

ORIGINAL

CASE NO. 2009-0213  
IN THE SUPREME COURT OF OHIO

---

OHIO APARTMENT ASSOCIATION, GREENWICH APARTMENTS LTD.,  
AND D&S PROPERTIES,  
*Appellants,*

v.

RICHARD A. LEVIN, TAX COMMISSIONER,  
*Appellee.*

---

ON APPEAL FROM THE BOARD OF TAX APPEALS  
CASE NO. 2006-0861

---

APPELLANTS' BRIEF IN OPPOSITION TO  
APPELLEE'S MOTION TO DISMISS FOR LACK OF JURISDICTION

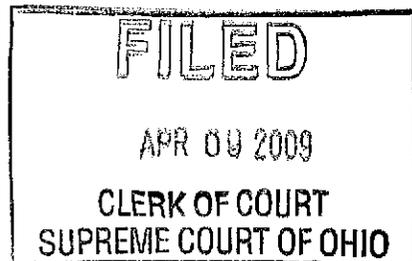
---

Mark I. Wallach (0010948)  
Counsel of Record  
James F. Lang (0059668)  
Laura C. McBride (0080059)  
Calfee, Halter & Griswold LLP  
1400 KeyBank Center  
800 Superior Avenue  
Cleveland, Ohio 44114-2688  
(216) 622-8200  
fax: (216) 241-0816  
mwallach@calfee.com  
jlang@calfee.com  
lmcbride@calfee.com

Attorneys for Appellants,  
Ohio Apartment Assoc., Greenwich  
Apartments, Ltd., and D&S Properties

Richard Cordray (0038034)  
Larry D. Pratt (0021870)  
Counsel of Record  
Alan Schwepe (0012676)  
Office of the Attorney General,  
Taxation Division  
30 East Broad Street, 25th Floor  
Columbus, Ohio 43215  
(614) 995-3573  
fax: (614) 466-5967  
lpratt@ag.state.oh.us  
aschwepe@ag.state.oh.us

Attorneys for Appellee,  
Richard A. Levin, Tax Commissioner



## **INTRODUCTION**

Appellee Robert A. Levin, Tax Commissioner (the “Commissioner”), seeks to prevent this Court from reviewing the constitutionality of Department of Taxation Rules 5704-25-18 and 5703-25-10 (the “Rules”) by raising multiple challenges to the Court’s jurisdiction. Indeed, this is not the Commissioner’s first attempt to avoid review of the Rules. The Commissioner made many of the same arguments in a motion to dismiss filed in the Board of Tax Appeals (“BTA”) proceedings in this matter, which the BTA properly rejected. The instant Motion simply continues the Commissioner’s over-reaching efforts to prevent a determination that the Rules are unconstitutional.

Each of the Commissioner’s jurisdictional challenges lacks merit. The Commissioner asserts that Appellants’ action is not ripe, but Ohio law provides that it is. The Commissioner asserts that Appellants’ Notice of Appeal to this Court is insufficiently definite, but the Notice clearly states the errors complained of. The Commissioner asserts this Court lacks jurisdiction because the BTA action was quasi-legislative, but the proceedings below were adversarial and quasi-judicial. And, the Commissioner asserts that this Court is not authorized to consider Appellants’ constitutional challenges, but this Court has held otherwise. The Commissioner’s Motion to Dismiss ignores the clear authority and role of the BTA in presiding over taxpayers’ adversarial complaints regarding the application of Department of Taxation rules to their taxes, as well as the authority and role of this Court in reviewing appeals of BTA decisions. The Motion should be denied.

## **BACKGROUND**

An extensive background of this dispute is provided in Appellants’ Merit Brief, which was filed, in accordance with this Court’s Rules of Practice, on April 1, 2009. (The

Commissioner filed his Motion to Dismiss two days prior, on March 30, 2009.) Thus, Appellants will focus here on presenting the factual and procedural background most necessary for the Court's review of the Commissioner's Motion to Dismiss.

In July 2006, Appellants, Ohio Apartment Association, Greenwich Apartments, Ltd., and D&S Properties (collectively "Appellants"), filed with the BTA an Application for Review challenging the propriety and constitutionality of the Rules, which eliminated, as of December 15, 2005, the prior standard and uniform reduction of ten percent (10%) of the tax bill levied on all real property (the "Rollback"). The Rules were promulgated to eliminate the Rollback for properties that are "intended primarily for use in a business activity," pursuant to the General Assembly's revisions to Ohio Revised Code § 319.302. Based on the statutory revisions and the Commissioner's subsequent Rules, rental properties containing four or more units are deemed to be "primarily for use in a business activity" and, thus, ineligible for the Rollback. However, rental properties containing three or fewer units continue to be eligible for the Rollback. *See* O.R.C. § 319.302; OAC 5703-25-18, 5703-25-10.

Appellants brought the Application for Review because they have been injured, or represent parties injured, by the Commissioner's implementation of the Rules in that they are, or represent, taxpayers that own residential rental properties containing four or more units. In their Application for Review<sup>1</sup> to the BTA, Appellants explained, over the course of several pages, that the Rules are unreasonable and unconstitutional for two independent reasons:

(1) Article XII, Section 2 of the Ohio Constitution: The Ohio Constitution mandates that property and improvements on property "shall be taxed by uniform rule according to value" with

---

<sup>1</sup> The operative Application for Review is the Amended Application filed by Appellants on February 1, 2008, amending reference to one of the Appellants and clarifying the bases for Appellants' equal protection challenge.

limited (and inapplicable) exceptions. This uniformity requirement mandates the consistent application of any tax rate reductions to all real property in order to ensure uniformity in tax. In contrast, the Rules apply different tax reductions to similarly valued property based simply on the number of units contained on the property.

(2) Article I, Section 2 of the Ohio Constitution: The equal protection clause of the Ohio Constitution mandates that all persons be treated equally. Again, in direct contrast, the Rules' classification of rental properties containing four or more units separate from rental properties containing three or fewer units is arbitrary and connotes no real or substantial distinction.

On September 17, 2007, the Commissioner filed a "Motion to Dismiss for Ripeness, or, in the Alternative, for a Summary Ruling in [the Commissioner's] Favor" with the BTA. In that motion, the Commissioner asserted that Appellants' challenge was not yet ripe because the underlying statute had not been determined to be unconstitutional and that the BTA should issue a summary ruling in the Commissioner's favor because the BTA could not make a determination of Appellants' constitutional challenges. After responsive briefing from Appellants, the BTA properly determined that the Commissioner's motion to dismiss should be denied. *See* Appendix to Appellants' Merit Brief ("Appx.") 0025-0031 (BTA Order). The BTA recognized that "Appellants are attempting to exercise their statutory right to challenge the rules in question herein, and we believe the statute requires that they be afforded the opportunity to do so." Appx., p. 0030.

The parties proceeded through discovery and the matter eventually was heard by the BTA on May 28, 2008. At the hearing, Appellants and the Commissioner all presented witnesses, who were subject to cross-examination, and documentary evidence in support of their respective positions. *See, generally*, Supplement to Appellants' Merit Brief ("Supp.") 0001-0048 (hearing

transcript). After post-hearing briefing, the BTA issued its decision on December 30, 2008. Appx. 0015. In its Decision & Order, the BTA found the Rules to be reasonable, but acknowledged its limited ability to resolve Appellants' constitutional arguments in reaching that determination. *Id.* Appellants appealed the BTA's decision by filing a Notice of Appeal with this Court on January 29, 2009. Appx. 0001-0014. The Commissioner filed a Notice of Cross-Appeal on February 5, 2009.

## ARGUMENT

### I. Appellants' Challenge To The Rules Is Ripe.

Despite the Commissioner's pleas otherwise, Ohio law provides that:

The appeal [of a tax rule] may be taken at any time after the rule is filed with the secretary of the state, the director of the legislative service commission, and, if applicable, the joint committee on agency rule review.

Ohio Rev. Code § 5703.14(C) (emphasis added). The clear enabling language of § 5703.14 does not limit the BTA's authority to accept an application, as the Commissioner suggests, until after the underlying statute has been declared unconstitutional. In fact, the statute establishes that the trigger for BTA jurisdiction is "any time after the rule is filed with the secretary of state . . . ."<sup>2</sup> *Id.* Instead of acknowledging this clear statutory language, the Commissioner unbelievably asserts that "Appellants have not been harmed" and that Appellants "do not seek redress from an injury." Yet the injury to Appellants, in the form of the Rules' increase of 10% in their real

---

<sup>2</sup> The fact that the statute does not require any statutory determination by another body prior to BTA review stands in sharp and notable contrast with the statute's limitation on the BTA's ability to hear an application for the review of a rule "where the grounds of the allegation that the rule is unreasonable have been previously contained in an application for review and have been previously heard and passed upon by the board." Ohio Rev. Code § 5703.14(C) (emphasis added). Thus, while the statute does limit the BTA from reviewing rules that have been the subject of prior applications, it does not limit the BTA from reviewing rules stemming from statutes that have not been construed by a court.

property taxes, is clear. *See* Motion to Dismiss, p. 19. The Rules were filed with the Secretary of State in 2005 and, thus, Appellants' action, which was initiated in 2006 – after real property taxes had been levied against them in accordance with the Rules' elimination of the Rollback – is timely and ripe. To be sure, if the Rules are deemed unconstitutional, so must their enabling statute, Ohio Revised Code § 319.302, the language of which is tracked by the Rules. *Compare* Ohio Rev. Code § 319.302 *with* O.A.C. 5703-25-18, 5703-25-10. Regardless, if the Rules are deemed unreasonable and unconstitutional, the Commissioner will be precluded from eliminating the Rollback on the real property tax bills for properties containing four or more residential units. This would alleviate the injuries suffered by Appellants and others similarly situated.

The Commissioner provides no authority in support of his argument that Appellants' taxpayer challenge to the Rules' effect on their real property tax is not yet ripe. All the Commissioner does is discuss the general doctrine of ripeness and then overreach. But, the decisions he refers to on this issue are illustrative of those actions that are, indeed, unripe as opposed to the instant dispute. In *State ex rel. Elyria Foundry Co. v. Indus. Comm'n of Ohio*, 82 Ohio St. 3d 88, 89 (1998), the appellant “ask[ed] [the Court] to address the abstract and the hypothetical” when it filed a mandamus action that “effectively ask[ed] [the Court] to answer the question that, if the claim is allowed, and if it is allowed only for silicosis, is [the appellant] entitled to temporary total disability compensation?” *Id.* (emphasis in original) (affirming the court of appeals' dismissal of the mandamus action). This same assertion of a hypothetical question arose in the Commissioner's other citation, *Kalnasy v. Metrohealth Med. Ctr.*, Case No. 90211, 2008 WL 2476798 (8th Dist. Jun. 12, 2008) (dismissing *sua sponte* the trial court's finding that a statute limiting non-economic damages was unconstitutional because the plaintiff

had not yet been awarded non-economic damages and, so, it is unknown whether the alleged future harm will occur). There is nothing abstract or hypothetical about the fact that the Rules are in effect and that the Rules already have resulted in a greater than 10% increase in Appellants' real property tax bills. There is nothing abstract about Appellants being taxed non-uniformly because of the Rules. Appellants' challenge does not focus on a future unknown. The injury is occurring now. Both Ohio law and common sense dictate that Appellants' action, to alleviate injuries currently suffered by them, is ripe. The Commissioner's Motion should be denied.

## **II. The Parties' Appeal Before The BTA Was A Quasi-Judicial Proceeding.**

It is true, as established in Article IV, Section 2 of the Ohio Constitution, that the scope of the Court's appellate revisory jurisdiction extends only to judicial or quasi-judicial actions of administrative agencies. *Zangerle v. Evatt*, 139 Ohio St. 563, syl. 1, 2 (1942). However, there can be no doubt that the proceedings giving rise to this appeal are quasi-judicial in nature. This Court's prior decisions support the determination that, when an administrative agency, such as the BTA, conducts hearings and accepts evidence, it acts in a quasi-judicial role. *See Haught v. City of Dayton*, 34 Ohio St. 2d 32, 35 (1973) ("Quasi-judicial proceedings' [a]re defined as those in which the function under consideration involves the exercise of discretion and requires notice, a hearing and the opportunity for the introduction of evidence.") *citing M. J. Kelley Co. v. Cleveland*, 32 Ohio St. 2d 150, syl. 2 (1972); *Cambridge Commons Ltd. Partnership v. Guernsey Cty. Bd. of Revision*, 106 Ohio St. 3d 27, 29 (2005) (noting that the BTA and its hearing officers "serv[c] in a quasi-judicial role" when conducting hearings). The Ohio Administrative Code affirms the BTA's quasi-judicial role in its directive regarding BTA hearing procedures: "All hearings [before the BTA] shall proceed in a similar manner to a civil action, with witnesses

sworn and subject to cross-examination.” O.A.C. 5717-1-15(G). Indeed, the BTA defines itself as a “separate, quasi-judicial, administrative agency” whose mission “is to provide taxpayers . . . with an accessible, fair and efficient appeals process” and whose decisions may be appealed to this Court. *See* Board of Tax Appeals, “Introduction,” *available at* <http://bta.ohio.gov/Intro.htm>.

The Commissioner’s distinguishable case citations actually illustrate the distinction between quasi-judicial proceedings, such as Appellants’, and legislative proceedings that are not subject to this Court’s revisory jurisdiction – providing further support for this Court’s determination of this appeal. In *Zangerle v. Evatt*, 139 Ohio St. 563 (1942), the Court determined that it lacked jurisdiction to review an appeal initiated by “a communication” from county auditors requesting the BTA’s review of a rule. *Id.* at 565. The Court’s determination hinged on the fact that the parties were not adversarial and that the parties did not include a taxpayer; thus, the proceedings were quasi-legislative. *See id.* at 574-577. In fact, counsel for appellants agreed that “they were not there engaged in an adversary proceeding.” *Id.* at 566, 578 (“What we have here is two administrative officers contending with another set of administrative officers that the rules prescribed by the Department of Taxation . . . should be changed.”). But, the Court repeatedly noted that if the proceedings were adversarial and an affected taxpayer was involved, the Court would properly be empowered to make a determination on the lawfulness and reasonableness of the rule:

When a case reaches this court involving the valuation of taxation of some specific property of a taxpayer and the question of whether rule No. 2 or any other rule is reasonable and lawful is presented, we will, of course, pass upon such concrete question.

*Id.* at 579.

The Court in *Fortner*, which drew heavily on the *Zangerle* decision, was also presented with a non-adversarial proceeding initiated by a party not subject to the rules he sought to

challenge. *Fortner v. Thomas*, 22 Ohio St. 2d 13, 14 (1970) (noting that the appellant “had never been directly subjected to the application of the amended regulation”). But, again, the Fortner Court recognized that its powers would be different were it presented with a specific dispute: “Courts . . . [are] confined to deciding whether such rules are reasonable and lawful as applied to the facts of a particular justiciable case.” *Id.* at syl. 2 (affirming *Zangerle*). Simply because an appeal to the BTA involves the review of a rule does not make its proceedings legislative, as opposed to judicial, in nature.

There can be no doubt that Appellants’ challenge to the Rules is an adversarial dispute giving rise to a quasi-judicial proceeding. Appellants are, or represent, taxpayers who have been directly and adversely affected by the challenged Rules. Based on the Rules’ impact on their taxes, Appellants sought review of the Rules by the BTA and this Court. In order to do so, Appellants and the Commissioner were afforded a hearing before the BTA during which proceeding both sides presented witnesses, who were subject to cross-examination, and documentary evidence. Thus, Appellants’ challenge to the Rules before the BTA is a quasi-judicial proceeding subject this Court’s appellate review.

### **III. This Court Has Jurisdiction To Consider Constitutional Challenges To The Rules, Despite The Fact That The BTA Cannot.**

Ohio Revised Code § 5703.14(C) provides that “any person who has been or may be injured by the operation of the rule” may file an application for review of any rule adopted by the Tax Commissioner with the BTA. The BTA is then charged to make a determination of whether the challenged rule is “reasonable or unreasonable.” Ohio Rev. Code § 5703.14(C). This process involves a hearing before the BTA for which the BTA “shall . . . afford both [the Commissioner and the applicant] an opportunity to be heard” and to “introduce evidence.” *Id.* This Court is then authorized to hear an appeal of the BTA’s determination and, in doing so,

must assess whether the BTA's decision is "unreasonable or unlawful." Ohio Rev. Code § 5717.04 (emphasis added).

Nothing in the statute precludes an application for review by the BTA from raising constitutional challenges. While it is true that the BTA is "without jurisdiction to determine the constitutional validity of a statute," this Court repeatedly has acknowledged the right of an application to establish a record before the BTA on constitutional claims, which may then be appealed to and determined by this Court. *S.S. Kresge Co. v. Bowers*, 170 Ohio St. 405, syl. 1 (1960); *see Herrick v. Kosydar*, 44 Ohio St. 2d 128, 130 (1975).

When a statute is challenged on the basis that it is unconstitutional in its application, this court needs a record, and the proponent of the constitutionality of the statute needs notice and an opportunity to offer testimony supporting his or her view.

To accommodate this court's need for extrinsic facts and to provide a forum where such evidence may be received and all parties are apprised of the undertaking, it is reasonable that the BTA be that forum. The BTA is statutorily created to receive evidence in its role as factfinder.

*Cleveland Gear Co. v. Limbach*, 35 Ohio St. 3d 229, 232, syl. 1 (1988) ("[T]he [BTA] must receive evidence concerning this [constitutional] question if presented, even though the [BTA] may not declare the statute unconstitutional.") citing *Bd. of Educ. of South-Western City Schools v. Kinney*, 24 Ohio St. 3d 184 (1986). This Court has further explained the crucial role of the BTA in providing a forum for a factual record when constitutional issues are raised:

[T]he BTA need only receive evidence for us to make the constitutional finding. This is because the BTA accepts facts but cannot rule on the question. On the other hand, we can decide the constitutional questions but have a limited ability to receive evidence. Thus, the BTA receives evidence at its hearing, but we determine the facts necessary to resolve the constitutional question.

*MCI Telecommunications Corp. v. Limbach*, 68 Ohio St. 3d 195 (1994) (resolving an equal protection argument raised by the applicant before the board and again on appeal to the Ohio Supreme Court).

This Court has, indeed, often made determinations of constitutional issues that were originally presented to the BTA, despite the BTA's inability to determine such issues. For example, in *Kelleys Island Caddy Shack, Inc. v. Zaino*, 96 Ohio St. 3d 375 (2002), the Court determined the constitutionality of Ohio Revised Code § 5739.01 under the Uniformity Clause (one of the arguments made by Appellants here) after the applicants had brought the constitutional argument via a refund request and appeal before the BTA. The *Kelleys Island* Court noted that “[b]ecause the [BTA] does not have jurisdiction to declare statutes unconstitutional, it affirmed the Tax Commissioner[‘s]” denial of the refund request and continued to determine the constitutional issues – the only issue before the Court. *Id.* at 376. Thus, when confronted with a constitutional claim, the BTA may be required to issue an entry simply noting its lack of jurisdiction to consider the claim. However, if the taxpayer needs to establish a record concerning the illegality of a tax, the BTA must accept evidence from the taxpayer (and the Commissioner) concerning the constitutionality of the tax. The taxpayer may then take an appeal to this Court, which has jurisdiction to review the constitutional questions.

The Commissioner's logic on this issue is, and must be, flawed. In essence, the Commissioner asserts that a rule can be reasonable and lawful, but unconstitutional. If the BTA is precluded from making constitutional determinations and, as a result, deems a rule reasonable based on its limited authority (as was the case here), the Commissioner would then preclude this Court from finding anything otherwise, despite the fact that the rule is in clear conflict with the Ohio Constitution. This makes no sense and would be clearly violative of Appellants'

constitutional rights. The statutory standard of “reasonableness” must include whether a rule is constitutional, and the Appellants are entitled to establish a record for their constitutional arguments before the BTA prior to proceeding to this Court. While he ignores this Court’s responsibility to assess whether the BTA’s decision is “lawful” for most of his brief on this issue, the Commissioner also, in essence, asserts that the BTA’s decision can be lawful, but unconstitutional. In fact, the Commissioner argues that the BTA’s decision must be lawful unless it is “in clear conflict with [a] statutory enactment.” Motion to Dismiss, p. 13 *quoting The Kroger Grocery & Baking Co. v. Glander*, 149 Ohio St. 121, 125 (1948). A decision that conflicts with a valid statute must, indeed, be unlawful – but so too must a decision that conflicts with the Ohio Constitution.

The Commissioner’s Motion attempts to distance the instant appeal from that in *Roosevelt Properties*, but the attempt is unavailing. While the Court did not directly address the Commissioner’s jurisdictional arguments (which have been rebutted above), the *Roosevelt Properties* decision can only support Appellants’ right to bring their constitutional challenges to the Rules. In *Roosevelt Properties Co. v. Kinney*, BTA Case Nos. 81-F-666, 81-A-667, 1983 Ohio Tax LEXIS 698 (Jan. 11, 1983), the BTA heard an appeal that procedurally mirrors the instant appeal sought by Appellants in every material regard. In *Roosevelt Properties*, the Apartment & Home Owners Association and Columbus Apartment Association were able to assert in an application filed with the BTA (and later appealed to this Court) that rules classifying residential and commercial property as required by Ohio Rev. Code § 5713.041 were both unreasonable and unconstitutional. The appellants’ application argued that Rule 5705-3-06 was unconstitutional for a number of reasons, including violations of the Equal Protection and Uniformity clauses. *Id.* at \*2-4. The BTA did not consider the constitutional claims, as it lacks

jurisdiction to do so. However, the appellants were able to establish a record and, on appeal, this Court did consider, and issue an opinion regarding, the appellants' claims that the classification of multi-unit apartment complexes as commercial violated the Uniformity and Equal Protection provisions of the Ohio Constitution. *See Roosevelt Properties Co. v. Kinney*, 12 Ohio St. 3d 7 (1984). The Motion to Dismiss should be denied because this Court is a proper forum for Appellants' constitutional challenges to the Rules.

#### **IV. Appellants' Notice Of Appeal Is Sufficient.**

Ohio law requires that a notice of appeal to this Court claiming error in a BTA decision "shall set forth the decision of the board appealed from and the errors therein complained of." Ohio Rev. Code § 5717.04. Appellants' Notice satisfies these requirements. However, the Commissioner again relies on collateral and materially distinguishable precedent in his attempt to evade review of the Rules by asserting that Appellants' Notice of Appeal is insufficient. First, the Commissioner cites three cases in which the notice of appeal to the BTA (and not this Court) was held insufficient. *See Queen City Valves, Inc. v. Peck*, 161 Ohio St. 579 (1954); *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St. 3d 290 (2006); *Painesville v. Lake Cty. Budget Comm'n*, 56 Ohio St. 2d 282 (1978). It is important to note that the Commissioner never challenged the sufficiency of Appellants' Application for Review before the BTA. He never moved the BTA for a dismissal of this dispute on the basis of the sufficiency of the Application for Review and, therefore, is not entitled to challenge it before this Court. Second, even if such an analysis was appropriate, Appellants' five-page Application for Review provides significant substance and explanation of their bases for challenge of the Rules.<sup>3</sup> *See* Supp. 0055-0059.

---

<sup>3</sup> In *Queen City*, the Court affirmed the BTA's dismissal of an action where the notice of appeal stated that the Tax Commissioner's decision sought to be appealed to the BTA was simply "contrary to law," and "contrary to" and "against the weight of the evidence." *Queen City*

Although the Commissioner's citation to *Castle Aviation* is misplaced because that decision focused on the propriety of a notice of appeal to the BTA (not the sufficiency of a notice to the Supreme Court, such as the Notice at issue in this Motion), *Castle Aviation* does affirm Appellants' right to present to this Court their constitutional challenges to the Rules. In *Castle Aviation*, the appellant challenged the "imposition of the use tax on [appellant's] purchases" as violative of equal protection. *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St. 3d 290, 296 (2006). The Commissioner argued that the BTA erred in failing to dismiss the appellant's "broad, vague" equal protection claim for failure to specify the alleged errors. *Id.* This Court described the jurisdictional import of a notice of appeal to the BTA:

The purpose of specifying error to the BTA, be the error constitutional or nonconstitutional, is to put the Tax Commissioner on notice as to the issues that will be contested. As this court stated in *Cleveland Gear Co.*, "[w]hen a statute is challenged on the basis that it is unconstitutional in its application, this court needs a record, and the proponent of the constitutionality of the statute needs notice and an opportunity to offer testimony supporting his or her view." . . . . When a taxpayer merely makes an allegation in its notice of appeal to the BTA that the imposition of the use tax violates federal and state equal protection, there is no specificity and the allegation of error must fail . . . [Here,] [appellant's] claim of unconstitutionality at the BTA was not specific. The assignment of error did not state which provision of the use tax violated the Equal Protection Clauses or how the application of the use tax violated its right to equal protection.

---

*Values, Inc.*, 161 Ohio St. at 580. It was this language that the Court noted could be "such as might be advanced in nearly any case and [is] not of a nature to call the attention of the board to those precise determinations of the Tax Commissioner with which appellant took issue." *Id.* at 583. Even a quick review of Appellants' Application for Review reveals that Appellants set forth a sufficiently thorough explanation of their challenges to the Rules, including a description of the Rules, the Rules' adverse impact on Appellants, the reasons the Rules are unreasonable, and the authority upon which a finding of unreasonableness is warranted – language that certainly cannot be utilized in any random appeal to the BTA, as was the case in *Queen City*. See Supp. 0055-0059.

*Id.* at 297. Thus, as discussed in Section III, *supra*, the BTA is a proper forum for constitutional challenges, and the notice of appeal to the BTA must provide sufficient notice to the Commissioner to allow him to offer testimony in his support. That is exactly what occurred here. Appellants' five-page Application for Review set forth the bases for their challenges, under the Uniformity and Equal Protection Clauses, and the Commissioner responded – not by challenging the sufficiency of the Application, but by presenting witnesses and exhibits at the hearing and later briefing the issues for the BTA's consideration. The Commissioner also provided extensive briefing on these issues. For the Commissioner to now, after nearly three years of proceedings, seek to dismiss this action by suggesting that he was not provided with notice regarding the bases for Appellants' challenges to the Rules is, at best, disingenuous and, at worst, deceitful.

The Commissioner does reference two decisions in which a notice of appeal to the Supreme Court was deemed insufficient, but those decisions are again wholly distinguishable and simply reflective of the Commissioner's desperation. In fact, the Commissioner wholly misrepresents this Court's decision in *City of Canton v. Stark Cty. Budget Comm'n*, 40 Ohio St. 3d 243 (1988). The Commissioner asserts that the *Canton* Court found a notice of appeal insufficient because the "listed errors were general in nature." Motion to Dismiss, p. 20 *quoting Canton*, 40 Ohio St. 3d at 246. However, the actual holding was that "[w]hile the instant notice of appeal identifies several particular errors, it does not identify the issue now raised. Therefore, we do not have jurisdiction to review this claimed error." *Canton*, 40 Ohio St. 3d at 246. This is clearly not the case here and, as such, *Canton* is of no bearing. The notice of appeal at issue in *Lawson Milk Co. v. Bowers*, 171 Ohio St. 418 (1961), is similarly distinguishable. That notice of appeal simply stated that the claimed error was "the decision by the [BTA]," without any

explanation or description of the specific errors complained of. *Lawson Milk*, 171 Ohio St. at 419 (sustaining motion to dismiss). Again, this is wholly distinguishable from the specific explanation of the errors in the BTA's Decision & Order set forth in Appellants' Notice of Appeal here.

Appellants' Notice of Appeal properly, sufficiently, and specifically notifies the Commissioner that Appellants will argue that the BTA's decision was unreasonable and unlawful because the BTA erred in finding that the Rules were reasonable despite their clear conflict with two specific constitutional provisions. The Commissioner's suggestion that he "cannot be expected to divine what Appellants intend to argue from a Notice of Appeal this broad" is simply ridiculous. The Notice is sufficient and the Commissioner has no basis to argue otherwise.

#### **CONCLUSION**

For each of the foregoing reasons, the Commissioner's Motion is not well taken. Appellants' action is ripe and the requested review is available to them. Further, Appellants are entitled to bring their constitutional arguments to this Court after having established a record before the BTA. And, the Appellants properly asserted the bases of the claimed errors in their Notice of Appeal, which constitutes the framework for this Court's review. Accordingly, the Commissioner's Motion should be denied.

Respectfully submitted,

Laura C. McBride (N.T.A 0080713)

MARK I. WALLACH (0010948)

Counsel of Record

JAMES F. LANG (0059668)

LAURA C. MCBRIDE (0080059)

CALFEE, HALTER & GRISWOLD LLP

1400 KeyBank Center

800 Superior Avenue

Cleveland, Ohio 44114-2688

(216) 622-8200

fax: (216) 241-0816

mwallach@calfee.com

jlang@calfee.com

lmcbride@calfee.com

Attorneys for Appellants,

Ohio Apartment Association, Greenwich

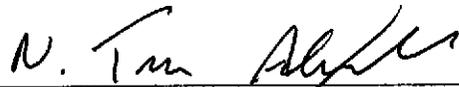
Apartments, Ltd., and D&S Properties

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing *Appellants' Brief in Opposition to Appellee's Motion to Dismiss for Lack of Jurisdiction* was served this 9th day of April, 2009, by First Class U.S. Mail, postage pre-paid upon:

Larry D. Pratt, Esq.  
Alan Schwepe, Esq.  
Office of the Attorney General, Taxation Division  
30 East Broad Street, 25th Floor  
Columbus, Ohio 43215

Attorneys for Appellee



---

One of the Attorneys for Appellants