IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

THE CITIZENS BANK OF WESTON, INC., a West Virginia banking corporation, BENNETT D. ORVIK, M.D., d/b/a Primary Health Care Assoc., and THE SUN LUMBER COMPANY, a West Virginia corporation,

Appellants,

v. CASE NO. 28458

THE CITY OF WESTON, a West Virginia municipal corporation,

Appellee.

**BRIEF AMICUS CURIAE**
**ON BEHALF OF THE WEST VIRGINIA BANKERS ASSOCIATION**

The West Virginia Bankers Association (hereinafter referred to as "WVBA"), by counsel, submits the following arguments and authorities as its Brief Amicus Curiae to assist this Court in resolving the above-referenced action.

## I. FACTUAL BACKGROUND

The instant appeal arises from the City of Weston's (hereinafter "Weston") enactment of a Business & Occupation Tax Ordinance (hereinafter "B&O Ordinance") on December 18, 1998, effective retroactively to July 1, 1998. West Virginia Code § 8-13-5 allows municipalities to impose a B&O Tax upon local businesses, but requires that municipalities use a system that is similar to the

State of West Virginia's old pre-1987 B&O Tax in imposing such taxation, and the statute sets maximum taxation rates which may not be exceeded.

In an attempt to comply with the law, in 1997, Weston hired a Clarksburg accountant to prepare a pro-forma of tax receipts which would be raised by the adoption of a B&O tax in Weston and to project expenditures of the additional revenue to be raised. The pro-forma applied three separate levels of the maximum permissible tax rate per class for the multiple classifications of businesses and included gross revenue estimates in the various classes of businesses to be taxed. The tax rate levels in the pro forma for the respective classifications were proportionally consistent with the State's pre-1987 rate-to-class relationship, as the rate for each class was a constant percent of the rate established by the Legislature.

Ultimately, however, Weston did not adopt the tax scheme prepared by its accountant and outlined in the pro forma. Instead, Weston opted for rates determined by its City Council which are not proportional to the rates set by the Legislature under the aforementioned statute. Indeed, Weston compromised and negotiated the rates with the members of some favored business classifications and completely ignored others.

As a result, Weston's B&O tax rates adopted for the various classes are not ratable or proportional to the State of West Virginia's rates established by the State's pre-1987 B&O Tax. West Virginia Code § 8-13-5(a) requires that a municipal B&O Tax be similar to the State's pre-1987 B&O Tax. As the Appellants contend, "similarity" requires that the rate-to-class relationship of the municipal ordinance bear the same rate-to-class relationship as the State's pre-1987 B&O Tax. Indeed, the rate-to-class comparison of the Weston's B&O Ordinance with the State's pre-1987 B&O Tax should be the crux of the test whether Weston's Ordinance is similar as required by West Virginia Code § 8-13-5(a).

Furthermore, the rates in a municipal ordinance may not exceed the maximum rates provided by the State in the enabling legislation. See, W.Va. Code § 8-13-5(b). Although Weston's B&O Tax rates do not exceed the maximum rates established by the Legislature, they are not proportional to the rates set by the Legislature or ratable with the State's B&O Tax. Consequently, the B&O Ordinance is in clear violation of West Virginia Code § 8-13-5(a) requiring that it be similar to the State's pre-1987 B & O Tax.

Appellants filed a complaint for declaratory judgment challenging the B&O Ordinance pursuant to West Virginia Code § 55-15-1 and Rule 59 of the West Virginia Rules of Civil Procedure seeking to determine whether the Ordinance complied with the similarity requirement of West Virginia Code § 8-13-5(a). Appellants below did not challenge Weston's right to enact a B&O Tax with different rates in different classes. Rather, Appellants challenged the lack of "similarity" between Weston's B&O Ordinance and the State's pre-1987 B&O Tax, as well as attacking the Ordinance on constitutional grounds.

The evidence presented at trial established Weston's disregard for the statutory "similarity" limitation, including both classifications and rates, and that the rate-to-class relationship in Weston's B&O Ordinance must be proportional with the legislatively determined rate-to-class structure to insure similarity between the Ordinance and the State's pre-1987 B&O Tax. Even the Deputy State Auditor, Lisa Thornburg, who reviewed Weston's B&O Ordinance, did not testify that the rate-to-class structure of the Weston B&O Ordinance and the State's old B&O Tax were ratable and, thus, statutorily "similar."

Nonetheless, the lower court ruled that the Weston B&O Ordinance did not violate West Virginia Code §8-13-5(a). The Circuit Court confused the Legislature's prerogative of establishing classes and rates with the Weston City Council's incorrectly presumed right to do so. Varying the impact of the rate-to-class relationship established by the Legislature can vary the tax burden so that the impact on one class may be many times greater than on another class.

Through its experiences over many years, the Legislature foresaw this problem and therefore preempted Weston or any municipality's authority to arbitrarily establish classes, rates and the rate-to-class relationship among the classes. It did so by requiring that any municipal B&O tax be "similar" to the State's pre-1987 B&O Tax. While it is true that the rates among the classes can and do vary, the true test is the ultimate equality of the tax burdens placed on the taxpayers in each of the classes, each with the other, and this determination has never been delegated by the Legislature.

Because the Legislature reserved to itself the rate-to-class determination by mandating that the B&O Tax be "similar" to the State's pre-1987 B&O Tax, the Legislature did not delegate to municipalities the authority to change classifications or the rate-to-class relationship which had been legislatively determined. This Court has consistently noted that only the Legislature has the expertise and the legal authority to establish rates and classes. Lewis v. Canaan Valley Resorts, Inc., 185 W.Va. 684, 408 S.E.2d 634, 640-42 (1991) (citing Gibson v. West Virginia Department of Highways, 406 S.E.2d 440 (W.Va. 1991).

The West Virginia Bankers Association respectfully suggests that the lower court's ruling is in error and that the Weston B&O Ordinance is in violation of West Virginia Code § 8-13-5(a) because of its dissimilarity to the State's pre-1987 B&O Tax. Consequently, the Weston Ordinance must be struck down and to hold otherwise would misapply the West Virginia municipal B&O Tax statute.

Appellants raised several other issues in the lower court on which the West Virginia Bankers Association, in this Brief Amicus Curiae, expressly takes no position.

## II. DISCUSSION

### A. The City of Weston has no authority to vary the inter-class proportionality of B&O Tax rates established by the Legislature.

The enabling statute for municipal B&O taxation, West Virginia Code § 8-13-5(a), requires similarity with the State's pre-1987 B&O Tax. Furthermore, Weston has no independent statutory or inherent legislative power or authority to establish B&O Tax rates dissimilar to the rates established in the statute.

A city has only the powers which have been expressly granted to it by the Legislature. As this Court has stated:

> "A municipal corporation possesses and can exercise only powers granted in express words, or those necessarily or fairly implied in or incident to the powers expressly granted, or those essential and indispensable to the accomplishment of the declared objects and purposes of the corporation; and the power must be denied if any reasonable doubt exists whether the corporation is possessed of such power."

Hukel v. City of Huntington, 134 W.Va. 249, 58 S.E.2d 780 (1950). Regarding a municipality's power to levy taxes, this Court has been even more explicit, stating that "a municipality being without inherent power to levy taxes, if such power exists, it must be delegated by the Legislature." Likewise, "statutes delegating power to municipalities to levy taxes must be construed strictly, and if any doubt exists, it should be resolved against the municipality and in favor of the taxpayer." Hukel, *supra*; City of Fairmont v. Bishop, 68 W.Va. 308, 313, 69 S.E. 802.

Although West Virginia Code § 8-13-5(a) expressly authorizes municipalities to impose a B&O Tax, such a tax is constrained to one which is "similar" in rates, classes, and rate-to-

class relationship to the State's pre-1987 B&O Tax. Because similarity encompasses all of these factors, simply not exceeding maximum rates established by the Legislature in West Virginia Code § 8-13-5(b) does not render Weston's B&O Ordinance similar to the State's old B&O Tax.

The trial court failed to distinguish between the Legislature's plenary power to tax and the Weston City Council, which has no plenary authority and may not adopt rates which are not similar to the State's pre-1987 B&O Tax. The Legislature has the exclusive constitutional power to establish numerous classifications of businesses and the tax rates for each class. Weston as a municipal corporation does not. Weston does not have the power to establish classes or rates proportionally or ratably different from those established by the Legislature. Weston has no express or implied delegation of legislative authority to do so, nor any inherent power by which to take such action.

Weston clearly attempted to overstep its authority when it endeavored to show at trial that it had considered social, economic, historic and geographic factors in setting the rates in its B&O Tax. As this Court has repeatedly held, these are matters which only the Legislature can consider in determining classes and rates. See, Gibson v. West Virginia Department of Highways, 406 S.E.2d 440 (W.Va. 1991).

Appellants have challenged the Ordinance based upon its dramatic departure from the rate-to-class relationship of the State's pre-1987 B&O Tax. This disparity constitutes an illegal and irrational departure that violates the provisions of West Virginia Code § 8-13-5(a). The flaws in the Weston Ordinance are demonstrated graphically in Appellants' Brief. Specifically, evidence introduced by Plaintiffs at trial clearly demonstrated that rates imposed on some classifications by the Ordinance are substantially higher than Weston's average rate (59.03%) of the maximum allowable rate while other classifications are taxed substantially lower than 59.03% of Weston's average maximum rate.

As Appellants have discussed at length, the rate structure chosen by Weston is a substantial departure from the rate structure imposed by the State under its former B&O Tax. This departure is clearly evidenced by the significant difference from historical rate relationships between classes under the State B&O Tax and Weston's variability from the old norms. For example, under the State B&O Tax, for decades, the services rate was two times the rate imposed on retail sales. However, in Weston's scheme, the gap between the retail rate (0.20%) and the services rate (0.60%) is significantly widened.

Likewise, under the old West Virginia regime, rates for services, rentals and banks had a one-to-one relationship. Again, the Weston B&O Ordinance makes tremendous distinctions among these three tax classifications with receipts from rental and banking activities taxed much higher than service activities.

Yet another major disparity is the fact that contracting rates doubled the rates imposed on services, rental and banking in the State B&O Tax, while no such relationship exists in the Weston Ordinance.

Thus, the historical rate relationships, which must be viewed to determine whether rates in the Weston classifications are similarly related to the old State B&O Tax, show a dramatic dissimilarity between Weston's scheme and the pre-1987 State tax. This fundamental departure from the historic proportional rate-to-class relationships constitutes an outright rejection of the pre-1987 State B&O Tax structure and constitutes an illegal dissimilarity between the Weston B&O Tax and the old State B&O Tax.

The fundamental dissimilarity is clear and the Weston Ordinance violates West Virginia Code § 8-13-5(a). Accordingly, this Court should reverse the lower court's decision and declaration and declare the Weston B&O Ordinance dissimilar to the State's pre-1987 B&O Tax, thereby making the Ordinance void as a matter of law.

## III. CONCLUSION

Based upon the foregoing arguments and authorities, the WVBA respectfully requests that the lower court's ruling be reversed and that this Court find that the Weston B&O Ordinance violates West Virginia Code § 8-13-5(a) and, on that basis, is void as a matter of law.

WEST VIRGINIA BANKERS ASSOCIATION

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