

CLEAR CHANNEL OUTDOOR, INC.,

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IN THE

*Petitioner,*

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MARYLAND TAX COURT

v.

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Appeal No. 16-MI-BA-0571

DEPARTMENT OF FINANCE  
OF BALTIMORE CITY,

\*

\*

*Respondent.*

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### MEMORANDUM AND ORDER

This case concerns a challenge to the constitutionality of a tax imposed by the City of Baltimore in 2013 on a category of outdoor signs brought pursuant to the First and Fourteenth Amendments of the United States Constitution and Article 40 of the Maryland Declaration of Rights. Petitioner, Clear Channel Outdoor, Inc. ("Clear Channel" or "Petitioner"), is an outdoor media company which owns and operates outdoor signs throughout the City of Baltimore. Respondent, the Director of the Department of Finance of Baltimore City ("City" or "Respondent"), is the Baltimore City official responsible for collecting all Baltimore City revenue through various taxes, fines, fees and penalties.

The Baltimore City Council passed, and the Mayor signed, Ordinance 13-139 into law on June 17, 2013 (the "Ordinance"). The Ordinance imposes "a tax on the privilege of exhibiting outdoor advertising displays" in the City of Baltimore. The Ordinance defines an "outdoor advertising display" as any display of a 10 square foot or larger image or message that directs attention to a business, commodity, service, event, or other activity that is: (i) sold, offered, or conducted somewhere other than on the premises on which the display is made; and (ii) sold, offered or conducted on the premises only incidentally if at all.

The tax is an excise tax imposed on the privilege of exhibiting outdoor advertising

displays in the City of Baltimore that is exercised by an "Advertising Host," which is a person who owns or controls a billboard, poster board, or other sign and charges fees for its use as an outdoor advertising display. An Advertising host's tax liability is measured per a square foot of advertising imagery which means a square foot of space occupied by an outdoor advertising display. The annual amount of the tax imposed is \$15 per square foot of advertising imagery for an electronic outdoor advertising display that changes more than once a day and \$5 per square foot of advertising imagery for any other outdoor advertising display. The tax imposed is due at the time the annual report is filed by the Advertising Host.

Two months after the City enacted the tax, Clear Channel sued in federal court to block the City's imposition of the tax contending that the Ordinance restricted constitutionally protected speech. The City moved to dismiss the case on two grounds: (i) that the Ordinance imposed a state tax that a federal court lacked jurisdiction to consider, and (ii) that Clear Channel failed to state a claim under the First Amendment. After substantial document and deposition discovery, the parties cross-moved for summary judgment. In December 2015, the District Court ruled that the Ordinance imposed a tax subject to review in the state-court system. Clear Channel paid the 2014 and 2015 taxes invoiced by the City under protest and demanded a refund on the ground that the tax is unconstitutional. The City denied Clear Channel's refund request, asserting that the tax did not unconstitutionally restrict speech. Clear Channel filed this refund action in the Tax Court, and while the refund request was pending, Clear Channel also paid its 2016 tax and filed another refund claim on the same grounds.

"Billboards in Baltimore City" are defined in the City's Zoning Code as "any sign that directs attention to a business, commodity, service, event, or other activity that is: (i)

sold, offered, or conducted somewhere other than on the property on which the sign is located; or (ii) sold, offered, or conducted on that property only incidentally, if at all.” BALTIMORE CITY CODE ART. 32, 1-303(g)(1). The zoning laws prohibit general advertising signs altogether in non-commercial areas, and in certain business and industrial areas where general advertising signs are permitted, they are subject to numerous restrictions. The zoning laws also make clear that no sign may constitute a traffic hazard and that the City may relocate or remove any sign it deems to be one.

Baltimore City has prohibited the construction of new general advertising signs for more than the last decade. Petitioner owns and operates several hundred outdoor advertising displays in the City, some of which are electronic with images that change more than once a day. Others are nonelectronic. All of them, however, are “offsite” displays. They promote businesses, commodities, services, events, and other activities that do not occur on the premises where the display appears. Moreover, Clear Channel’s displays often carry a variety of messages. Clear Channel owns and operates approximately ninety-five percent (95%), or 800 of the 830, advertising displays subject to the Billboard Ordinance. There are three (3) other entities that own or operate the outdoor advertising displays subject to the Billboard Ordinance.

Baltimore City credits the revenue generated by the Billboard Ordinance to the City’s General Fund, and the revenue is used to benefit the general public by funding programming at public schools, theaters, and museums that are open to the general public.

Clear Channel contends that billboard speech is protected expression under the U.S. Constitution and Maryland Declaration of Rights, subjecting the tax to heightened rather than rational-basis scrutiny. According to Clear Channel, the Ordinance is

unconstitutional for three independent reasons. *First*, the government may not impose a specific (rather than general) tax on speech. *Second*, targeted taxes on a limited number of speakers create an intolerable risk of chilling speech. *Third*, the tax is not narrowly tailored under intermediate scrutiny because by imposing a specific rather than general tax, it imposes a greater-than-necessary burden on speech.

The City of Baltimore holds the power to tax to the same extent as the State of Maryland has or could exercise said power within the limits of the City of Baltimore as part of its general taxing power. The Baltimore City Council holds the legislative power to impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products, "*Herman v. Mayor & City Council of Baltimore*, 189 Md. 191, 197 (1947). "Taxes...may...be laid on the exercise of personal rights and privileges," including "the privilege of exhibiting outdoor advertising displays in the City." Art. 28, § 29-2; *Carmichael*, 301 U.S. at 508, 57 S. Ct. 868. The First Amendment does not prohibit the imposition of excise taxes, and in the First Amendment context, there is a "strong presumption in favor of duly enacted taxation schemes." *Leathers v. Medlock*, 499 U.S. 439, 451, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991). If the tax is rationally related to a legitimate state interest, including collecting public revenues, it is not incumbent on the government to state its reasons, motives or policies for adapting the tax. Merely because a tax has some regulatory effect does not mean the tax violates First Amendment rights. In fact, every tax is in some measure regulatory. The power of the City to tax is broad and exertion of that power may not be judicially restrained because it may have a regulatory effect.

An excise tax imposed on the privilege of exhibiting outdoor advertising displays is a tax on the privilege of continuing in business, not on exercising free speech. The

Court agrees with the City that the business of owning or controlling a billboard, poster board or other sign and charging taxes for its use as an outdoor advertising display to show messages on behalf of paying clients is not violative of Petitioner's rights to free speech. Petitioner's conduct does not possess "sufficient communicative elements" for the First Amendment to come "into play," *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). Petitioner does not express or say anything; it only sells space to advertisers who say things. First Amendment protection extends only to conduct that is inherently expressive and displaying a third party's message on an outdoor advertising billboard in exchange for financial compensation lacks any significant expressive element. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986); See e.g. *Rumsfeld* 547 U.S. at 64, 126 S. Ct. 1297 ("accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions."); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980) (no First Amendment violation in authorizing expressive activity on private property because views expressed are not associated with owner, who was "free to publicly dissociate themselves from the views of the speakers.")

The Court finds that the tax is subject to rational basis review because the tax does not infringe Petitioner's free speech rights. The tax has a rational relation to a legitimate governmental purpose and would only be subjected to a higher level of scrutiny if it interfered with the exercise of a fundamental right such as freedom of speech. In the present case, the taxpayer has made no showing that the tax imposes a burden on free speech. It was imposed for revenue purposes on the privilege of exhibiting outdoor advertising displays and not on the right to disseminate information, ideas or speech. It

is permissible to tax non-expressive conduct such as imposing a tax on the privilege of making retail sales of personal property. In the present case, this tax is directed toward a means of expression rather than the expression itself and does not burden the substance of the expression. First Amendment protection does not extend to the form of communication if there is no deterrence or interference with the expression of information and ideas. Here there is no cognizable burden on speech.

Clear Channel further claims that Baltimore City's tax unconstitutionally limits the classifications of signs and targets a small group of operators of outdoor advertising displays. The result is a targeted tax measure which causes a significant risk of chilling speech by speakers fearful of further taxation and regulation. At a minimum, the City could have drafted a sign tax to apply to a broader group of operators.

However, the City argues that the tax's classification in Art. 28, § 29-3(a) for digital billboards poses no threat to the expression of particular ideas or expressions. The amount of the tax based on size and technology is not measured by the extent of the circulation of the message shown on the outdoor advertising displays. The tax's requirement that an Advertising Host charge fees for the use of an Outdoor Advertising Display at least one time per year is consistent with the continuance of a non-conforming use and does not raise any constitutional question.

Moreover, the tax is applicable to all off-premises billboards and does not single out one small group of off-premises billboards while exempting others from taxation. The City ordinance charges any entity that owns or operates an off-premises outdoor display ten feet (10') or larger in size. There is a rational basis for classifying large and immobile billboards designed to stand out from other signs and other advertising. The billboards subject to tax take up space and may obstruct views, distract motorists and displace

alternative uses of land. These physical characteristics of taxable signs are certainly within the City's broad latitude in creating classifications and distinctions in its tax statutes. Even though there are a limited number of advertising hosts subject to the tax, there is not suppression of speech. The City's long-standing zoning regulations controlling billboards and the concentrated marketplace in the City has caused the majority of the tax to fall on the Petitioner, not the structure of the tax ordinance. Otherwise, local governments would be restricted from raising operating revenue through general taxation ordinances where there were only a few similar business enterprises.

The Court finds that the City's denial of Petitioner's requests for a refund of the Outdoor Advertising Tax for the fiscal years 2014, 2015 and 2016 shall be **AFFIRMED**.

CC: Benjamin Rosenberg, Esq.  
Steven Potter, Esq.  
Gordon D. Todd, Esq.

**CERTIFIED TRUE COPY**  
**TEST: John T. Hearn, Clerk**

**NOTICE:** You have the right of appeal from the above Order to the Circuit Court of any County or Baltimore City, wherein the property or subject of the assessment may be situated. The Petition for Judicial Review **MUST** be filed in the proper Court within thirty (30) days from the date of the above Order of the Maryland Tax Court. Please refer to Rule 7-200 et seq. of the Maryland Rules of Court, which can be found in most public libraries.

Issued: February 27<sup>th</sup>, 2018