona, the Senate concurring:

1. The following amendment to the Constitution of Arizona, to be known as article IX, section 14 thereof, is proposed, to become valid as a part of the Constitution when approved by a majority of the qualified electors voting thereon and upon proclamation of the governor:

Section 14. No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on the public highways, or to fuels used for the propulsion of such vehicles, shall be expended for other than cost of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, cost of construction, reconstruction, maintenance and repair of public highways and bridges, county, city and town roads and streets, and for distribution to counties, incorporated cities and towns in an amount not less than that as provided by law on July 1, 1952, to be used by them only for the purposes permitted by law on that date, expense of state enforcement of traffic laws, and payment of costs for publication and distribution of Arizona Highway Magazine, provided, however, that this section shall not apply to moneys derived from the automobile license tax imposed under section 11 of Article IX of the Constitution of Arizona.

2. The proposed amendment (approved by a majority of the members elected to each house of the Legislature, and entered upon the respective journals thereof, together with the ayes and nayes thereon) shall be by the secretary of state submitted to the qualified electors at the next regular general election (or at a special election called for that purpose), as provided by article XXI, Constitution of Arizona.

Passed by the House March 3, 1952, by the following vote: 38 Ayes, 21 Nays, 6 Absent, 7 Excused.

Passed by the Senate March 14, 1952, by the following vote: 15 Ayes, 2 Nays, 2 Not voting.

Filed in the Office of the Secretary of State - March 14, 1952.

WESLEY BOLIN, Secretary of State

The following is the form and number in which the question will be printed on the Official Ballot:

PROPOSED AMENDMENT TO THE CONSTITUTION
PROPOSED BY THE LEGISLATURE

HOUSE CONCURRENT RESOLUTION NO. 2

PROPOSING AN AMENDMENT OF THE CONSTITUTION OF ARIZONA RELATING TO THE EXPENDITURE OF REVENUES FOR HIGHWAY PURPOSES

If you favor the above law, vote YES; if opposed, vote NO.

100 YES ☐ 128,094

101 NO ☐ 48,409

AFFIRMATIVE ARGUMENT

REASONS WHY

THE BETTER ROADS AMENDMENT SHOULD BE APPROVED

BY VOTING 100 YES ☒

100 YES, RELATING TO THE EXPENDITURE OF REVENUES FOR HIGHWAY PURPOSES, a proposed amendment to the Arizona Constitution, is being submitted to the people by Resolution of the Legislature.

POPULARLY CALLED THE BETTER ROADS AMENDMENT, its purpose is to INSURE THE EXPENDITURE OF ALL REVENUES DERIVED FROM ROAD USERS TO ROAD USES ONLY. These road uses (highway purposes) are delineated in the amendment. They include costs of building and repairing public highways, streets, and roads in the state, counties, cities, and towns and costs attendant thereto such as: administration, refunds, bonding, traffic enforcement, and the ARIZONA HIGHWAYS magazine.

REVENUES IN ARIZONA are derived from state gasoline and diesel taxes, registration fees, unladen weight fees on common and contract motor carriers, and motor carrier taxes based on gross receipts. Road users in the fiscal year '51-52 paid $13,545,135. in motor fuel taxes and $5,620,930. in motor vehicle excise taxes. 100 YES would not apply to revenues from the

automobile license property tax (in lieu tax) which goes to state, county, city, and school general funds and is not included in the above figures.

BY AN AVERAGE OF 2-⅜ to 1, the citizens of 21 states, including seven neighboring western states, have already adopted amendments to their constitutions earmarking all road user taxes for roads.

100 YES CARRIES THE ENDORSEMENT OF a variety of ARIZONA'S CITIZEN GROUPS, such as:

Arizona Automobile Associations
Arizona Automobile Dealers Assn.
Ariz. Bottlers of Carbonated Beverages
Arizona Cattle Growers' Assn.
Ariz. Chambers of Commerce Mgrs. Assn.
Arizona Citrus Exchange
Arizona Cotton Growers' Assn.
Arizona Dairymens' League
Arizona Farm Bureau Federation
Arizona Good Roads Association
Arizona Highway Commission
Arizona Hotel Association
Arizona Milk Producers Assn.
Arizona Motor Hotel Assn.
Arizona Motor Transport Assn.
Arizona Petroleum Industries Com.
Ariz. Rural Letter Carriers Assn.
Arizona Small Mine Owners Assn.
Arizona Supervisors and Clerks Assn.
Arizona Tire Dealers Assn.
Arizona Vegetables Growers Assn.
Arizona Woolgrowers Assn.
Associated Equipment Distr.
Associated General Contractors
Central Ariz. Cattle Feeders Assn.
Desert Citrus Growers Assn.
Implement Dealers Assn.
Maricopa County Farm Bureau
Portland Cement Assn.
Retail Lumber & Bldg. Supply Assn.

WHY DO SO MANY DIFFERENT PEOPLE WANT THE BETTER ROADS AMENDMENT? Because they, and we, all share a common problem—the need for better roads: (1) to secure needed improvements in our highway transportation system; (2) to reduce our accident toll; (3) to alleviate traffic congestion in urban areas; (4) to reach standards of economical operation and convenient use in suburban and rural areas; (5) to strengthen lines of communication in Arizona, whether needed for business such as: farm-to-market, or for vacationing pleasure.

THE ONLY WAY TO BE SURE WE HAVE BETTER ROADS is to be sure of our revenues for roads.

IF USED FOR ROAD PURPOSES, the road user taxes are fair because they are based on benefits received by the taxpayer. The user pays as he drives. If not used for road purposes, these user taxes become unfair because they are not based on benefits received, ability to pay, or the taxpayer's interest. Congress, in passing the Hayden-Cartwright Amendment of 1934, declared: "It is unfair and unjust to tax motor vehicle transportation unless the proceeds of such taxation are applied to the construction, improvement, or maintenance of highways."

OF PARAMOUNT IMPORTANCE to the United States as a nation is its network of highways—arteries of commerce in peacetime, the lifeline of defense in wartime. The federal government grants aid to the states for construction of primary, secondary, and urban highways. This aid in Arizona is 72¢ for each 28¢ spent for construction by state, county, or city, but only if the Arizona user tax revenues are used exclusively for public highway, street, and road purposes.

SINCE SO MUCH of the land area of Arizona, fifth largest state in the nation, is owned or controlled by the federal government, the need for federal help is great. WHY JEOPARDIZE FEDERAL AID BY ALLOWING ANY DIVERSION OF ROAD USER TAXES TO OTHER THAN ROAD PURPOSES?

PUBLIC POLICY IN ARIZONA has consistently opposed diversion, although there have been CONSTANT THREATS TO HIGHWAY FUNDS in bills introduced from time to time in the legislature. In the meantime, in other states not having a Better Roads Amendment, diversion of road user funds MORE THAN DOUBLED IN THE FOUR YEAR PERIOD FROM 1946 - 1950, from $97,579,000. to $217,038,000.

ARIZONA IS IN A PARTICULARLY FAVORABLE POSITION TO ADOPT 100 YES this year, because it is not now diverting its road user taxes.

THEREFORE 100 YES WILL ENTAIL NO CHANGE in the source or expenditure of highway revenues. Nor will it make any change in provisions of the initiated measure allocating gas taxes to the state, 3½¢; counties, 1¢; cities, ½¢ per gallon.

WITH A STABILIZED SOURCE OF highway revenue, 100 YES will insure the continuity of improvement needed to complete such desirable roads as the Black Canyon Highway. This vital, 100-mile North-South link from Phoenix to Prescott and the Camp Verde leg to Flagstaff will connect with East-West traffic in and thru Arizona. The Prescott leg has required five years to construct at an average cost of $50,000. a mile. Arizona will spend $1½ million in its construction, while the federal government will grant $3½ million.

OVER 50% OF THE COMMUNITIES in our state have no rail or airport facilities. For welfare, security, growth, and prosperity, the citizens of these communities depend upon highway transportation. Whether they truck to the nearest railroad point or haul all the way to market, whether their production is industrial, agricultural, or mineral, these citizens must have better roads. Arizona's growth demands their needs be met.

THE NEWEST BUSINESS IN THIS BABY STATE is the $200,000,000. tourist industry. The vacationing public is attracted to those states which have better roads. Those states which neglect their roads thru diversion of revenues, will be neglected by tourists—more than 75% of whom travel by automobile or bus. Arizona must provide good roads not only into and thru the state, but also to vacation spots and scenic and historic points of interest within the state.

SIGNIFICANTLY, 45% OF THE RECEIPTS from the gas tax in Arizona is paid by out-of-state motor vehicle owners. This large tax on non-residents may be justified by using their moneys for the roads they use.

ARIZONA'S GEOGRAPHY IS such that most Arizonans depend upon motor transportation in order to reach their work, markets, and recreation. They have a right to expect that the taxes they pay give them their money's worth in good roads.

MANY ARIZONA CITIZENS ARE EMPLOYED IN ROAD WORK. Because road construction cost is 90% labor, road work is as desirable in bad times as good.

THE VERY SORT OF PEOPLE who, years ago, did not want to pay for needed highways out of general funds of the state, and so devised the gas tax, now look longingly at the highway fund and all to often bring pressures in the legislature to appropriate these revenues to other than highways.

AS SO MANY STATES have discovered in the past ten years, there is only one sure way to put an end to diversion, or the threat of diversion—that is, by the ADOPTION OF A CONSTITUTIONAL AMENDMENT SUCH AS THIS BETTER ROADS AMENDMENT, Proposition 100, Relating to the Expenditure of Revenues for Highway Purposes. KEEP PACE WITH ARIZONA'S PROGRESS. VOTE 100 YES, AT THE TOP OF THE BALLOT ON THE RIGHT HAND SIDE.

ARIZONA BETTER ROADS COMMITTEE
/s/
A. J. Fram
Chairman

To be submitted to the qualified electors of the State of Arizona for their approval or rejection at the

REGULAR GENERAL ELECTION

to be held

ON NOVEMBER 4, 1952

Referred to the People by the Legislature and filed in the office of the Secretary of State, March 10, 1952, and printed in pursuance of Paragraph 60-107, Chapter 60, Article 1, Arizona Code Annotated, 1939.

WESLEY BOLIN, Secretary of State

(On Official Ballot Nos. 300-301)

HOUSE CONCURRENT RESOLUTION NO. 4

A CONCURRENT RESOLUTION

ENACTING AND ORDERING THE SUBMISSION TO THE PEOPLE OF A MEASURE REPEALING AN INITIATIVE MEASURE PROPOSED BY INITIATIVE PETITION, ENTITLED: "AN ACT TO ESTABLISH A

A C T S
Resolutions and Memorials

OF THE

REGULAR SESSION
Twelfth Legislature

OF THE

STATE OF ARIZONA
-1935-

Regular Session Convened January 14th, 1935.

Regular Session Adjourned Sine Die March 21st, 1935, Legislative Day of March 14th, 1935.

expenses of the members of the house of representatives herein provided for shall be presented to the speaker of the house by the members thereof, to be by said speaker audited, and when so audited shall be by the speaker approved and submitted to the state auditor and state treasurer for payment.

The legislative committee expenses of the members of the senate herein provided for shall be presented to the president of the senate by the members thereof, to be by said president audited, and when so audited shall be by the president approved and submitted to the state auditor and state treasurer for payment.

Sec. 4. EMERGENCY CLAUSE. To preserve the public peace, health and safety it is necessary that this act shall become immediately operative. It is therefore declared to be an emergency measure, and shall take effect upon its passage in the manner provided by law.

Approved March 23, 1935.

CHAPTER 77

(House Bill No. 118)

AN ACT

RELATING TO EXCISE TAXATION, AND TO IMPOSE A LICENSE FEE AND A PRIVILEGE TAX UPON THE PRIVILEGE OF ENGAGING IN CERTAIN OCCUPATIONS AND BUSINESS; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Arizona:

ARTICLE 1

Section 1. SHORT TITLE. This act may be cited as "The excise revenue act of 1935."

ARTICLE II.

PRIVILEGE TAX

Section 1. DEFINITIONS. (a) When used in this article, the term "person" or the term "company", herein used interchangeably includes any individual, firm, co-partnership, joint adventure, association, corporation, municipal corporation, estate, trust, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

(b) The terms "tax commission" and "the commission" mean the tax commission of the state of Arizona, and any board, commission, official, or officials upon whom the duties and powers exercised by said state tax commission under existing laws may hereafter devolve.

(c) The term "tax year" or "taxable year" means either the calendar year, or the taxpayer's fiscal year when permission is obtained from the tax commission to use same as the tax period in lieu of the calendar year.

(d) The term "sale" or "sales" includes the

exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale.

(e) The word "taxpayer" means any person liable for any tax hereunder.

(f) The term "gross income" means the gross receipts of a taxpayer derived from trades, business, commerce or sales and the value proceeding or accruing from the sale of tangible personal property, or service, or both, and without any deduction on account of losses.

(g) The term "business" when used in this article shall include all activities or acts engaged in (personal and corporate), or caused to be engaged in with the object of gain, benefit or advantage either direct or indirect, but shall not include casual activities or sales.

(h) The term "gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property without any deduction on account of the cost of property sold, expenses of any kind, or losses; provided, however, that cash discounts allowed and taken on sales shall not be included as gross income. But the terms "gross income" and "gross proceeds of sales" shall not be construed to include goods, wares or merchandise. or value thereof, returned by customers when the sale price is refunded either in cash or by credit; nor the sale of any article accepted as part payment on any new article sold, if and when the full sale price of the new article is included in the "gross income" or "gross proceeds of sales", as the case may be.

(i) The term "engaging" as used in this article with reference to engaging or continuing in business shall also include the exercise of corporate or franchise powers.

(j) The term "auditor" as used in this article means the auditor of the state of Arizona.

(k) The term "retail" when used in this article, shall mean the sale of tangible personal property for consumption and not for resale.

(l) The term "wholesaler" or "jobber" when used in this article shall mean any person who sells tangible personal property for resale and not for consumption by the purchaser.

Sec. 2. IMPOSITION OF THE TAX. From and after the effective date of this act, there is hereby levied and shall be collected by the tax commission for the purpose of raising public money to be used in liquidating the outstanding obligations of the state government and to aid in defraying the necessary and ordinary expenses of the same and to reduce or eliminate the annual tax levy on property for state purposes and to reduce the levy on property for public school education to the extent hereinafter provided, annual privilege taxes measured by the amount or volume of business done by the persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, in accordance with the following schedule:

(a) At an amount equal to one per cent of the gross proceeds of sales or gross income from

(f) At an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the following businesses:

1. Operating or conducting theatres, operas, shows of any type or nature, exhibitions, concerts, carnivals, circuses, amusement parks, menageries, fairs, races, contests, games, billiard and pool parlors and bowling alleys, dance, dance halls and any business charging admission fees for exhibition, amusement or instruction, other than projects of bona fide religious or educational institutions. Provided, however, moving picture shows which exhibit pictures as a major attraction at any performance shall be taxed at a rate equal to one per cent of the gross income of such shows.

2. Hotels, guest houses, dude ranches and resorts, rooming houses, apartment houses, automobile rental services, automobile storage garages, parking lots, tourist camps or any other business or occupation charging storage fees or rents and adjustment and credit bureaus and collection agencies.

(g) At an amount equal to one-fourth of one per cent of the gross proceeds of sale or the gross income from the business upon every person engaging or continuing within this state in the following businesses:

Compounding, packing, preserving, processing and/or selling any tangible personal property whatsoever at wholesale.

"That the Secretary of the Treasury is authorized to grant permits, as provided for in section thirty-two hundred and ninety-seven of the Revised Statutes of the United States, for the withdrawal of alcohol from bond, free of tax to any scientific university or college of learning created and constituted as such by any State or Territory under its laws, though not incorporated or chartered, and to any hospital maintained by endowment or otherwise, and not conducted for profit, upon the same terms and subject to the same restrictions and penalties already provided by said section thirty-two hundred and ninety-seven: *Provided, however*, That alcohol so obtained by hospitals may be used in surgical operations and, except as a beverage, in the treatment of patients, under such regulations as the Secretary of the Treasury may prescribe: *And provided further*, That the bond required by said section thirty-two hundred and ninety-seven may be executed by an officer of such hospital or institution or by any other person for it, and on its behalf, with two good and sufficient sureties, upon like conditions, and to be approved as by said section is provided."

Alcohol.
Withdrawal free of tax for colleges, hospitals, etc.
Vol. 20, p. 48, amended.

Conditions.

Provisos.
Hospital use.

Bond.

Approved, July 8, 1916.

July 11, 1916.
[S. 3348.]
[Public, No. 155.]

CHAP. 240.—An Act Conferring jurisdiction on the Court of Claims to adjudicate the claims of the State of Massachusetts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of the State of Massachusetts for premium paid for coin with which it paid the interest and principal of its bonds issued in the year eighteen hundred and sixty-one for money borrowed and used to furnish troops of the State for the service of the United States during the Civil War, and also its claim for interest and premium paid for coin used in payment of such interest on bonds issued for money borrowed and expended at the request, during said war, of the President of the United States in protecting the harbors and fortifying the coast, which claims were rejected by the Comptroller of the Treasury Department, be, and the same are hereby, referred to the Court of Claims for a determination of the law and the facts and report to Congress. The evidence of the amount of said expenditures and of the computations of such premiums made by the accounting officers of the Treasury on file in said department, as furnished by the State, may be considered by the court so as to relieve the State of the necessity of again filing said evidence in court.

Massachusetts.
Claims for premium, etc., referred to Court of Claims.

Evidence admitted.

Approved, July 11, 1916.

July 11, 1916.
[H. R. 7617.]
[Public, No. 156.]

CHAP. 241.—An Act To provide that the United States shall aid the States in the construction of rural post roads, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of Agriculture is authorized to cooperate with the States, through their respective State highway departments, in the construction of rural post roads; but no money apportioned under this Act to any State shall be expended therein until its legislature shall have assented to the provisions of this Act, except that, until the final adjournment of the first regular session of the legislature held after the passage of this Act, the assent of the governor of the State shall be sufficient. The Secretary of Agriculture and the State highway department of each State shall agree upon the roads to be constructed therein and the

Rural post roads.
Cooperation with States authorized for construction of.

Proviso.
To be free from tolls.

character and method of construction: *Provided*, That all roads constructed under the provisions of this Act shall be free from tolls of all kinds.

Meaning of terms.
"Rural post road."

SEC. 2. That for the purpose of this Act the term "rural post road" shall be construed to mean any public road over which the United States mails now are or may hereafter be transported, excluding every street and road in a place having a population, as shown by the latest available Federal census, of two thousand five hundred or more, except that portion of any such street or road along which the houses average more than two hundred feet apart; the term "State highway department" shall be construed to include any department of another name, or commission, or official or officials, of a State empowered, under its laws, to exercise the functions ordinarily exercised by a State highway department; the term "construction" shall be construed to include reconstruction and improvement of roads; "properly maintained" as used herein shall be construed to mean the making of needed repairs and the preservation of a reasonably smooth surface considering the type of the road; but shall not be held to include extraordinary repairs, nor reconstruction; necessary bridges and culverts shall be deemed parts of the respective roads covered by the provisions of this Act.

"State highway department."

"Construction."

"Properly maintained."

Bridges and culverts included.

Appropriation.

SEC. 3. That for the purpose of carrying out the provisions of this Act there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending June thirtieth, nineteen hundred and seventeen, the sum of $5,000,000; for the fiscal year ending June thirtieth, nineteen hundred and eighteen, the sum of $10,000,000; for the fiscal year ending June thirtieth, nineteen hundred and nineteen, the sum of $15,000,000; for the fiscal year ending June thirtieth, nineteen hundred and twenty, the sum of $20,000,000; and for the fiscal year ending June thirtieth, nineteen hundred and twenty-one, the sum of $25,000,000. So much of the appropriation apportioned to any State for any fiscal year as remains unexpended at the close thereof shall be available for expenditure in that State until the close of the succeeding fiscal year, except that amounts apportioned for any fiscal year to any State which has not a State highway department shall be available for expenditure in that State until the close of the third fiscal year succeeding the close of the fiscal year for which such apportionment was made. Any amount apportioned under the provisions of this Act unexpended at the end of the period during which it is available for expenditure under the terms of this section shall be reapportioned, within sixty days thereafter, to all the States in the same manner and on the same basis, and certified to the Secretary of the Treasury and to the State highway departments and to the governors of States having no State highway departments in the same way as if it were being apportioned under this Act for the first time: *Provided*, That in States where the constitution prohibits the State from engaging in any work of internal improvements, then the amount of the appropriation under this Act apportioned to any such State shall be turned over to the highway department of the State or to the governor of said State to be expended under the provisions of this Act and under the rules and regulations of the Department of Agriculture, when any number of counties in any such State shall appropriate or provide the proportion or share needed to be raised in order to entitle such State to its part of the appropriation apportioned under this Act.

Annual increases.

Continuation of unexpended balances.

Reapportionment of balances to States.

Proviso.
Apportionment if State action prohibited by constitution.

Administration expenses to be deducted.

SEC. 4. That so much, not to exceed three per centum, of the appropriation for any fiscal year made by or under this Act as the Secretary of Agriculture may estimate to be necessary for administering the provisions of this Act shall be deducted for that purpose,

available until expended. Within sixty days after the close of each fiscal year the Secretary of Agriculture shall determine what part, if any, of the sums theretofore deducted for administering the provisions of this Act will not be needed for that purpose and apportion such part, if any, for the fiscal year then current in the same manner and on the same basis, and certify it to the Secretary of the Treasury and to the State highway departments, and to the governors of States having no State highway departments, in the same way as other amounts authorized by this Act to be apportioned among all the States for such current fiscal year. The Secretary of Agriculture, after making the deduction authorized by this section, shall apportion the remainder of the appropriation for each fiscal year among the several States in the following manner: One-third in the ratio which the area of each State bears to the total area of all the States; one-third in the ratio which the population of each State bears to the total population of all the States, as shown by the latest available Federal census; one-third in the ratio which the mileage of rural delivery routes and star routes in each State bears to the total mileage of rural delivery routes and star routes in all the States, at the close of the next preceding fiscal year, as shown by the certificate of the Postmaster General, which he is directed to make and furnish annually to the Secretary of Agriculture.

Notification of State allotments.

Ratios of apportionment.

Area.

Population.

Rural delivery and star route mileage.

SEC. 5. That within sixty days after the approval of this Act the Secretary of Agriculture shall certify to the Secretary of the Treasury and to each State highway department and to the governor of each State having no State highway department the sum which he has estimated to be deducted for administering the provisions of this Act and the sum which he has apportioned to each State for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and on or before January twentieth next preceding the commencement of each succeeding fiscal year shall make like certificates for such fiscal year.

Certification to Treasury and States of amount apportioned.

SEC. 6. That any State desiring to avail itself of the benefits of this Act shall, by its State highway department, submit to the Secretary of Agriculture project statements setting forth proposed construction of any rural post road or roads therein. If the Secretary of Agriculture approve a project, the State highway department shall furnish to him such surveys, plans, specifications, and estimates therefor as he may require: *Provided, however*, That the Secretary of Agriculture shall approve only such projects as may be substantial in character and the expenditure of funds hereby authorized shall be applied only to such improvements. Items included for engineering, inspection, and unforeseen contingencies shall not exceed ten per centum of the total estimated cost of the work. If the Secretary of Agriculture approve the plans, specifications, and estimates, he shall notify the State highway department and immediately certify the fact to the Secretary of the Treasury. The Secretary of the Treasury shall thereupon set aside the share of the United States payable under this Act on account of such project, which shall not exceed fifty per centum of the total estimated cost thereof. No payment of any money apportioned under this Act shall be made on any project until such statement of the project, and the plans, specifications, and estimates therefor, shall have been submitted to and approved by the Secretary of Agriculture.

Submission of projects.

Plans, etc.

Proviso.
Condition of approval.

Notification of approval, etc.

Conditions of payments.

Payments to States.

When the Secretary of Agriculture shall find that any project so approved by him has been constructed in compliance with said plans and specifications he shall cause to be paid to the proper authority of said State the amount set aside for said project: *Provided*, That the Secretary of Agriculture may, in his discretion, from time to time make payments on said construction as the same progresses,

Proviso.
During construction.

but these payments including previous payments, if any, shall not be more than the United States' pro rata part of the value of the labor and materials which have been actually put into said construction in conformity to said plans and specifications; nor shall any such payment be in excess of $10,000 per mile, exclusive of the cost of bridges of more than twenty feet clear span. The construction work and labor in each State shall be done in accordance with its laws, and under the direct supervision of the State highway department, subject to the inspection and approval of the Secretary of Agriculture and in accordance with the rules and regulations made pursuant to this Act.

Limit.

State supervision, etc.

Manner of payments, etc.

The Secretary of Agriculture and the State highway department of each State may jointly determine at what times, and in what amounts, payments, as work progresses, shall be made under this Act. Such payments shall be made by the Secretary of the Treasury, on warrants drawn by the Secretary of Agriculture, to such official, or officials, or depository, as may be designated by the State highway department and authorized under the laws of the State to receive public funds of the State or county.

Maintenance by State authorities.

Action on failure.

SEC. 7. To maintain the roads constructed under the provisions of this Act shall be the duty of the States, or their civil subdivisions, according to the laws of the several States. If at any time the Secretary of Agriculture shall find that any road in any State constructed under the provisions of this Act is not being properly maintained he shall give notice of such fact to the highway department of such State and if within four months from the receipt of said notice said road has not been put in a proper condition of maintenance then the Secretary of Agriculture shall thereafter refuse to approve any project for road construction in said State, or the civil subdivision thereof, as the fact may be, whose duty it is to maintain said road, until it has been put in a condition of proper maintenance.

National forests.

Appropriations for roads and trails in, for use, etc., of adjacent communities.

SEC. 8. That there is hereby appropriated and made available until expended, out of any moneys in the National Treasury not otherwise appropriated, the sum of $1,000,000 for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and each fiscal year thereafter, up to and including the fiscal year ending June thirtieth, nineteen hundred and twenty-six, in all $10,000,000, to be available until expended under the supervision of the Secretary of Agriculture, upon request from the proper officers of the State, Territory, or county for the survey, construction, and maintenance of roads and trails within or only partly within the national forests, when necessary for the use and development of resources upon which communities within and adjacent to the national forests are dependent: *Provided*, That the State, Territory, or county shall enter into a cooperative agreement with the Secretary of Agriculture for the survey, construction, and maintenance of such roads or trails upon a basis equitable to both the State, Territory, or county, and the United States: *And provided also*, That the aggregate expenditures in any State, Territory, or county shall not exceed ten per centum of the value, as determined by the Secretary of Agriculture, of the timber and forage resources which are or will be available for income upon the national forest lands within the respective county or counties wherein the roads or trails will be constructed; and the Secretary of Agriculture shall make annual report to Congress of the amounts expended hereunder.

Request of State, etc.

Provisos.
Cooperation required.

Limit of expenditures.

Report to Congress.

Notification of amount determined upon.

That immediately upon the execution of any cooperative agreement hereunder the Secretary of Agriculture shall notify the Secretary of the Treasury of the amount to be expended by the United States within or adjacent to any national forest thereunder, and beginning

with the next fiscal year and each fiscal year thereafter the Secretary of the Treasury shall apply from any and all revenues from such forest ten per centum thereof to reimburse the United States for expenditures made under such agreement until the whole amount advanced under such agreement shall have been returned from the receipts from such national forest. Reimbursement from forest revenues.

SEC. 9. That out of the appropriations made by or under this Act, the Secretary of Agriculture is authorized to employ such assistants, clerks, and other persons in the city of Washington and elsewhere, to be taken from the eligible lists of the Civil Service Commission, to rent buildings outside of the city of Washington, to purchase such supplies, material, equipment, office fixtures, and apparatus, and to incur such travel and other expense as he may deem necessary for carrying out the purposes of this Act. Employees authorized. Civil-service eligibles. Supplies, etc.

SEC. 10. That the Secretary of Agriculture is authorized to make rules and regulations for carrying out the provisions of this Act. Regulations, etc.

SEC. 11. That this Act shall be in force from the date of its passage. In effect at once.

Approved, July 11, 1916.

July 11, 1916.
[H. J. Res. 257.]
[Pub. Res., No. 24.]

CHAP. 242.—Joint Resolution Permitting the use of certain hospital facilities belonging to the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That until November first, nineteen hundred and sixteen, the Secretary of Labor be, and he is hereby, authorized, in his discretion, to utilize the available hospital facilities at the immigration station at Ellis Island, New York Harbor, for the purpose of housing and caring for indisposed persons from the city of New York and vicinity, under such conditions as the Secretary of Labor shall prescribe, but without expense to the Government of the United States; and the State or city of New York, or both, shall compensate the Government of the United States for any and all losses sustained by the Government in the use and occupation of such buildings. Ellis Island immigrant station, N. Y. Use of hospital facilities by New York allowed.

Approved, July 11, 1916.

July 14, 1916.
[H. R. 16911.]
[Public, No. 157.]

CHAP. 244.—An Act Making an appropriation for the relief and transportation of destitute American citizens in Mexico.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the relief of destitute American citizens in Mexico, including transportation to their homes in the United States, there is appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $300,000, to be expended under the direction and within the discretion of the Secretary of State, and to be available for the fiscal years nineteen hundred and sixteen and nineteen hundred and seventeen: *Provided*, That American citizens to whom relief is extended or transportation is furnished hereunder shall pay to or reimburse the United States all reasonable expenses so incurred, respectively, on their account, if financially able to do so. Destitute Americans in Mexico. Appropriation for relief, etc., of. Proviso. Reimbursement.

Approved, July 14, 1916.

[CHAPTER 585.]

AN ACT

Making receivers appointed by any United States courts and authorized to conduct any business, or conducting any business, subject to taxes levied by the State the same as if such business were conducted by private individuals or corporations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after the enactment of this Act, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation: *Provided, however*, That nothing in this Act contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to the approval of this Act, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States imposing the same.

Approved, June 18, 1934.

[CHAPTER 586.]

AN ACT

To increase employment by authorizing an appropriation to provide for emergency construction of public highways and related projects, and to amend the Federal Aid Road Act, approved July 11, 1916, as amended and supplemented, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of increasing employment by providing for emergency construction of public highways and other related projects there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $200,000,000, which shall be apportioned by the Secretary of Agriculture immediately upon the passage of this Act under the provisions of section 204 of the National Industrial Recovery Act, approved June 16, 1933 (in addition to any sums heretofore allocated under such section), in making grants under said section to the several States to be expended by their highway departments pursuant to the provisions of such section, and to remain available until expended: *Provided*, That the Secretary of Agriculture shall act upon projects submitted to him under his apportionment of this authorization, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto: *Provided further*, That not less than 25 per centum of the apportionment to any State shall be applied to secondary or feeder roads, including farm to market roads, rural free delivery mail roads, and public-school bus routes, except that the Secretary of Agriculture, upon request and satisfactory showing from the highway department of any State, may fix a less percentage of the apportionment of such State for expenditure on secondary or feeder roads: *And provided further*, That any funds allocated under the provisions of section 204 (a) (2) of such Act shall also be available for the cost of any construction that will provide safer traffic facilities or definitely eliminate existing hazards to pedestrian or vehicular traffic.

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SEC. 2. To further increase employment by providing for emergency construction of public highways and other related projects, there is hereby also authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $24,000,000 for allotment under the provisions of section 205 (a) of the National Industrial Recovery Act, approved June 16, 1933 (in addition to any sums heretofore allotted under such section), to be expended for the survey, construction, reconstruction, and maintenance of highways, roads, trails, bridges, and related projects in national parks and monuments (including areas transferred to the National Park Service for administration by Executive order dated June 10, 1933), national forests, Indian reservations, and public lands, pursuant to the provisions of such section, and to remain available until expended.

SEC. 3. Not to exceed $10,000,000 of any money heretofore, herein, or hereafter appropriated for expenditure in accordance with the provisions of the Federal Highway Act shall be available for expenditure by the Secretary of Agriculture, in accordance with the provisions of the Federal Highway Act, as an emergency relief fund, after receipt of an application therefor from the highway department of any State, in the repair or reconstruction of highways and bridges on the system of Federal-aid highways, which he finds, after investigation, have been damaged or destroyed by floods, hurricanes, earthquakes, or landslides, and there is hereby authorized to be appropriated any sum or sums necessary to reimburse the funds so expended from time to time under the authority of this section.

SEC. 4. For the purpose of carrying out the provisions of the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes", approved July 11, 1916, and all Acts amendatory thereof and supplementary thereto, there is hereby authorized to be appropriated out of any money in the Treasury not otherwise appropriated, the following sums, to be expended according to the provisions of such Act as amended: The sum of $125,000,000 for the fiscal year ending June 30, 1936; and the sum of $125,000,000 for the fiscal year ending June 30, 1937.

All sums authorized in this section and apportioned to the States shall be available for expenditure for one year after the close of the fiscal year for which said sums, respectively, are authorized, and any sum remaining unexpended at the end of the period during which it is available for expenditure shall be reapportioned among the States as provided in section 21 of the Federal Highway Act.

SEC. 5. For the purpose of carrying out the provisions of section 23 of the Federal Highway Act, approved November 9, 1921, there is hereby authorized to be appropriated for forest highways, roads, and trails, the following sums, to be available until expended in accordance with the provisions of said section 23: The sum of $10,000,000 for the fiscal year ending June 30, 1936; the sum of $10,000,000 for the fiscal year ending June 30, 1937.

SEC. 6. For the purpose of carrying out the provisions of section 3 of the Federal Highway Act, approved November 9, 1921, as amended June 24, 1930 (46 Stat. 805), there is hereby authorized to be appropriated for the survey, construction, reconstruction, and maintenance of main roads through unappropriated or unreserved public lands, nontaxable Indian lands, or other Federal reservations other than the forest reservations, the sum of $2,500,000 for the fiscal year ending June 30, 1936, and the sum of $2,500,000 for the fiscal year ending June 30, 1937, to remain available until expended.

SEC. 7. For the construction, reconstruction, and improvement of roads and trails, inclusive of necessary bridges, in the national parks, monuments, and other areas administered by the National Park Service, including areas authorized to be established as national parks and monuments, and national park and monument approach roads authorized by the Act of January 31, 1931 (46 Stat. 1053), as amended, there is hereby authorized to be appropriated the sum of $7,500,000 for the fiscal year ending June 30, 1936, and the sum of $7,500,000 for the fiscal year ending June 30, 1937.

SEC. 8. For construction and improvement of Indian reservation roads under the provisions of the Act approved May 26, 1928 (45 Stat. 750), there is hereby authorized to be appropriated the sum of $4,000,000 for the fiscal year ending June 30, 1936, and the sum of $4,000,000 for the fiscal year ending June 30, 1937.

SEC. 9. The term "highway" as defined in the Federal Highway Act, approved November 9, 1921, as amended and supplemented, shall for the period covered by this Act be deemed to include such main parkways as may be designated by the State and approved by the Secretary of Agriculture as part of the Federal-aid highway system.

SEC. 10. Section 19 of the Federal Highway Act, approved November 9, 1921, is hereby amended to read as follows:

"SEC. 19. That on or before the first Monday in January of each year the Secretary of Agriculture shall make a report to Congress, which shall include a detailed statement of the work done, the status of each project undertaken, the allocation of appropriations, an itemized statement of the expenditures and receipts during the preceding fiscal year under this Act, and itemized statement of the traveling and other expenses, including a list of employees, their duties, salaries, and traveling expenses, if any, and his recommendations, if any, for new legislation amending or supplementing this Act. The Secretary of Agriculture shall also make such special reports as Congress may request."

SEC. 11. With the approval of the Secretary of Agriculture, not to exceed 1½ per centum of the amount apportioned for any year to any State under sections 1 and 4 of this Act may be used for surveys, plans, and engineering investigations of projects for future construction in such State, either on the Federal-aid highway system and extensions thereof or on secondary or feeder roads.

SEC. 12. Since it is unfair and unjust to tax motor-vehicle transportation unless the proceeds of such taxation are applied to the construction, improvement, or maintenance of highways, after June 30, 1935, Federal aid for highway construction shall be extended only to those States that use at least the amounts now provided by law for such purposes in each State from State motor vehicle registration fees, licenses, gasoline taxes, and other special taxes on motor-vehicle owners and operators of all kinds for the construction, improvement, and maintenance of highways and administrative expenses in connection therewith, including the retirement of bonds for the payment of which such revenues have been pledged, and for no other purposes, under such regulations as the Secretary of Agriculture shall promulgate from time to time: *Provided*, That in no case shall the provisions of this section operate to deprive any State of more than one-third of the amount to which that State would be entitled under any apportionment hereafter made, for the fiscal year for which the apportionment is made.

SEC. 13. The limitations in the Federal Highway Act, approved November 9, 1921, as amended and supplemented, upon highway construction, reconstruction, and bridges within municipalities and

upon payments per mile which may be made from Federal funds, shall hereafter not apply.

SEC. 14. No deductions shall hereafter be made on account of prior advances and/or loans to the States for the construction of roads under the requirements of the Federal Highway Act or on account of amounts paid under the provisions of title I of the Emergency Relief and Construction Act of 1932 for furnishing relief and work relief to needy and distressed people.

SEC. 15. To provide for the continuation of the cooperative reconnaissance surveys for a proposed inter-American highway as provided in Public Resolution Numbered 104, approved March 4, 1929 (45 Stat. 1697), and for making location surveys, plans, and estimates for such highway, the Secretary of Agriculture is hereby authorized to expend not more than $75,000 to pay all costs hereafter incurred for such work from any moneys available from the administrative funds provided under the Act of July 11, 1916 (U.S.C., title 23, sec. 21), as amended, or as otherwise provided.

SEC. 16. Acts or parts of Acts in any way inconsistent with the provisions of this Act are hereby repealed and this Act shall take effect on its passage.

Approved, June 18, 1934.

[CHAPTER 587.]

AN ACT

To amend section 35 of the Criminal Code of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 35 of the Criminal Code of the United States, as amended (U.S.C., title 18, secs. 80, 82, 83, 84, 85, and 86), be, and the same is hereby, amended to read as follows:

"SEC. 35. Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder; or whoever shall take and carry away or take for his own use, or for the use of another, with intent to steal or purloin, or shall willfully injure or commit any depredation against, any property of the United States, or any branch or department thereof, or any corporation in which the United States of America is a stockholder, or any property which has been or is being made, manufactured, or constructed under contract for the War or Navy Departments of the United States; or whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the pay-

ORDINANCE NO. G-485

AN ORDINANCE IMPOSING A TWO-CENT PER GALLON EXCISE TAX ON MOTOR VEHICLE FUEL IMPORTED, SOLD, KEPT FOR SALE OR FOR OFFER OF SALE BY DISTRIBUTORS IN THE CITY OF PHOENIX; PROVIDING FOR TAX TO BE PAID BY DISTRIBUTORS OR TO BE PAID BY RETAIL DEALERS OR BULK CONSUMERS IN THE CITY OF PHOENIX WHO RECEIVE OR OTHERWISE ACQUIRE MOTOR VEHICLE FUEL FROM A DISTRIBUTOR WHO HAS NOT PAID SAID TAX ON SUCH MOTOR VEHICLE FUEL; DEFINITIONS; EXEMPTIONS; TIME OF PAYMENT OF TAX; PURPOSE AND USE OF REVENUES; CREATION OF MAJOR STREET AND HIGHWAY FUND; LICENSES; CANCELLATION OF LICENSES; DISCONTINUANCE OF BUSINESS AND LIEN OF TAX; REPORTS; INSPECTION OF RECORDS; ADOPTION OF ADMINISTRATIVE RULES AND REGULATIONS; FORMS; HEARINGS; RESTRICTING USE OF INFORMATION; PENALTY FOR FAILURE TO REPORT OR PAY TAX; REFUNDS; TESTING OF MOTOR VEHICLE FUEL; ENFORCEMENT; PAYMENT UNDER PROTEST; VIOLATIONS AND PENALTIES; SEVERABILITY; DECLARATION OF INTENT; AND DECLARING AN EMERGENCY.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF PHOENIX as follows:

SECTION 1. Definitions

In this ordinance, unless the context otherwise requires:

(a) "Bulk consumer" means any person in the City of Phoenix who buys, receives, or in any other manner acquires motor vehicle fuel in quantities of fifty-six (56) gallons or more in any single sale or delivery for use or consumption in a motor vehicle or motor vehicles. For the purposes of this ordinance, it shall be construed that a single acquisition of motor vehicle fuel in a quantity of fifty-six (56) gallons or more shall constitute the recipient a bulk consumer.

(b) "Collector" means the City Collector of the City of Phoenix.

(c) "Consumer" means any person who buys, receives, or in any other manner acquires motor vehicle fuel in the City of Phoenix in quantities less than fifty-six (56) gallons in any single sale or delivery for use or consumption in a motor vehicle or motor vehicles.

(d) "Distributor" means any person who imports, sells, offers for sale, or delivers motor vehicle fuel in quantities of fifty-six (56) gallons or more in any single sale or delivery in the City of Phoenix. For the purposes of this ordinance, it shall be construed that a single sale or delivery of motor vehicle fuel in quantities of fifty-six (56) gallons or more in the City of Phoenix by a distributor constitutes doing business as a distributor in the City of Phoenix.

(e) "Export" means the transportation of or the shipment of motor vehicle fuel from within the City of Phoenix to a point outside the City of Phoenix by any means, including, but without limitation to, motor vehicle, railcar, and pipeline.

(f) "Imports" or "importing" means the transportation of or the bringing of motor vehicle fuel into the City of Phoenix from outside the City of Phoenix by any means, including but without limitation to, motor vehicle, railcar, and pipeline.

(g) "Licensee" means any person who by the terms or provisions of this ordinance is required to obtain a motor vehicle fuel excise tax license.

(h) "Motor vehicle" means any vehicle operated upon streets and highways which is propelled by the use of motor vehicle fuel.

(i) "Motor vehicle fuel" means any volatile or flammable liquid or substance, by whatever name known or sold, including, but without limitation to, gasoline, diesel fuel, and butane or propane liquefied gas, either alone or when mixed, blended, or compounded, which is practically or commercially used or usable in motor vehicles to propel same. The term "motor vehicle fuel" does not include kerosene or distillates except when so refined or mixed with other volatile or flammable liquid or substance that the refined product or resultant mixture, blend, or compound is practically or commercially used or usable in motor vehicles to propel same.

(j) "Person" means any natural person, firm, partnership, joint venture, association, corporation, or any other legal entity whatsoever.

(k) "Retail dealer" means any person in the City of Phoenix who sells, offers for sale, or delivers motor vehicle fuel in quantities of less than fifty-six (56) gallons in any single sale or delivery to consumers. For the purposes of this ordinance, it shall be construed that a single sale for, offer of, or delivery of motor vehicle fuel in quantities of less than fifty-six (56) gallons to a consumer shall constitute doing business as a retail dealer in the City of Phoenix.

SECTION 2. Imposition of tax; purpose; shrinkage allowance

For the purpose of partially compensating the City of Phoenix for the use of its streets and highways; to defray costs of street construction and to meet the public need for better streets and highways in the City of Phoenix, there is hereby imposed, in addition to all other taxes provided by law, an excise tax of two cents (2¢) per gallon on motor vehicle fuel which shall be paid in the manner prescribed in Section 4 of this ordinance. In the computation of the tax, one percent (1%) of the tax otherwise due shall be deducted for shrinkage before payment.

SECTION 3. Exemptions

Motor vehicle fuel moving in interstate or foreign commerce, not destined or diverted to a point within the City of Phoenix, or motor vehicle fuel sold to the United States armed forces for use in ships or aircraft shall not be subject to the payment of the excise taxes required by this ordinance.

SECTION 4. Payment of the tax

Payment of the tax imposed in Section 2 of this ordinance shall be made as follows:

(a) Every distributor shall pay said tax to the City of Phoenix for each gallon of motor vehicle fuel imported, sold,

delivered, kept for sale or for offer of sale in the City of Phoenix.

(b) Every retail dealer in the City of Phoenix shall pay said tax to the City of Phoenix for each gallon of motor vehicle fuel received from or in any other manner acquired from a distributor who has not paid the tax on such motor vehicle fuel as required by paragraph (a) of this section.

(c) Every bulk consumer in the City of Phoenix shall pay said tax to the City of Phoenix for each gallon of motor vehicle fuel received from or in any other manner acquired from a distributor who has not paid the tax on such motor vehicle fuel as required by paragraph (a) of this section.

(d) Every retail dealer or bulk consumer in the City of Phoenix may require a distributor to provide the retail dealer or bulk consumer with satisfactory proof of payment by the distributor of the said tax on motor vehicle fuel sold or delivered to such retail dealer or bulk consumer.

SECTION 5. Time for payment of tax; use of revenue collected; creation of MAJOR STREET AND HIGHWAY FUND

(a) The excise tax accrued in any calendar month shall be paid to the City of Phoenix by distributors on or before the 25th day of the next succeeding calendar month, to be placed in a fund created hereby which shall be called the "MAJOR STREET AND HIGHWAY FUND."

(b) If a distributor neglects or refuses to pay the tax as required in paragraph (a) of this section on motor vehicle fuel sold or delivered to a retail dealer or bulk consumer, such retail dealer or bulk consumer shall, on or before the 25th day of the calendar month next succeeding the calendar month in which the tax was due and payable by the distributor, pay said tax on such motor vehicle fuel received or in any other manner acquired from such distributor.

(c) The tax moneys collected hereunder are to be used solely for the following: costs of engineering, acquisition of

of the provisions of this ordinance is necessary for the preservation of the public peace, health and safety and an EMERGENCY is hereby declared to exist and this ordinance shall be in full force and effect from and after its passage by the Council, approval by the Mayor and publication and posting as required by law, and is hereby exempted from the referendum clause of the City Charter.

PASSED by the Council of the City of Phoenix this 23 day of OCT, 1962.

APPROVED by the Mayor this 23 day of OCT, 1962.

Samuel Mardian Jr. MAYOR

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

REVIEWED BY:

City Manager

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1.	NOTICE OF APPEAL AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR REFUND OF TAXES IMPOSED UNDER A.R.S. 5-839	Nov. 16, 2010
2.	SUMMONS	Nov. 19, 2010
3.	SUMMONS	Nov. 19, 2010
4.	CERTIFICATE OF SERVICE	Nov. 19, 2010
5.	CERTIFICATE OF SERVICE	Nov. 19, 2010
6.	ANSWER	Dec. 7, 2010
7.	ANSWER IN INTERVENTION OF DEFENDANT-INTERVENOR ARIZONA SPORTS AND TOURISM AUTHORITY	Jan. 4, 2011
8.	ARIZONA SPORTS AND TOURISM AUTHORITY'S MOTION FOR LEAVE TO INTERVENE AS A DEFENDANT	Jan. 4, 2011
9.	PLAINTIFF'S RESPONSE TO ARIZONA SPORTS AND TOURISM AUTHORITY'S MOTION FOR LEAVE TO INTERVENE AS A DEFENDANT	Jan. 24, 2011
10.	MOTION FOR PRO HAC VICE ADMISSION OF GREGORY D. HANLEY	Jan. 31, 2011
11.	NOTICE OF LODGING PROPOSED ORDER	Feb. 3, 2011
12.	JOINT MOTION FOR ENTRY OF BRIEFING SCHEDULE	Feb. 11, 2011
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14.	SUPERIOR COURT ORDER	Feb. 17, 2011
15.	DEFENDANTS' MOTION FOR SUMMARY JUDGMENT	Feb. 18, 2011
16.	STATEMENT OF FACTS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT	Feb. 18, 2011
17.	SUPERIOR COURT ORDER	Mar. 4, 2011
18.	**ME: ORDER SIGNED [03/04/2011]**	**Mar. 7, 2011**
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20.	PLAINTIFFS' RESPONSE TO DEFENDANT-IN-INTERVENTION'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT RESPONSIVE AND SUPPORTING STATEMENT OF FACTS	Mar. 21, 2011

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27.	ORDER RE: STIPULATION TO EXTEND PLAINTIFFS DEADLINE FOR FILING REPLY TO DEFENDANTS RESPONSE TO MOTION FOR SUMMARY JUDGMENT	Apr. 15, 2011
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29.	**ME: 150 DAY MINUTE ENTRY [04/16/2011]**	**Apr. 20, 2011**
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35.	TOURISM AND SPORTS AUTHORITY'S REQUEST FOR COURT REPORTER	May. 23, 2011
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68.	**ME: MATTER UNDER ADVISEMENT [01/30/2012]**	**Feb. 1, 2012**
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89.	**ME: STATUS CONFERENCE [11/13/2012]**	**Nov. 15, 2012**
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105.	[PART 2 OF 2] PLAINTIFFS' NOTICE OF FILING AFFIDAVIT OF DENNIS SABAN RE: PAYMENT OF TAX	Jan. 30, 2013
106.	**ME: ORAL ARGUMENT SET [03/28/2013]**	**Apr. 1, 2013**
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RE: CASE: UNKNOWN

DUE DATE: 08/03/2016

CAPTION: SABAN RENT-A-CAR VS ARIZONA DEPT. OF REVENUE

EXHIBIT(S): NONE

LOCATION ONLY: NONE

SEALED DOCUMENT: NONE

DEPOSITION(S): NONE

TRANSCRIPT(S): NONE

COMPILED BY: chestangc on July 25, 2016; [2.4-12334.47]
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CERTIFICATION: I, MICHAEL K. JEANES, Clerk of the Superior Court of Maricopa County, State of Arizona, do hereby certify that the above listed Index of Record, corresponding electronic documents, and items denoted to be transmitted manually constitute the record on appeal in the above-entitled action.

CONTACT INFO: Clerk of the Superior Court, Maricopa County, Appeals Unit, 175 W Madison Ave, Phoenix, AZ 85003; 602-372-5375

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
06/17/2014 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2010-001089 06/16/2014

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

SABAN RENT-A-CAR L L C, et al. SHAWN K AIKEN

v.

ARIZONA DEPARTMENT OF REVENUE, et al. KIMBERLY J CYGAN

TIMOTHY BERG
WILLIAM H KNIGHT
KEVIN M GREEN

UNDER ADVISEMENT RULING

Following oral argument on May 7, 2014, the Court took Defendant and Defendant-Intervenor's Motion for Summary Judgment and Plaintiffs' Cross-Motion for Summary Judgment under advisement. Additionally, following the oral argument on May 7, 2014, the Court has read and considered Plaintiffs' Supplemental Citation of Legal Authorities Addressing Points Raised During Oral Argument on May 7, 2014, Defendants' Objections to Plaintiffs' Supplemental Citation of Authorities filed May 13, 2014, and Plaintiffs' Reply thereto filed May 27, 2014.

This matter involves a challenge to a tax as unconstitutional under provisions of both the state and federal constitutions.

The Court begins by determining how the Arizona Sports and Tourism Authority (AzSTA) "tax," which A.R.S. § 5-839(A) calls a "car rental surcharge," is to be categorized. Broadly, it is an excise tax. *Gila Meat Co. v. State*, 35 Ariz. 194, 197 (1929); *Arizona Farm Bureau Federation v. Brewer*, 226 Ariz. 16 ¶ 36 (App. 2010). More specifically, the Court of Appeals described it as "akin to" a transaction privilege tax, "more similar to [a] transaction privilege tax[] than to [a] sales tax[]." *Karbal v. Arizona Dept. of Revenue*, 215 Ariz. 114, 116 ¶ 9 and section A heading (App. 2007). It is a tax on the business activity of renting cars, *id.* at 116 ¶ 10. However, it is a tax of a very peculiar kind, because, although the surcharge falls on the business, the amount of the surcharge depends on the customer's reason for renting the car.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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A.R.S. § 5-839(B)(1) sets the rate at 3¼ percent of the gross proceeds with a $2.50 minimum; however, subsection 2 sets it at a fixed $2.50 if the vehicle is intended as "a temporary replacement motor vehicle" if the vehicle it is replacing is lost or under repair. (Arithmetically, the rates diverge when the total charge reaches approximately $77.00.) The Court is not familiar with any other statute taxing the privilege of conducting identical transactions differently based solely on the customer's reason for entering into them, which may explain the equivocal language used by the Court of Appeals. *Karbal* was decided on the narrow ground that the plaintiff lacked standing, and did not examine whether the tax contravenes the Arizona Constitution or the Interstate Commerce Clause. It also did not address whether, and if so on what ground, the business may challenge the tax, though it cited *Oklahoma Tax Comm. v. Chickasaw Nation*, 515 U.S. 450, 461-62 (1995), to the effect that it may.

There is some basis, both in the statutory text and in the legislative history,[1] for treating the AzSTA tax as an amalgamation of two distinct taxes. Prior to its enactment, there was a flat $2.50 tax on all car rental transactions, with the proceeds going to the Maricopa County Stadium District. A.R.S. § 5-839(G) preserves the Stadium District's entitlement to the first $2.50 of each rental, with the remainder of the 3¼ percent surcharge distributed to AzSTA. The official publicity pamphlet, at page 4, also distinguished between the Stadium District and AzSTA portions. The surcharge can therefore be seen as a $2.50 Stadium District tax on all car rental transactions and a 3¼ percent minus $2.50 AzSTA tax on car rental transactions not involving temporary replacement. However, while this may be conceptually neater – two taxes each at a fixed rate with only one dependent on the customer's motivation as against one tax at a variable rate dependent on the customer's motivation – it does not affect the legal analysis, and there is no statutory authorization to sever the AzSTA portion from the Stadium District portion should that be necessary.

"[T]he methodology whenever a right that the Arizona Constitution guarantees is in question [is to] first consult our constitution." *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm.*, 160 Ariz. 350, 356 (1989). Article 9 § 14 of the Arizona Constitution requires that "[n]o moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on the public highways or streets" be used for any but specified highway-related purposes. As has been seen, the AzSTA surcharge is an excise; *Gila Meat*, *supra*. The clause therefore applies to it. The Department does not argue that the rental of cars falls outside the scope of the constitutional provision: not only does A.R.S. § 5-839(C) limit the surcharge to "the business of leasing or renting for less than one year motor vehicles for hire without a driver, that are designed to *operate on the streets and highways of this state*" (emphasis added), but obviously no customer would go to the trouble and expense of renting a car only to leave it in the

[1] Voter pamphlets are relevant legislative history for measures enacted by the people. *Calik v. Kongable*, 195 Ariz. 496, 500 ¶ 17-18 (1999).

parking lot. Instead, it argues that, under Arizona law, the transaction privilege tax is levied, not on the sale of a good or service, but on the privilege of conducting such a sale. *Arizona State Tax Comm. v. Southwest Kenworth, Inc.*, 114 Ariz. 433, 436 (App. 1977). This argument fails for at least one and perhaps two reasons. The Court of Appeals in *Karbal*, *supra* at 116 ¶ 9, indicated that the AzSTA tax is neither a true transaction privilege tax nor a true sales tax, though more akin to the former; the general rule governing pure transaction privilege taxes thus may not apply to it. Even if it does, the Constitution restricts the use not only of taxes *on* vehicles, but of taxes *relating to* vehicles. The Arizona courts have not defined "relating to," either generally or in relation to this clause. But the constitutional language plainly includes more than just a tax whose incidence falls directly on the vehicle or its use. The required nexus between the motor vehicle and the tax is that some relationship exists to connect them. The case law holding that transaction privilege tax is a tax not on the underlying sale but on the right to conduct the transaction does not hold that the tax is unrelated to the underlying sale. Here, indeed, the distinction falls apart: the class of taxable transactions is defined by the relationship of those transactions to the rental of cars. That the AzSTA tax relates to the use of vehicles on the public highways or streets is plain. Its receipts may therefore be applied only to one or more of the purposes set down by the Constitution. The construction and maintenance of athletic facilities is not among those purposes.

Turning to the federal constitutional challenge, and beginning with the standing of these plaintiffs to bring it although the tax does not discriminate against them, the Court begins with the proposition that an unconstitutional tax is an illegal tax, and that its collection is consequently illegal. A.R.S. § 42-11005(A) allows an action to recover an illegally collected tax. Such a suit can be maintained only by the taxpayer; that the customer does not pay a transaction privilege tax was the rationale of *Karbal*, *supra* at 116-17 ¶ 11. But the statute does not limit the taxpayer's right to recover to those taxes whose illegality is targeted at him personally. The Department's argument to the contrary would create, where a tax is targeted at one group but collected from another, a transaction privilege tax exception to the commerce clause.[2] On a more general level, in Arizona law, standing may be found when there exists a "distinct and palpable injury" to the plaintiff. *Sears v. Hull*, 192 Ariz. 65, 69 ¶ 16 (1998). There is enough in the record to reach that threshold. In addition, standing can be waived in exceptional circumstances. Such cases must be ones involving issues of great public importance that are likely to recur, *id.* at 71 ¶ 25, and in which the parties are able to sharpen the legal issues presented, *id.* at 71 ¶ 24. The Court has no hesitation in finding that the AzSTA surcharge is indeed an issue of great public importance and that the parties are fully capable of and motivated to present the legal issues (as confirmed by the heft of their briefing).

[2] Nor is it evident that the commerce clause is the only constitutional provision that could be circumvented. To take one possible example, a TPT on car rentals to racial minorities would surely be invalid under the equal protection clause even if the rental company paying the tax was not itself a racial minority.

To determine the extent to which the surcharge burdens customers from out of state over Arizona customers, the Court ordered additional development of the factual record. The results are, it must be said, surprising. The Court's initial impression was that the replacement-vehicle exemption would work in a discriminatory manner, favoring in-state residents over out-of-state residents with no rational basis to do so. Were that the case, the Court might very well have found the surcharge to violate the federal constitution. But in practice, the exemption from the surcharge does not seem to have made a significant difference simply because the car rental companies are charging the same rate to all customers regardless of their reason for renting. As Mr. Saban explained in his December 9, 2013 affidavit, the burden of proof the Department has placed on the companies is so onerous that to charge a customer the lower replacement-car rate and then document his entitlement to it would be prohibitively expensive. Thus, the Court is faced with the reverse of the typical commerce clause challenge: instead of a facially neutral tax being discriminatory as applied, the tax here is, at least arguably, facially non-neutral but applied in a nondiscriminatory manner.

The Court can find no support for the proposition that discriminatory intent standing alone violates the commerce clause. The Supreme Court has held that a finding of economic protectionism can be made on the basis of either discriminatory purpose or discriminatory effect. *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 270 (1984). But the surcharge is not protectionist in nature. It does not seek to deter or impede interstate commerce; on the contrary, the promise of palatial sports facilities can only be realized by maximizing the amount that can be extracted from visitors without keeping them away. Thus, the situation here differs from that in *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003) (striking down constitutional provision excluding out-of-state corporations from owning farms), and *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316 (4th Cir. 2001) (striking down statute prohibiting importation of out-of-state garbage), both dealing with laws protectionist in nature. The Commerce Clause also prohibits taxing interstate commerce at a disproportionate rate with a consequent lack of relationship to services provided by the government. "A tailored tax, however accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 289 n.15 (1977). This language does not suggest that a "tailored tax" is subject to strict scrutiny regardless of whether it produces any effect, but rather the opposite, that to invalidate such a law requires proof of discriminatory effect. Due to the manner in which the AzSTA surcharge is being applied in practice by the car rental companies, the Court cannot find in it a commerce clause violation. It is true that the formal incidence of the tax on the car rental companies rather than their customers does not insulate the tax from the purview of the commerce clause, provided that the customer pays indirectly. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 580 (1997) (incidence of tax makes no analytic difference). But the Supreme Court in that case expressly found that the economic incidence of the tax fell at least in part on the out-of-state customers. *Id.* Here, that simply has not happened: the companies have imposed

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the same tax on in-state and out-of-state renters, and on replacement-car and non-replacement car, customers alike. The economic incidence of the tax has fallen exclusively on the car rental companies, and its incidence on them raises no commerce clause issue. Perhaps recognizing the lack of discriminatory effect created by the surcharge, Plaintiffs belatedly raise a challenge to the tax on car rentals as a whole: because most car renters are from out of state, a tax on rental cars is discriminatory even without the differential rate for replacement cars. This would raise an entirely new issue requiring litigation from scratch. The Court does not believe it is appropriate at this late date. Nor does the Court find persuasive support for such an argument in relevant case law.

Nevertheless, the Court finds that A.R.S. § 5-839 violates Article 9 § 14 of the Arizona Constitution, in that it imposes an excise tax relating to registration, operation, or use of vehicles on the public highways or streets whose proceeds are applied to purposes not permitted by the constitutional text.

Accordingly,

IT IS ORDERED granting Plaintiffs' Cross-Motion for Summary Judgment.

IT IS FURTHER ORDERED denying Defendants' Motion for Summary Judgment.

IT IS FURTHER ORDERED directing Plaintiffs to lodge a form of judgment and file any Application and Affidavit for Attorney's Fees and Statement of Taxable Costs by July 18, 2014.

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
03/25/2015 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2010-001089 03/19/2015

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

SABAN RENT-A-CAR L L C, et al. SHAWN K AIKEN

v.

ARIZONA DEPARTMENT OF REVENUE, et al. KIMBERLY J CYGAN

TIMOTHY BERG

MINUTE ENTRY

The Court has considered Motions for Reconsideration filed by both Defendants, the Plaintiffs' consolidated response, and the Defendants' replies. The Court does not find that oral argument would be of assistance.

The Court is of course bound by the unambiguous language of Article 9, § 14: "No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on the public highways or streets… shall be expended for other than highway and street purposes." The authors of the provision were certainly capable of using precise language: in contrast to the broad wording of the prohibition, the enumeration of permitted uses for vehicle and fuel taxes is exhaustive, down to authorization to use them to fund *Arizona Highways* magazine. The Court must therefore conclude that the authors intended for their broad language to be interpreted broadly.

Assuming that the AzSTA tax is a transaction privilege tax, as the Court did in its ruling, it is an excise, and so falls within the constitutional scope. *Gila Meat Co. v. State*, 35 Ariz. 194, 197 (1929) ("Excise has come to include every form of taxation which is not a burden laid directly on persons or property, and a tax on the privilege of engaging in an occupation is clearly an excise."). And this tax is not a general tax on transactions that happens to encompass vehicle-related transactions; it is explicitly applied to, and only to, transactions involving rental cars to be driven on the public streets and highways of this state. The Court therefore need not, and does

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MARICOPA COUNTY

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not, examine whether vehicle-related funds derived from a transaction privilege tax of general application must be somehow earmarked for highway and street purposes.

To the extent that the Ohio opinions cited by each side, issued on successive days, instruct the interpretation of the nearly-identical language of Arizona's constitution, the Court believes Plaintiff's case, *Beaver Excavating Co. v. Testa*, 983 N.E.2d 1317 (Ohio 2012), better fits the situation here than *Ohio Trucking Assn. v. Charles*, 983 N.E.2d 1262 (Ohio 2012). *Ohio Trucking Assn*. involved a fee for a certified abstract of a driver's record. While the data in the abstracts was derived from the individual's past operation of vehicles on the public highways, the Ohio Supreme Court concluded reasonably that they were more closely related to the hiring of drivers than to the operation or use of vehicles (which, one imagines, would be driven by someone else if not by the subject of the abstract). Similarly, in *American Automobile Assn. v. State*, 618 A.2d 844 (N.H. 1992), a fee for obtaining a certificate of title was held to relate to the ownership of vehicles, not to their operation; the court distinguished that fee from a fee for registration, which was required to operate the vehicle on state roads and thus fell within the restriction. *Id*. at 846. (In any event, New Hampshire's restriction is significantly narrower than Arizona's. *See generally Opinion of the Justices*, 377 A.2d 137 (N.H. 1977).) *Beaver Excavating*, on the other hand, dealt with the application of a general business-privilege tax (similar to our transaction privilege tax, though it is built into the selling price rather than charged separately to the purchaser, *see* Ohio R.C. § 5751.02) to fuel sales. There, the court held that the phrase "relating to" was to be construed broadly. "Objectively, one is hard pressed to deny the close connection between the tax paid (moneys derived) and the source (excise on fuels used) of that tax revenue. The close relationship is not severed because the excise is on the revenue derived from the sales of motor-vehicle fuel rather than the quantity of such fuel. There is still a close connection to the fuels used for propelling vehicles on public highways and the revenue generated to fall within the amendment's intended ambit." 983 N.E.2d at 1326. Again, this Court is not going so far as to invalidate general transaction privilege taxes which happen to also fall on motor vehicles or their fuel; its ruling is limited to the AzSTA tax only. Neither of the other out-of-state cases cited by AzSTA strikes the Court as being on point. *Thrifty Rent-A-Car System, Inc. v. City and County of Denver*, 833 P.2d 852 (Colo. 1992), found that the fee in question was effectively a payment for the use of airport property and so was properly allocated to airport operations. *Wittenberg v. Mutton*, 280 P.2d 438 (Or. 1955), addressed a city tax assessed on bakeries, irrespective of whether they operated out of a motor vehicle or at a fixed location.

Accordingly, and for the reasons set forth in the Plaintiffs' consolidated response brief,

IT IS ORDERED denying: (1) the Motion for Reconsideration, filed August 11, 2014 by Defendants-In-Intervention, Tourism and Sports Authority and (2) Defendant Department of Revenue's Motion for Reconsideration, filed August 11, 2014.

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
08/12/2015 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2010-001089 07/28/2015

HONORABLE CHRISTOPHER WHITTEN

CLERK OF THE COURT
A. Quintana
Deputy

SABAN RENT-A-CAR L L C, et al. SHAWN K AIKEN

v.

ARIZONA DEPARTMENT OF REVENUE, et al. KIMBERLY J CYGAN

TIMOTHY BERG

UNDER ADVISEMENT RULING

The Court has the three motions pending:

(1) Defendant Arizona Department of Revenue's (AZDOR) Motion for Partial Summary Judgment Re: Lack of Liability for the Payment of Any Refunds filed April 24, 2015.

(2) AZDOR's Motion for Partial Summary Judgment Re: Prospective Relief filed April 24, 2015, and

(3) Defendant AzSTA's Motion for Partial Summary Judgment filed April 24, 2015.

All three motions are fully briefed. As mentioned during the oral argument, all the briefs related to these motions were extremely well written, concise and persuasive. In addition, the Court benefited from excellent oral argument on the motions on July 24, 2015.

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Two issues are raised in the motions: (1) should Judge Fink's order be applied prospectively or retroactively, and (2) if it should be applied retroactively, who is responsible for paying the refund.

Retroactive Application of Judge Fink's Order (Refund)

The United States Supreme Court addressed the issue of retroactive application in *McKesson v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). It held that if the government requires a taxpayer to pay a tax which is subsequently determined to be illegal, it must provide meaningful backward-looking relief to rectify any unconstitutional deprivation. In discussing the reasons for its ruling, the Court seemed to focus, at least in part, on the fact that prospectively enforcing the ruling would not make the taxpayer whole. Specifically, it rejected the lower Court's finding that a retroactive application would result in a windfall to the taxpayer, as the illegal tax was likely passed on to its customers. Such a conclusion, the Supreme Court held, was not supported by the record.

The record in this case, however, does support a conclusion that a retroactive application will result in a windfall to the taxpayer, as it is undisputed that the taxpayer here has passed this illegally collected tax on to its customers. This distinction seems to leave open the possibility that prospective only relief is appropriate in a case where a tax is illegally collected, but the taxpayer is otherwise made whole by having passed the illegal tax on to its customers.

The Arizona Court of Appeals, however, has twice interpreted *McKesson* in such a definitive manner, that this possibility seems foreclosed. In *Tucson Electric Power Co. v. Apache County*, 185 Ariz. 5 (App. 1995)("retroactive application [of a tax decision], as a matter of federal constitutional law, is required in this case where the taxes at issue were paid under protest, regardless of our non-tax cases that consider retroactivity a policy question within the court's discretion") and *Scottsdale Princess v. ADOR*, 191 Ariz. 499 (App. 1997), two different panels of the Arizona Court of Appeals both interpreted *McKesson* to require retroactive application of a holding that a tax is illegal. Those interpretations of *McKesson* control.

Who is Responsible for Paying the Refund

Having determined that the taxpayer here is entitled to final judgment in its favor, the legislature has made clear how a tax refund should be refunded to the taxpayer.

A.R.S. § 42-1254(D)(5) states, "If a final judgment is rendered in favor of the taxpayer,… the amount of the balance remaining due to the taxpayer shall be certified by the department of revenue to the department of administration [which] shall draw a warrant payable to the taxpayer in an amount equal to the amount of the tax found by the judgment to be illegal."

"The ordinary meaning of 'shall' in a statute is to impose a mandatory provision. However, it may be deemed directory when the legislative purpose can best be carried out by such construction." *HCZ Const., Inc. v. First Franklin Financial Corp*., 199 Ariz. 361, 364 (App. 2001) (citations omitted). There is no indication that the use of the word "shall" in A.R.S. § 42-1254(D)(5) was intended by the legislature to be directive.

As between the Defendant and the Defendant-In-Intervention in this case, the legislature has further described the mechanism for responsibility for the refund. A.R.S. § 42-5069(G) provides, "if a court of competent jurisdiction finally determines that tax monies distributed under this section were illegally collected …, the department shall compute the amount of such monies that was distributed to each town, city and county.… Each month the state treasurer shall reduce the amount otherwise distributable to the city, town and county under this section by one thirty-sixth of the total amount to be recovered from the city, town or county until the total amount has been recovered, but the monthly reduction for any city, town or county shall not exceed ten percent of the full monthly distribution to that entity."

A.R.S. § 5-802 created Defendant-In-Intervention AzSTA as a tax levying public improvement district with all the rights, powers and immunities of municipal corporations. It is therefore covered as a "town, city and county" would be by § 42-5069(G).

While ultimate liability rests on the receiving entity, the statutory language plainly envisions that the department, having collected and distributed the illegal taxes, is responsible for their repayment, and recovers that amount from the receiving entity as provided by A.R.S. § 42-5069(G).

Copper Hills Enterprises, Inc. v. Arizona Dept. of Revenue, 214 Ariz. 386 (App. 2007), is not to the contrary. It stands for the proposition that reliance on A.R.S. §42-5069(G) is not the exclusive avenue for relief, if the ultimate recipient of the illegal tax can afford complete relief by disgorging that amount.

Conclusion

Plaintiffs are entitled to judgment which must be retroactively applied, resulting in a refund to the taxpayers. The Defendant is responsible for paying this refund, with the right to reduce the amount otherwise distributable to Defendant-In-Intervention as provided for in A.R.S. § 42-5069(G).

Plaintiffs shall provide a proposed form of judgment by August 28, 2015.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2010-001089 07/28/2015

Arizona Tax Court - ATTENTION: eFiling Notice

Beginning September 29, 2011, the Clerk of the Superior Court will be accepting post-initiation electronic filings in the tax (TX) case type. eFiling will be available only to TX cases at this time and is optional. The current paper filing method remains available. All ST cases must continue to be filed on paper. Tax cases must be initiated using the traditional paper filing method. Once the case has been initiated and assigned a TX case number, subsequent filings can be submitted electronically through the Clerk's eFiling Online website at http://www.clerkofcourt.maricopa.gov/

NOTE: Counsel who choose eFiling are strongly encouraged to upload and e-file all proposed orders in Word format to allow for possible modifications by the Court. Orders submitted in .pdf format cannot be easily modified and may result in a delay in ruling.

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SUPERIOR COURT OF THE STATE OF ARIZONA

ARIZONA TAX COURT

SABAN RENT-A CAR, LLC; DS RENTCO, INC.; and, PTNK, individually and in a representative capacity,

Plaintiffs,

v.

ARIZONA DEPARTMENT OF REVENUE, a political subdivision of the State of Arizona; and, GALE GARRIOTT, Director of the Arizona Department of Revenue,

Defendants,

and

SPORTS AND TOURISM AUTHORITY dba THE ARIZONA SPORTS AND TOURISM AUTHORITY, a political subdivision of the State of Arizona,

Defendant-In-Intervention.

Case No. TX 2010-001089

PLAINTIFFS' REPORT REGARDING DISCOVERY RESPONSES AND DEVELOPMENT OF THE FACTUAL RECORD

(Assigned to the Honorable Dean M. Fink)

I. INTRODUCTION AND BACKGROUND

On November 16, 2010, Plaintiffs filed this action appealing the final order of the Arizona Department of Revenue ("ADOR") dated October 20, 2010 regarding the Car Rental Taxes imposed under A.R.S. §5-839. In 2011, the parties briefed and argued cross-motions for summary judgment on the constitutionality of the Car Rental Taxes and Plaintiffs moved for class certification. In December 2011, the Court certified this matter as a class action. Notices were sent to all potential class members (identified by ADOR based on tax reporting records) and the operative class was identified.

On August 31, 2012, with the merits of the case having been fully briefed, the class certified, and proper notice having been given to all class members, Plaintiffs notified the Court that this case was ripe for decision. *See Plaintiffs' Notice Re Case Ripe for Merits Decision Following Closure of Class Notice Period*. The Court noted though that "Plaintiffs' briefs appear to assume that both named Plaintiffs – and all other class members – do, in fact, pass this tax on to individual rental car customers." *See* October 25, 2012 Minute Entry (**Exhibit A**). The Court determined that this fact "is material to arguments made by the Plaintiffs" and therefore "additional information is needed." *Id.* After briefing, the Court approved the submission of interrogatories to all class members. *See* November 13, 2012 Minute Entry (**Exhibit B)**. In May 2013, the Court approved the form of the interrogatories to be submitted to class members and the process for collecting responses. *See Revised Stipulated Order* (**Exhibit C**).

Following these orders, Class Counsel collected responses from class members and provided copies to Defendant ADOR and Intervenor Tourism and Sports Authority dba The Arizona Sports and Tourism Authority ("AZSTA"). An index identifying those taxpayers from whom responses were received is attached as **Exhibit D**.[1] During the past several months, Defendant ADOR has also reviewed Plaintiffs' invoices and related

[1] In the course of communicating with class members regarding the interrogatories, Class Counsel was notified by 15 taxpayers that they were erroneously included in the class or did not wish to be part of the operative class. ADOR and AZSTA stipulated to the dismissal of those 15 taxpayers and this Court granted their dismissal on September 11, 2013. *See* September 11, 2013 Order.

source documents.

This report summarizes the responses to the discovery served on class members and provides the Court with the information necessary to address its inquiry about the operations of the Car Rental Tax.

II. DISCOVERY RESPONSES[2]

Class Counsel has received discovery responses from 21 entities.[3] Of the 21 responding entities, 19 class members provided substantive responses (the "Responding Entities")[4]. The responses to the interrogatories are summarized as follows:[5]

Interrogatory No. 1: Did you pass all car rental surcharges on to your rental car customers during the Refund Period?

All 19 of the Responding Entities indicated that they did, in fact, pass all car rental surcharges on to their rental customers during the Refund Period.

Interrogatory No. 2: If you did pass all or some of the car rental surcharges on to your rental car customers, explain in specificity and detail, how you passed it on to your customers.

---

[2] Copies of all discovery responses are attached as **Exhibit E**. Responses are number tabbed to correspond to the Index attached as **Exhibit D**.

[3] Class Counsel believes that the 19 substantive responses are sufficient. Responding entities include Advantage Rent-a-Car, Inc., Avis Budget Group, Dollar Rent-A-Car, Thrifty Rent-a-Car, and Hertz Corporation, national car rental agencies with operations in Maricopa County, Arizona, who undoubtedly were responsible for the vast majority of car rental transactions conducted by the operative class. Class Counsel offered to conduct additional follow up to collect additional responses from class members and satisfy its good faith obligations under the Court's order. Class Counsel was advised by ADOR that no additional follow up was necessary at this time. Likewise, Class Counsel has not received any request for production or supplemental requests for information from Plaintiffs or from the operative class.

[4] One entity, Earnhardt Enterprises, Inc., did not rent vehicles during the refund period and one entity, Simply Wheelz, LLC, as a result of a change in ownership, does not have access to the records necessary to provide responses.

[5] This summary addresses the five substantive interrogatories and does not include information about the individuals that prepared or assisted with the preparation of the responses to the interrogatories. Complete responses for each responding entity can be reviewed at **Exhibit E**.

(a) Did you pass on the surcharge at a different rate depending on whether the person was leasing or renting the motor vehicle as a temporary replacement motor vehicle during the Refund Period?

Of the 19 Responding Entities, 17 indicated that they did not pass the surcharge on at a different rate depending on whether the person was leasing or renting the motor vehicle as a temporary replacement motor vehicle; one entity did not respond to subpart (a) and one entity indicated that the car rental surcharge was added as a separate line item to rental invoices after February 2005.

(b) If your answer to subpart (a) is "yes", explain, in specificity and detail, how you determined which rate applied to your customers.

Of the 19 Responding Entities, three (Salem Boys Xpress Rental Cars, LLC, Hertz Corporation and Messner RV Rentals, Inc.) provided details about how they calculated the amount of the car rental surcharge, even though they did not respond "yes" to subpart (a).

Interrogatory No. 3: Did you add a separate charge to your rental customers' invoices specifically identified as the car rental surcharge during the Refund Period?

Of the 19 Responding Entities, 14 indicated that they **did** add a separate charge to the car rental customer's invoice specifically identified as the car rental surcharge; one Responding Entity indicated that it specifically identified the car rental surcharge in the rental agreement. Four Responding Entities indicated that they did **not** include a separate charge on the invoice identified as the car rental surcharge (but did indicate that they did pass the car rental surcharge on to their customers in response to Interrogatory No. 1).

Interrogatory No. 4: Did you charge a higher price for the lease or rental of the motor vehicle without specifying on the invoice that a separate charge was being imposed during the Refund Period?

Of the 19 Responding Entities, 18 indicated that they did **not** charge a higher price for the lease or rental of the motor vehicle without specifying on the invoice that a separate charge was being imposed.

Interrogatory No. 5: When you leased or rented a motor vehicle to a customer during the Refund Period, did you photocopy the customer's driver's license? If so, do your records still contain the photocopies?

Of the 19 Responding Entities, nine indicated that they did photocopy the customers' driver's license when they leased or rented a motor vehicle during the Refund Period. Of those nine, six indicated that they do **not** still have the photocopies in their records; one indicated that it **does** still have the photocopies; one indicated that it has **some** of the photocopies; and one indicated that it **may** have the photocopies.

III. CONCLUSION

With this Report, Plaintiffs believe that this Court has the information necessary to address its questions about the operation of the Car Rental Tax. With the record now having been developed on this issue, and following the response (November 22d) and reply (December 2d), Plaintiffs believe that the Court may determine the merits.

AIKEN SCHENK HAWKINS & RICCIARDI P.C.

DATED: October 31, 2013.

By: */s/ Stephanie McCoy Loquvam*

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E-FILED with the Clerk of the Court
and **COPY** of the foregoing electronically
transmitted this 31st day of October, 2013, to:

Honorable Dean M. Fink
MARICOPA COUNTY SUPERIOR TAX COURT
125 West Washington, Suite 202
Phoenix, Arizona 85003

COPY transmitted via email and regular U.S. Mail
this 31st day of October, 2013, to:

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By: */s/ Stephanie McCoy Loquvam*