

No. 03-13-00753-CV

FILED IN
3rd COURT OF APPEALS
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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' ORAL ARGUMENT EXHIBIT

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CERTIFICATE OF SERVICE

The undersigned certifies that this exhibit has been served on the following counsel of record via electronic service and hand delivery at oral argument on July 16, 2014:

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THE QUESTION IS: EQUAL AND UNIFORM?

The Texas Constitution:

Art. 8, §1 (a) Taxation shall be equal and uniform.

Art. 8, §2 (a) All occupation taxes shall be equal and uniform upon the same class of subjects

The cases:

- The measure of whether the tax is unconstitutional is whether the classification has no reasonable basis in the *nature of the businesses classified*, and that the law operates unequally upon subjects between which there is no real difference to justify the separate treatment of them. *Texas Co. v. Stephens*, 103 S.W. 481 (Tex. 1907).
- If the *operation* and *nature* of the businesses and the *commodities* sold are the same, a classification that attempts to differentiate them is impermissible. *Dancetown, U.S.A., Inc. v. State*, 439 S.W.2d 333 (Tex. 1969).
- The Legislature may pursue policy goals through tax legislation, but only goals related to the taxation. Tax classifications must not only be rational but must attempt to group similar things and differentiate dissimilar things. The Equal and Uniform Clause is “more strict” than the Equal Protection Clause. *In re Nestle USA, Inc.*, 387 S.W.3d 610 (Tex. 2012).

THE QUESTION IS: EQUAL AND UNIFORM?

<u>Big Tobacco (R.J. Reynolds, et al.)</u>	<u>Small Tobacco Competitors</u>
<p>Texas Big Tobacco Contract:</p> <ul style="list-style-type: none">• Settled Fraud, Antitrust, DTPA claims• Annual payment based on predetermined percentage for Texas's market share of national sales. Amount paid is not a function of cigarette sales in Texas.• Payment capped - any increase in Big Tobacco's Texas sales results in <i>reduced cost</i> to Big Tobacco for each additional cigarette sold and <i>no</i> additional revenue to state.• Immunity from torts and all other liability claims• Funds paid to General Fund	<p>Texas Targeted Cigarette Tax:</p> <ul style="list-style-type: none">• Even the playing field• Tax assessed at .0275 cents per cigarette sold.• No cap on sales. The cost per cigarette is fixed.• No immunity from torts or other liability claims• Funds paid to General Fund

EQUAL PROTECTION CLAUSE

- A tax must have a reasonable basis. The State may not resort to a classification that is palpably arbitrary. A classification must result on some ground of difference having a fair and substantial relation to the object of the legislation. *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959).
- A statute should be overturned if the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purpose that a court can only conclude that the legislature's actions were irrational. *Vance v. Bradley*, 440 U.S. 93 (1979).

FEE VERSUS TAX

Fee: An assessment is a fee if its purpose is primarily regulatory. A fee may be targeted at a particular person if the fee is *related to the benefits that will be received by that person* through the government's expenditure of the amounts paid.

A fee is related to benefits conferred on payor –
Therefore the fee can be targeted on the payor.

Tax: An assessment is a tax if the primary purpose is to raise revenue. An assessment targeted at a particular person that is *not* related to the benefits that will be received by that person through the government's expenditure of the amounts paid, is not a permissible fee; it is a tax.

A tax is related to raising revenue –
Therefore the tax must be assessed against all payors within the permissible classification.