

No. 03-13-00753-CV

FILED IN

3rd COURT OF APPEALS
AUSTIN, TEXAS

3/19/2014 10:47:33 AM

JEFFREY D. KYLE
Clerk

In the Court of Appeals
Third District of Texas — Austin

SUSAN COMBS, IN HER OFFICIAL CAPACITY AS TEXAS
COMPTROLLER, AND GREG ABBOTT, IN HIS OFFICIAL
CAPACITY AS TEXAS ATTORNEY GENERAL

Appellants

v.

TEXAS SMALL TOBACCO COALITION AND
GLOBAL TOBACCO, INC.

Appellees

APPELLEES' REPLY IN SUPPORT OF MOTION FOR REVIEW OF SUPERSEDEAS ORDER

Craig T. Enoch
Melissa A. Lorber
Shelby O'Brien
ENOCH KEVER PLLC
600 Congress Avenue, Suite 2800
Austin, Texas 78701
(512) 615-1200 / (512) 615-1198 fax

Attorneys for Appellees

Appellees Texas Small Tobacco Coalition and Global Tobacco, Inc. (collectively, the “Coalition”) file this reply in support of the Coalition’s motion to review supersedeas order under Texas Rule of Appellate Procedure (“TRAP”) 24.4. This Court has jurisdiction and should conclude, based on the Coalition members’ evidence of financial hardship, that the members are excused under Texas Tax Code, Section 112.108 from paying the unconstitutional, discriminatory tax during the State’s appeal. Alternatively, the Coalition requests that the Court remand this matter to the trial court with an instruction that the trial court promptly determine the members’ entitlement to a hardship exemption.

I.

THIS COURT HAS JURISDICTION TO REVIEW THE COALITION’S MOTION FOR REVIEW OF SUPERSEDEAS ORDER UNDER TRAP 24.4(a).

The State is incorrect in arguing that this Court lacks jurisdiction to consider the Coalition’s motion to review supersedeas order under TRAP 24.4(a) because the trial court did not issue a “supersedeas order,” but instead declined to decide the Coalition members’ motion for a hardship exemption on the basis that the trial court lacked jurisdiction. But TRAP 24.4(a) does not merely allow review of a traditional supersedeas order. Instead, the rule also

allows review of “the determination of whether to permit suspension of enforcement.” TEX. R. APP. P. 24.4(a)(4). The State offers no explanation as to why this Court may not review the trial court’s determination that, because it is unable to consider the hardship motion, the State is permitted suspension of enforcement of the judgment.

This Court has jurisdiction and should determine, based on the Coalition members’ affidavits and financial data, that the members are entitled to a hardship exemption under Texas Tax Code, Section 112.108. But in any event, to the extent this Court believes that the trial court is the proper forum to decide the hardship motion, the Coalition has alternatively asked that this Court remand the motion to the trial court. The Coalition members request that either this Court or the trial court promptly consider their motion before they are forced out of business in Texas by the very tax they have successfully shown is unconstitutional.

The State is also incorrect in asserting that a request for a hardship exemption under Texas Tax Code, Section 112.108 is not a supersedeas issue. The Coalition members are required to pay the unconstitutional and enjoined tax during the State’s appeal because the State superseded the judgment. Through the motion for a hardship exemption, the Coalition members are

asking the Court to allow them to in effect counter-bond around the State's supersedeas, as is authorized under TRAP 24.2(a)(3) and Texas Tax Code, Section 112.101(a)(2)(B). In addition to this traditional counter-bond option, because of Open Courts concerns, Chapter 112 also offers taxpayers an alternative option—to counter the State's supersedeas without payment of bond when a hardship is shown. TEX. TAX CODE § 112.108. The Coalition members are attempting to exercise this alternative option of countering the State's suspension of the injunction through proof of financial hardship. Thus, the Coalition's request clearly implicates both Chapter 112 *and* TRAP 24.

This Court has jurisdiction under TRAP 24.4(a), should review the trial court's refusal to decide this supersedeas issue, and should determine—or instruct the trial court to determine—whether, because of financial hardship, the Coalition members are excused from paying the unconstitutional tax during the State's appeal.

II.

THE COALITION MEMBERS' REQUEST FOR A HARDSHIP EXEMPTION IS TIMELY.

The State's central argument is that the Coalition's request for a hardship exemption under Section 112.108 is not "timely." The State contends that a hardship exemption can only be sought in the trial court, no later than

30 days after its judgment enjoining an unconstitutional tax—apparently regardless of whether circumstances change or the need for the hardship exemption arises while the State appeals. That cannot be what the Legislature intended or else Section 112.108 would be stripped of any real effect for many taxpayers who become unable to pay a tax during a lengthy appeal process. *See In re Lee*, 411 S.W.3d 445, 479 (Tex. 2013) (observing that statutes must be construed to ensure no provision is rendered meaningless).

Here, the Coalition challenged the tax before it went into effect and obtained the judgment enjoining collection of the tax just weeks after the first monthly tax payment was required to be paid. The hardship that was imposed by the tax was not quantifiable until the Coalition members were required to begin paying the unconstitutional, discriminatory tax at the end of October 2013—and as a result had to significantly increase their prices (while their untaxed Big Tobacco competitors did not). After this initial payment, the members had not yet experienced the full impact of the tax. But within three months, the Coalition members saw that the discriminatory tax had caused them to suffer a more than 50 percent decline in sales in Texas. They immediately filed their motion for hardship exemption (with supporting financial data) in early January.

What the State proposes is a Catch 22. If the Coalition members had requested a hardship exemption during the trial court's plenary power (when they had just begun paying the monthly tax), they would not yet have had the financial data necessary to prove that the tax was causing a hardship and the State would have argued that any opinion about the hardship that would result was mere speculation. But now that the members possess concrete data showing hardship, the State argues that the Coalition's motion is too late. Under either scenario, the State's argument is that there is nothing the Coalition members can do but continue paying the unconstitutional, discriminatory tax—regardless of whether doing so will force them out of business in Texas during the State's appeal and thereby deprive them of access to the courts to see their constitutional challenge through a final mandate.

This cannot be the law in Texas. In this sort of tax suit—where a tax is deliberately designed to force one group of companies to raise prices, while exempting their competitors—it will almost always be the case that the impact of the tax will become an Open Courts issue only after a final judgment when the discriminatory tax becomes due. When an unequal tax is imposed for the very purpose of harming sales for a subset of companies, it is

difficult to imagine that a motion for hardship exemption is not “timely” when it is sought after financial data from the first three monthly tax payments show that the tax did in fact have the devastating effect it was designed to achieve. While the full impact of the tax was not quantifiable within the first six weeks while the trial court retained plenary power, it has certainly been felt now—and will continue to having a crushing effect throughout the State’s appeal.

The State is asking this Court to ignore the very purpose of Section 112.108—to allow litigants a means of continuing tax litigation through the appellate process even if payment of the challenged tax becomes a hardship. *See* TEX. TAX CODE § 112.108; *Rylander v. Bandag Licensing Corp.*, 18 S.W.3d 296, 304 (Tex. App.—Austin 2000, pet. denied). To construe the section in the manner the State advocates would serve the opposite function: it would deprive prevailing taxpayers of a means of continuing to defend their judgment on appeal. If the Coalition members are forced out of business in Texas by being required to pay the very tax they are challenging, they certainly lose any meaningful access to the courts. This Court should not construe Section 112.108 in a manner that contravenes its purpose of remedying the section’s constitutional infirmities. *See Marcus Cable Ass’n v.*

Krohn, 90 S.W.3d 697, 706 (Tex. 2002) (courts should construe statutes to avoid constitutional infirmities); *see In re Bailey*, 296 S.W.3d 859, 863-64 (Tex. App.—Tyler 2009) (recognizing the “‘overarching power’ to grant such writs as may be necessary to enforce or protect this court's jurisdiction over a pending appeal, and preserve the subject matter of the appeal”).

Moreover, the cases the State cites for the proposition that indigence is waived if it is not asserted in a timely manner are not on point and do not provide any support for the State’s argument. Each of these cases concerned TRAP 20.1, which mandates that an affidavit of indigency must be filed “with or before the notice of appeal.” *See* TEX. R. APP. P. 20.1(c)(1). But TRAP 20.1 is markedly different from Section 112.108 and TRAP 24. Section 112.108 expressly allows a court to excuse a party’s payment of a tax during appeal if requiring payment would restrict access to the courts—and it states no deadline for seeking a hardship exemption. TRAP 24.3 also specifically recognizes the continuing need to review supersedeas matters during an appeal.

The Coalition is not making a “thinly veiled request for the Court to delete [the] provision from Chapter 112” requiring payment of the tax during the State’s appeal, as the State contends. Instead, it is asking the Court to

give real meaning to Section 112.108, which allows a taxpayer an exemption from payment of a tax during appeal if payment imposes a hardship. Taxpayers should be ensured continued access to the courts even when their hardship does not arise until more than 30 days after the trial court's judgment. Some court—either the trial court or this Court—must have jurisdiction to determine a taxpayer's entitlement to a hardship exemption based on circumstances that arise during appeal.

III.

THE COALITION MEMBERS HAVE OFFERED SUFFICIENT EVIDENCE THAT THEY ARE ENTITLED TO A HARDSHIP EXEMPTION UNDER SECTION 112.108.

The State's argument that the Coalition members have offered insufficient proof of a hardship that will block their access to the appellate courts is unavailing. Specifically, the State contends that the members' affidavits are conclusory. This is simply untrue. Though the members redacted the financial data in their affidavits, the Coalition has also filed a motion to seal the versions of their affidavits that contain detailed, confidential financial data. And the Coalition offered to share its members' financial data with the State under protective order, but the State never accepted this offer.

The Coalition members' averment that they will go out of business in Texas during the State's appeal, and their offer of concrete financial data supporting that averment, is sufficient evidence of hardship. Section 112.108 expressly provides that a party must file "an oath of inability to pay the tax," which the Coalition members have done. TEX. TAX CODE § 112.108. The State offers no authority or explanation as to what more they believe should be required in this circumstance. Certainly the State cannot be arguing that a Coalition member must actually be forced out of business in Texas by payment of an unconstitutional tax before it can prove the tax imposes a hardship.

The bottom line is that the members are unable to pay the discriminatory tax and stay in business in Texas, as they have stated in affidavits and shown with their financial data. And if the members go out of business while the State appeals (potentially all the way up to the Texas Supreme Court, which could take two years or more), then the Coalition will be unable to defend the trial court's judgment. If this does not implicate the Open Courts provision that Section 112.108 was intended to address, it is difficult to imagine what does. The State's argument is absurd in its practical implications and would render Section 112.108 meaningless. This Court

should decline the State's invitation to construe TRAP 24 and Texas Tax Code, Chapter 112 in a manner that renders Section 112.108 meaningless and unconstitutional and produces absurd results. *See Lee*, 411 S.W.3d at 479.

CONCLUSION AND PRAYER

Appellees Texas Small Tobacco Coalition and Global Tobacco, Inc. pray that the Court render an order under Section 112.108 excusing prepayment of the tax imposed by House Bill 3536 on cigarettes manufactured or distributed by any Coalition member during the State's appeal. Appellees alternatively request that the Court direct the trial court to promptly determine their motion for a hardship exemption on the merits.

Respectfully submitted,

By: /s/ Craig T. Enoch

Craig T. Enoch (SBN 00000026)

cenoch@enochkever.com

Melissa A. Lorber (SBN 24032969)

mlorber@enochkever.com

Shelby O'Brien (SBN 24037203)

sobrien@enochkever.com

ENOCH KEVER PLLC

600 Congress Avenue, Suite 2800

Austin, Texas 78701

(512) 615-1200 / (512) 615-1198 fax

ATTORNEYS FOR APPELLEES

TEXAS SMALL TOBACCO COALITION

and GLOBAL TOBACCO, INC.

CERTIFICATE OF SERVICE

The undersigned certifies that this Motion has been served on the following counsel of record via electronic service and email on March 19, 2014:

JOSEPH D. HUGHES

ERIKA M. KANE

ARTHUR C. D'ANDREA

Office of the Attorney General

P.O. Box 12548, Capitol Station

Austin, Texas 78711-2548

(512) 320-0067 Fax

jody.hughes@texasattorneygeneral.gov

erika.kane@texasattorneygeneral.gov

arthur.dandrea@texasattorneygeneral.gov

/s/ Craig T. Enoch

Craig T. Enoch