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EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents two critical issues of great interest to taxpaying residents in municipalities statewide, in relation to local ordinances imposing an affirmative obligation to timely file a prescribed municipal income tax return on an annual basis or face possible criminal sanctions: 1) whether a municipal tax authority that, in performing the discretionary action of designing and prescribing municipal income tax forms fails to uphold the rule of law by conforming its prescriptions to applicable statutory limitations enacted to protect taxpayers from Administrative arbitrariness and/or over-reaching, thereby violates the procedural due process rights of taxpayers who, after being misled by such arbitrary prescriptions, are subjected to criminal prosecution; and 2) whether a municipal tax authority is entitled to elect criminal prosecution as a routine matter in response to taxpayers who seek to avail themselves of statutorily-mandated substantive and procedural rights relative to tax prescriptions, thereby imposing a practical deterrent on taxpayers who might otherwise seek to challenge the scope and manner in which municipal tax obligations are imposed.

This case also raises a substantial Constitutional question: 3) whether procedural due process, in relation to the charged criminal offense of failure to timely file a prescribed municipal income tax return, requires that a municipal tax payer first be afforded a prescribed form that comports with the relevant format and content requirements mandated by statute, or else a meaningful opportunity to be heard with respect his claim that the form is deficient.

Judicial resolution of these issues is essential as a basis for ensuring that municipal taxing authorities operate within statutory limitations imposed by state statute and local ordinance, and that the threat of prosecution is not misused as a vehicle for deterring citizens from the proper

exercise of their statutory and constitutional rights to raise challenges against perceived arbitrariness and/or over-reaching relative to the manner in which municipal tax obligations are imposed.

The constitutional authority of an Ohio municipality to levy an income tax upon its residents is derived from the “home rule” clause, Section 7 of Article XVIII of the Ohio Constitution. This authority is also made subject to statutory limitation pursuant to Section 3, Article XVIII of the Ohio Constitution, which authorizes municipalities “to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” Ohio Const. Art. XVIII, § 3; See Thompson v. Cincinnati (1965), 2 Ohio St.2d 292-295, 208 N.E.2d 747. One inevitable consequence of the reservation of municipal home rule authority, inclusive of the power to levy income taxes, is that the legitimate interests of municipal governments to levy taxes for local purposes may, depending on the manner of their pursuit, encroach upon important property and liberty interests of municipal residents. The power of each municipality to design and prescribe its distinct income tax return forms, thereby determining the manner in which information is provided in support of calculated individual and corporate tax liability, together with the power to impose criminal sanctions upon those who fail to timely file such prescribed return forms with the local tax authority, may potentially give rise to controversy over the manner in which prescribed and periodically updated tax forms conform, or not, to applicable statutory mandates. In any given case, a taxpayer may be confronted with a tax return form that, on its face, fails to comply with statutory format and content requirements, or as in this case, an actual or apparent choice among multiple forms, each being prescribed by the local tax administrator without clear guidance as to the manner in which a “proper” filing thereof may be effected so as to avoid

possible criminal prosecution for failure to file. Under these foreseeable circumstances, a failure to afford taxpayers the opportunity to challenge the adequacy of the prescribed form, via an administrative hearing, where abuse of administrative discretion may be a significant contributing factor in precipitating the alleged taxpayer violation, may oftentimes result in a proliferation of unnecessary, routine and frequent prosecutions of municipal taxpayers, and a corresponding deprivation of the taxpayers' substantive liberty and property interests.

STATEMENT OF THE CASE AND FACTS

This case arises from a decision by the City of Conneaut, a chartered municipal corporation, to exercise its home rule taxing authority in a manner that disregards substantive and procedural limitations imposed by state law and municipal ordinance, by 1) depriving residents who comply with a mandatory filing requirement of a reasonable opportunity and means to claim one or more of fifteen statutory exemptions to which they may be entitled under law, and by 2) unilaterally pre-determining which residents are exempt from paying municipal income tax and unlawfully treating those residents as exempt from filing the prescribed tax return. As a direct result of this unlawful procedure implemented by the Conneaut Tax Administrator, the Appellant Rev. Rudolph G. Babcock, a city resident seeking to claim an enumerated exemption from the municipal income tax for the years 2006 and 2007, respectively, signed and returned a short form provided to him by the Tax Administrator expressly for the purpose of indicating such claim of exemption. However, notwithstanding the Appellant's compliance with the procedure for claiming exemption as apparently directed by the Tax Administrator, the Appellant was subjected to criminal prosecution for failure to timely return a "proper" tax form; the latter form having been formulated in a manner which does not allow a

resident to indicate a claim of exempt status, as required by the following mandatory language of the Conneaut Tax Code.

The City of Conneaut, pursuant to Section 191.04(a) of its Codified Ordinances, mandates that:

[e]very taxpayer, on or before each Annual Return Due Date, shall make and file a return for the Applicable Tax Year with the Administrator on a form prescribed by the Administrator or on a generic form containing all of the information required by the Administrator's form.

That ordinance further provides that:

[t]he return form prescribed by the Administrator shall be designated so that Residents receiving no income taxable under Section 191.02 or receiving income exempted by Section 191.15 may report such information, without filling out the remainder of the return. Codified Ordinances § 191.04(a).

The word "taxpayer" as used in the foregoing ordinance is defined to mean "[a] person, whether an individual, Association, Corporation or Other Entity subject to the tax imposed by this chapter." Codified Ordinances, § 191.01. The word "resident" as used in the second sentence quoted above is defined, in relevant part, to mean "An individual domiciled in the City or and an Association, Corporation or Other Entity whose principal Place of Business is in the City." Id. Section 191.02(b) provides, in relevant part, that

(b) The tax shall be levied upon:

(1) All Salaries, Wages, Commissions and Other Compensation earned, received or accrued by Resident individuals, Associations or Other Entities.

Thus, by the plain language of the Ordinance, all "residents" who earn, receive or accrue some form of compensation during an applicable tax year are considered "taxpayers" who must file a municipal tax return on a form prescribed by the administrator, and that form must allow those taxpayers who believe themselves entitled to one of the statutory exemptions to indicate such claim and the reasons therefore on the prescribed form.

The record of the case below shows that the Appellant, a retired pastor, had received non-employee compensation for certain pastoral services rendered in the relevant tax years, and that he believed such compensation to fall within one or more of the specified exemptions from taxation contained in Section 191.15 of the Codified Ordinances. The record further shows that Appellant was led to reasonably believe that by signing and returning a short form provided to him by the Tax Administrator, he was complying with Section 191.04(a) "by making and filing a return ... on a form prescribed by the Administrator" while also availing himself of his right to formally claim an exemption from the tax itself, utilizing the sole means made available to him by the City for the purpose of exercising such right. Only afterwards, after the City initiated a criminal prosecution against Appellant for failure to timely file the prescribed "proper" tax return, did the City's Tax Administrator through testimony indicate that his standard practice was: 1) to exempt from filing the "proper" tax return form those individuals or entities who he determines are exempt from taxation, and 2) to routinely refer for criminal prosecution those individuals or entities who may, in like manner, attempt to claim an exemption but with whom the Administrator disagrees. The Appellant in this case, having fallen into the latter group, was thereby deprived of a meaningful opportunity to claim an enumerated exemption on a form apparently prescribed for that purpose, without thereby subjecting himself to criminal prosecution based on a unilateral, discretionary, case-by-case determination by the Tax Administrator.

More fundamentally, the Administrator's above-stated practice confounds a lawful determination of exemption from paying taxes, with an unauthorized and therefore unlawful determination of exemption from filing a prescribed tax return; the latter determination being one that exceeds the scope of the applicable home rule taxing authority, insofar as it contravenes a

mandatory requirement imposed by Ordinance upon all city residents who receive compensation in whatever form, regardless of any potential claim of exemption. Codified Ordinances § 191.04. The ordinance, by requiring that the prescribed tax return form include a space for designating one or more claims of exemption, provides the means for taxpayers to comply with the mandatory filing requirement without having to designate as taxable income those items of compensation that are believed to qualify as exempt under one of 15 categories set forth in Section 191.15 of the Codified Ordinances.

When the case came before the Court of Appeals, the Appellant argued that the City had deprived him of his substantive right to liberty without due process of law, by prosecuting him for failure to file a “proper” tax return, a charge predicated on the Administrator’s discretionary determination that he would not qualify for an exemption *and therefore* was criminally liable for not having filed a “proper” tax return form. The Appellant asserted that in this context, involving a criminal prosecution for an offense *made contingent* on a discretionary administrative determination of the city Tax Administrator, due process required that prior to being charged he be afforded a meaningful opportunity to challenge the discretionary actions via an administrative appeal in the manner prescribed by both state statute and local ordinance, R.C. 718.11 and Section 191.13 of the Codified Ordinances, respectively.

The Court of Appeals ruled that nothing in the Codified Ordinances or state law prohibits the City from instituting criminal action for failure to file a tax return, and that because the violations were alleged to have occurred prior to the events which appellant claims resulted in his loss of procedural due process, i.e., the days after the due dates for filing of income tax returns, there was no deprivation of Appellant’s due process rights.

The Court of Appeals erred in ruling that Appellant's procedural due process rights were fully protected by the trial court, which provided him a right to a jury trial. The transcript of the jury trial clearly shows that Appellant was not permitted to pose to the jury questions regarding the Administrator's improper exercise of discretionary authority, as a prelude and basis for the alleged violation, or the legal validity of the prescribed "proper" tax form, in terms of its format and content.

The Court ruled that there is no evidence that the City ever denied Appellant the right to file an administrative appeal in this case, and that the Appellant had been informed that he had a right to an administrative appeal after he filed a tax return. However, the Court failed to address the evidence in the record showing that the Tax Administrator, by failing in the first instance to prescribe forms which, in form and content, satisfy the mandatory requirements of Section 191.04, coupled with the Administrator's grossly misleading behavior in sending out alternative forms with directions to return them for purposes of claiming exemption, deprived the Appellant of procedural due process in relation to the City's initiation of a criminal prosecution based on Appellant's alleged failure to file the "proper" tax form. The Court of Appeals erred by failing to account for the fact, clearly shown in the record, that the prosecution of Appellant for failure to file a "proper" tax return, as prescribed by the city Tax Administrator, turned significantly on the arbitrary manner in which the Administrator exercised his discretionary authority relative to the act of prescribing the mandatory tax form.

The Court of Appeals further erred in failing to account for the evidence showing that the Administrator exceeded his authority by routinely exempting from filing those taxpayers determined to qualify for an exemption, and that such practice had been made known to Appellant at a time, and in a manner that significantly misled Appellant into reasonably

believing that, to comply, he was required to sign and return abbreviated forms provided by the Administrator expressly for that purpose.

In a concurring opinion, the Court of Appeals ruled that the Conneaut Codified Ordinance Section 191.04(a) makes clear, if you do not think you are obligated to pay tax, you must still file the return. However, the Court failed to address the substantial evidence in the record showing that the Conneaut Tax Administrator, by his written communications and practices, communicated precisely the opposite message to taxpayers, i.e., that upon an administrative finding of exemption, the taxpayer is thereby released from the obligation to file a return. The Court did express significant concern regarding the form notices sent to Appellant by the City of Conneaut, referring in particular to the fact that the form notices contained misleading statements including the following: "If any of the following exemptions apply, please so indicate and return this letter to the above address within the ten (10) day deadline." After affirming the jury verdict convicting the Appellant for failure to file the prescribed form, the Court ruled that the misleading notices should not form the basis of any prosecution for failure to file. Yet the record shows that the misleading notices had, in fact, formed the basis for the prosecution in this case, and that subsequent correspondence, supposedly intended to clear up the resulting confusion, failed to afford Appellant an avenue to comply without listing as "taxable income" the very income which Appellant sought to list as tax exempt. The City of Conneaut, by failing in the first instance to prescribe forms which, in form and content, satisfy the mandatory requirements of Section 191.04, thereby allowing the filer to claim an exemption where applicable, coupled with the Administrators grossly misleading behavior in sending out alternative forms with directions to return them for purposes of claiming exemption, deprived the

Appellant of procedural due process in relation to its initiation of a criminal prosecution based on Appellant's alleged failure to file the "proper" tax form.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1:

A municipal tax authority exceeds his lawful discretionary authority by selectively treating as exempt from filing a municipal income tax return those residents who the Administrator pre-determines as exempt from paying income tax, where such unlawful action by the Tax Administrator misleads a resident taxpayer into filing a form other than the "prescribed" form and in so doing deprives a resident taxpayer of a meaningful legal recourse via the administrative process, thereby exposing him to a criminal prosecution.

The Conneaut Tax Code clearly requires that "[e]very taxpayer ... shall make and file a return for the Applicable Tax Year with the Administrator on a form prescribed by the Administrator or on a generic form containing all information required by the Administrator's form." Codified Ordinances, § 191.04(a). As stated *supra*, the term taxpayer is inclusive of all residents who, having received some form of compensation from any source within the relevant tax year, are thereby made subject to the municipal income tax, regardless of whether they may be entitled to one or more of the enumerated statutory exemptions set forth in Codified Ordinances § 191.15. In contrast to the general duties and powers of the Tax Administrator related to the "administration, reexamination, and correction of returns and payments and to prescribe all forms necessary or useful in the administration of this [Tax Code]," see Codified Ordinances § 191.11(b), the Code contains no corresponding provision authorizing the Tax Administrator to grant, either categorically or on a case-by-case basis, an exemption from the mandatory obligation imposed on taxpayers to timely file an annual income tax return. In other words, the obligation to file a tax return arises directly from statute, and any correspondence,

pronouncement or other action by the Tax Administrator purporting to grants such an exemption from filing therefore constitutes an unlawful *ultra vires* act by that public official.

Furthermore, the Tax Administrator, in exercising his authority to “prescribe all forms necessary or useful in the administration of this [Tax Code],” is subject to a corresponding affirmative obligation, under Section 191.04(a) thereof, to prescribe a tax return form that “shall be designed so that Residents receiving no income taxable under Section 191.02 or receiving income exempted by Section 191.15 *may report such information, without filling out the remainder of the form.*” Codified Ordinances § 191.04(a). [emphasis added]

The undisputed record in this case reveals that the Conneaut Tax Administrator engaged in a practice whereby he purported to exempt, or treat as exempt, from the obligation to file a municipal income tax form those residents who he determined were entitled to one or more of the enumerated exemptions, *even while* the Tax Administrator referred for prosecution those residents who may have not submitted to him a “proper” income tax form; a document which, on its face, *afforded no means for Residents to provide information constituting a claim of exemption.* Thus, the Conneaut Tax Administrator engaged in a pattern of practice that both exceeded his authority by treating certain Residents as exempt from the mandatory filing obligation, and neglected his affirmative duty to format the prescribed tax form in a manner that clearly affords taxpayers the ability to claim any applicable exemptions.

Proposition of Law No. 2:

A municipal tax authority, whose arbitrary discretionary action relative to prescribing tax return forms, constituted the substantive basis for a criminal prosecution of a resident taxpayer for failure to file a municipal income tax return, must provide the resident a timely and meaningful opportunity to be heard with respect to such discretionary decision prior to instituting criminal prosecution.

The Ohio Constitution, in Article XIII, Section 6, provides as follows:

§ 13.06 Organization of cities, etc.

The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, *and restrict their power of taxation*, assessment, borrowing money, contracting debts and loaning their credit, *so as to prevent the abuse of such power.* [emphasis added]

With reference to the power of taxation reserved to municipalities, the General Assembly has chosen, as its primary means of imposing a restriction to prevent the abuse of such municipal taxing power, a statutory appeals mechanism whereby,

Whenever a tax administrator issues a decision regarding a municipal income tax obligation that is subject to appeal as provided in this section or in an ordinance or regulation of the municipal corporation, the tax administrator shall notify the taxpayer in writing at the same time of the taxpayer's right to appeal the decision and of the manner in which the taxpayer may appeal the decision. R.C. 781.11 ¶ 2

Any person who is aggrieved by a decision by the tax administrator *and who has filed with the municipal corporation the required returns or other documents pertaining to the municipal income tax obligation at issue in the decision* may appeal the decision to the board created pursuant to this section by filing a request with the board.R.C. 781.11 ¶ 3 [emphasis added]

These safeguard provisions are reproduced virtually verbatim in Conneaut Codified Ordinance §191.13 with the significant exception that the local ordinance omits the foregoing italicized phrase affording an appeal only to a person "who has filed the required returns or other documents pertaining to the income tax obligation at issue." The Ordinance instead extends the right of appeal to:

(c) any Person dissatisfied with any determination or ruling of the Administrator *made under the authority conferred by this chapter ...*” [emphasis added]

Therefore, even though the language of the local Ordinance is more inclusive with regard to the types of administrative decisions deemed to trigger a right of appeal, neither the state statute nor corresponding local Ordinance appear to offer an administrative appeal as a remedy for taxpayers aggrieved by any actions of the tax Administrator *that lie outside his lawful authority*. It thus can be concluded that when a local tax Administrator exercises discretion that is not in conformity with a statute delimiting his authority, and that thereby operates to mislead a taxpayer and to deprive him of otherwise available remedies, such as an administrative appeal that likely would be available but for the unlawful discretionary actions of the tax Administrator, the taxpayer’s substantive interests in conforming to the requirements of law and thus avoiding potential criminal liability are implicated and placed at risk.

The record in this case reveals that such *ultra vires* actions and omissions by the Conneaut Tax Administrator operated to deprive the Appellant of his ability to comply with his affirmative obligation to file a “prescribed” tax return form, in the manner contemplated by applicable law. As a result of these discretionary actions and omissions, the Appellant was given every reason to believe that he had a right to submit a valid claim of exemption via an alternative short form provided by the Tax Administrator, and in a manner that would produce a formal decision by the Administrator and allow him to utilize an available administrative appeals process, relative to his claim of exemption. In other words, the Appellant under these circumstances was led proceed in a manner that, for all intents and purposes based on the plain language of the statute, constituted compliance.

However, the Appellant incurred criminal liability for failure to file a tax return form designated as “proper” by the tax Administrator. Yet this same form contained serious facial

deficiencies relative to the unambiguous requirements of Section 191.04(a), the very Code provision under which the Appellant was charged.

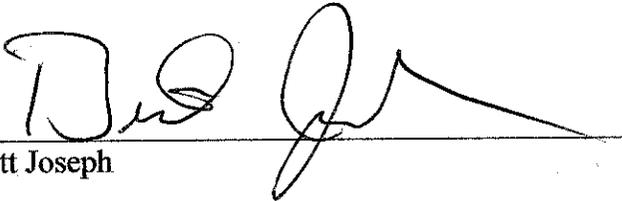
Under these circumstances, where a taxpayer is obligated under penalty of criminal sanction to file a “prescribed” tax return form, *it is implicit within the doctrine of procedural due process that the taxpayer is entitled to have prescribed to him a tax return form that comports with the relevant format and content requirements mandated by statute*, or else the taxpayer is entitled to be afforded an opportunity to be heard with respect to his claim that the form is deficient, and that specific formatting allowing for a claim of exemption must be included on the prescribed form, or any generic form filed in substitution for the prescribed form, in order to bring his municipal filing into compliance with applicable law.

The Court of Appeals, by ruling that no procedural due process was required as an antecedent to criminal prosecution in this case, misconstrued the record by apparently assuming that Appellant (and others similarly) could have avoided criminal liability by reserving any challenges to the sufficiency of the “prescribed” tax form to be raised in the context of a criminal jury trial. Yet no such opportunity to take this issue to the jury was provided by the trial court, and for this and the other reasons stated above, it is respectfully submitted that the ruling of the Court of Appeals was in error.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,
Brett R. Joseph, Counsel of Record

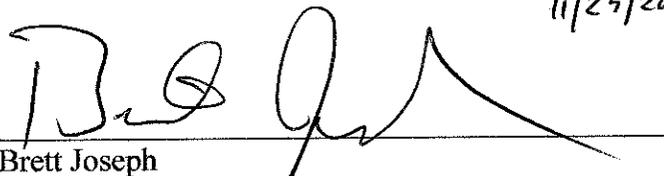
A handwritten signature in black ink, appearing to read "Brett Joseph", written over a horizontal line.

Brett Joseph

COUNSEL FOR APPELLANT,
RUDOLPH G. BABCOCK

Certificate of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellee, Luke Gallagher, Assistant Law Director, City of Conneaut, 294 Main Street, Conneaut, Ohio 44030.

A handwritten signature in black ink, appearing to read "Brett Joseph", written over a horizontal line.

Brett Joseph

COUNSEL FOR APPELLANT,
RUDOLPH G. BABCOCK

11/29/2010

COURT OF APPEALS

STATE OF OHIO

IN THE COURT OF APPEALS

COUNTY OF ASHTABULA

ELEVENTH DISTRICT

FILED
JUL 12 P 2:15

THE CITY OF CONNEAUT,

JUDGMENT ENTRY

Plaintiff-Appellee,

CASE NOS. 2009-A-0042
and 2009-A-0043

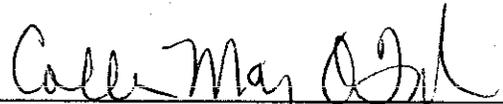
- vs -

RUDOLPH BABCOCK,

Defendant-Appellant.

For the reasons stated in the opinion of this court, the assignments of error are without merit. It is the judgment and order of this court that the judgment of the Conneaut Municipal Court is affirmed.

It is ordered that appellant is assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.


JUDGE COLLEEN MARY O'TOOLE

CYNTHIA WESTCOTT RICE, J., concurs,

TIMOTHY P. CANNON, J., concurs with Concurring Opinion.

COURT OF APPEALS

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO

FILED

2009 OCT 12 P 2:15

DAVID A. NEAD
CLERK OF COURTS
CRIMINAL PLEAS COURT
ASHTABULA CO., OH

THE CITY OF CONNEAUT,	:	OPINION
	:	
Plaintiff-Appellee,	:	CASE NOS. 2009-A-0042
	:	and 2009-A-0043
- vs -	:	
	:	
RUDOLPH BABCOCK,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeals from the Conneaut Municipal Court, Case Nos. 09 CRB 83 and 09 CRB 84.

Judgment: Affirmed.

David A. Schroeder, Conneaut Law Director, and *Luke P. Gallagher*, Assistant Conneaut Law Director, City Hall Building, 294 Main Street, Conneaut, OH 44030 (For Plaintiff-Appellee).

Brett R. Joseph, Joseph Law Services Co., LPA, 256 Main Street, Conneaut, OH 44030 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Rudolph Babcock, appeals from the August 12, 2009 judgment entry of the Conneaut Municipal Court, in which he was sentenced for failure to file city income tax returns.

{¶2} On March 6, 2009, appellee, the city of Conneaut ("City"), filed two complaints against appellant for failure to file city income tax returns for tax years 2006 (Case No. 09

CRB 83) and 2007 (Case No. 09 CRB 84), misdemeanors of the first degree, in violation of Section 191.04(a) of the city of Conneaut Income Tax Code. Appellant pleaded not guilty to the charges in both complaints at his initial appearance on March 17, 2009.

{¶3} Also, on March 17, 2009, appellant filed motions to dismiss both complaints, which were denied by the trial court on March 25, 2009.

{¶4} A jury trial was held on July 23, 2009.

{¶5} At the trial, Christine Brown ("Brown"), Moderator with the First Congregational United Church of Christ ("Church"), testified for the City that appellant provided ministerial services to the Church in 2006 and 2007 pursuant to a written "Call Agreement," which is a contract for services. Brown indicated that under the terms of the 2006 and 2007 contracts, appellant received a base annual salary of \$12,000 or \$13,000, an annual housing allowance of \$13,000, a car allowance of \$3,000, a hospital allowance, and three weeks paid vacation.¹

{¶6} Drusilla Bartone, Treasurer with the Church, testified for the City that as a result of appellant's employment with the Church, he was issued a 1099 Miscellaneous Income Tax Form for the years 2006 and 2007.

{¶7} Larry Gasch ("Gasch"), Income Tax Administrator for the City during the time periods at issue, testified for the City that appellant failed to file tax returns for 2006 and 2007, which were due on or before April 15, 2007 and April 15, 2008, respectively. According to Gasch, he sent two letters of inquiry for each of the tax years in question to appellant. Gasch indicated that he sent approximately four hundred such letters in 2006 and 2007 as a courtesy to taxpayers. Appellant sent back both letters, indicating that he

1. There is a discrepancy in the record as to whether appellant's base annual salary was \$12,000 or \$13,000.

was retired. Gasch then sent a third letter to appellant, explaining that the City was in possession of a 1099 showing that he had taxable income for the years at issue. Pursuant to a request made by appellant, Gasch sent him a certified copy of the city of Conneaut Income Tax Code. At no time during this process did appellant ever file the prescribed form for city income taxes for the tax years 2006 and 2007.

{¶8} John Williams ("Williams"), Finance Director for the City, testified for the City that his office operates with the current tax code as adopted by the City. Williams indicated that although appellant was required to file income tax returns for 2006 and 2007, he failed to do so.

{¶9} Judy Parlongo ("Parlongo"), a Trustee at the Church, testified for appellant that he made it clear to the Church that he was retired and would not come out of retirement.

{¶10} Following the trial, the jury found appellant guilty of both offenses charged in the complaints, failure to file city income tax returns for tax years 2006 (Case No. 09 CRB 83) and 2007 (Case No. 09 CRB 84), misdemeanors of the first degree, in violation of Section 191.04(a) of the city of Conneaut Income Tax Code.

{¶11} Pursuant to its August 12, 2009 judgment entry, the trial court sentenced appellant to the following: with respect to Case No. 09 CRB 83, appellant was ordered to pay a fine in the amount of \$1,000 plus court costs and to serve six months in jail, to be served intermittently; and with regard to Case No. 09 CRB 84, appellant was ordered to pay a fine in the amount of \$1,000 plus court costs and to serve six months in jail, consecutively to the sentence in Case No. 09 CRB 83 and intermittently. The trial court further ordered that appellant's intermittent jail sentence shall be served in twelve day blocks of time. The

trial court indicated that if appellant files a proper city income tax return, the balance of his jail sentence shall be suspended and he will not be required to serve any additional time. Appellant's sentence was stayed pending appeal. It is from that judgment that appellant filed timely appeals, asserting the following assignments of error for our review:²

{¶12} “[1.] The Trial Court committed prejudicial error by overruling [appellant's] pre-trial motion to dismiss predicated on grounds, *inter alia*, that [appellant] was prosecuted without first having been afforded his right to procedural due process of law; specifically, his right to receive timely, written notification of his right to an administrative appeal of the decision of the City Income Tax Administrator[.]”

{¶13} “[2.] The Trial Court committed prejudicial error by overruling [appellant's] pre-trial motion to dismiss for lack of ripeness, specifically, by rejecting [appellant's] affirmative defense that [appellee] prematurely charged him with failure to file income tax return, in a manner that effectively foreclosed [appellant's] right to seek a final administrative determination regarding his obligation to file, pursuant to applicable statutory administrative remedies provided under [Conneaut Codified Ordinance Section] 191.13(a-f)[.]”

{¶14} In his first assignment of error, appellant argues that the trial court erred by overruling his pre-trial motions to dismiss both complaints. Appellant maintains that he was prosecuted without first having been afforded his right to procedural due process, specifically his right to receive timely, written notification of his right to an administrative appeal of the decision of the City Income Tax Administrator.

{¶15} Appellant presents three issues under his first assignment of error:

2. This court, sua sponte, consolidated appellant's appeals, Case Nos. 2009-A-0042 and 2009-A-0043 for purposes of briefing and disposition.

{¶16} “[1.] Did [appellee], through its Income Tax Administrator, deprive [appellant] of procedural due process by failing to conform its exercise of taxing power to mandatory procedural requirements specified in both state statute and local ordinance, constituting an abuse of discretion?

{¶17} “[2.] Did the trial court commit prejudicial error by failing to determine, upon a pre-trial motion to dismiss, that [appellee] failed to provide a statutorily-mandated notice to [appellant] of his right to administrative appeal of the determination of the Income Tax Administrator, and that such failure constituted a denial of [appellant’s] right to procedural due process?

{¶18} “[3.] Did the trial court err by failing to determine that the denial of [appellant’s] procedural due process rights, coupled with evidence showing the Administrator’s routine use of misleading and deceptive correspondence, unnecessarily subjected [appellant] to the ordeal of an unexpected and avoidable criminal prosecution, thereby resulting in a deprivation of [appellant] of his substantive, constitutionally protected rights to liberty and property?”

{¶19} Because appellant’s three issues are interrelated, we will address them together.

{¶20} Preliminarily, we note that we review a trial court’s decision on a motion to dismiss pursuant to a de novo standard of review. *State v. Wendel* (Dec. 23, 1999), 11th Dist. No. 97-G-2116, 1999 Ohio App. LEXIS 6237, at 5. A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court’s decision. *Brown v. Scioto Cty. Bd. Of Commrs.* (1993), 87 Ohio App.3d 704, 711.

{¶21} Conneaut Codified Ordinance Section 191.04(a) states:

{¶22} “Every Taxpayer, on or before each Annual Return Due Date, shall make and file a return for the Applicable Tax Year with the Administrator on a form prescribed by the Administrator or on a generic form containing all of the information required by the Administrator’s form. Such returns shall be made and filed by Employees regardless of whether an Employer has withheld all or a portion of the Employee’s City income tax liability. The return form prescribed by the Administrator shall be designed so that Residents receiving no income taxable under Section 191.02 or receiving income exempted by Section 191.15 may report such information, without filling out the remainder of the form.”

{¶23} We note that the instant case involves a failure to file a tax return. Appellant does not cite any authority that prohibits the City from instituting criminal action for failure to comply with the foregoing ordinance. Nothing prohibits the City from enforcing the foregoing ordinance until an alleged administrative appeal has been conducted. The City gave appellant the opportunity to be heard at a meaningful time and manner. Appellant exercised his constitutional right to a jury trial and was afforded every constitutional protection throughout the entire process. Appellant’s procedural due process rights were fully protected by the trial court, which provided him a right to a jury trial.

{¶24} Although appellant alleges that the City failed to comply with posting its tax ordinances, rules, procedures, and forms on the Internet, no evidence of that sort was adduced at trial. The events which appellant claims resulted in his loss of procedural due process occurred after the dates the criminal offenses occurred, i.e., the days after the due dates for the filing of income tax returns. In addition, although the City’s forms appear to

improperly indicate that a retiree falls under an exemption, the record establishes that appellant had knowledge that the City required him to file income tax returns, specifically with respect to the City's November 28, 2007 letter to appellant.

{¶25} Also, we know of no liberty interest in an administrative procedure for tax appeals. The record establishes that the trial court informed appellant that he is entitled to an administrative review as to whether he owes taxes after he files his income tax returns, which has not yet occurred. Appellant was provided a certified copy of the city of Conneaut Income Tax Code. However, he never filed an administrative appeal in this case. There is no evidence that the City ever denied him the right to do so.

{¶26} Appellant's first assignment of error is without merit.

{¶27} In his second assignment of error, appellant contends that the trial court erred by overruling his pre-trial motion to dismiss for lack of ripeness, specifically by rejecting his affirmative defense that the City prematurely charged him with failure to file income tax returns in a manner that foreclosed his right to seek a final administrative determination regarding his obligation to file, pursuant to remedies under Conneaut Codified Ordinance Section 191.13(a)-(f).

{¶28} Appellant presents one issue under his second assignment of error:

{¶29} "Did the trial court err by allowing the criminal case to proceed to trial, notwithstanding the availability of administrative remedies mandated by statute and local ordinance, respectively, and which [appellant] at the time of being criminally charged, was actively seeking to utilize as a matter of right?"

{¶30} Conneaut Codified Ordinance Section 191.13 provides:

{¶31} "(a) A Board of Review, hereafter called the Board, is hereby created. The Board shall be composed of the City Director of Law, the Director of Finance and the President of Council. All rules, regulations, and amendments or changes to this chapter that are adopted by the Administrator under the authority conferred by this chapter must be approved by the Board before the same become effective. After approval, such rules, regulations, and amendments or changes must be filed with the Clerk of Council and are open to public inspection.

{¶32} "(b) Whenever the Administrator issues a decision regarding a City income tax obligation that is subject to appeal, the Administrator shall notify the Taxpayer at the same time of the Taxpayer's right to appeal the decision and the manner of such appeal.

{¶33} "(c) Any Person dissatisfied with any determination or ruling of the Administrator made under the authority conferred by this chapter may appeal to the Board in writing within thirty (30) days from the announcement of such ruling or decision stating why the decision should be deemed incorrect or unlawful.

{¶34} "(d) The Board shall schedule a hearing within forty-five (45) days after receiving an appeal pursuant to subsection (c) hereof, unless the Person appealing waives a hearing. The Board may affirm, reverse, or modify any determination or ruling appealed and shall issue a decision on the appeal within ninety (90) days after the final hearing on the appeal, and send notice of its decision by ordinary mail to the Taxpayer within fifteen (15) days after the date of its decision.

{¶35} "(e) A majority of the members of the Board will constitute a quorum. The Board may adopt its own procedural rules and shall keep a record of its transactions.

{¶36} "(f) All hearings by the Board may be conducted privately and the provisions of Section 191.12 with reference to the confidential character of information required to be disclosed by this chapter shall apply to all such matters as may be heard by the Board on appeal. ****"

{¶37} In the case at bar, the record establishes that appellant received taxable income and resided within the City limits with respect to the tax years at issue. Again, even assuming arguendo that appellant had a right to an administrative appeal before filing an income tax return, he never requested and was never denied an administrative appeal. During this case, appellant was informed that he had a right to an administrative appeal after he filed a tax return, which right presently still exists.

{¶38} Appellant's second assignment of error is without merit.

{¶39} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Conneaut Municipal Court is affirmed. It is ordered that appellant is assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

CYNTHIA WESTCOTT RICE, J., concurs,

TIMOTHY P. CANNON, J., concurs with Concurring Opinion.

TIMOPHY P. CANNON, J., concurring.

{¶40} I concur with the judgment of the majority, but write separately for the following two reasons.

{¶41} First, R.C. 718.11 does not apply here. As noted by the majority, appellant was not charged with failure to pay an assessed tax. As Conneaut Codified Ordinance Section 191.04(a) makes clear, if you do not think you are obligated to pay tax, you must still file the return. Appellant bases his argument on the failure of the city to afford an administrative review as required by R.C. 718.11. However, that administrative review is in regard to “a decision regarding a municipal income tax obligation ***.” The statute further provides that it applies to “[a]ny person who is aggrieved by a decision by the tax administrator *and who has filed with the municipal corporation the required returns ***.*” (Emphasis added.) Id. Appellant never invoked the requirements of the statute because he never filed the required returns.

{¶42} Second, I have a significant concern regarding the form notices sent to appellant by the city of Conneaut. There were at least two forms sent to appellant. The form dated November 6, 2007, directs appellant to complete the form and return it if “you feel this notice is in error.” There are several potential items to check off at the bottom of the form. These items are “Married, Divorced, Retired, Other (explain), Military, Student, Under 18 Yrs. of age, and Non-Resident.” Appellant assumed these were exemptions, checked “Retired,” and returned the form. A second form was sent on November 17, 2007, again requesting a reply. However, this form significantly misleads the taxpayer. It states: “If any of the following exemptions apply, please so indicate and return this letter to the above address within the ten (10) day deadline.” The same options are given at the bottom of this form. The problem is these are not exemptions from filing Conneaut income tax

returns. It is difficult to know why these items are listed. The actual exemptions are listed in Conneaut Codified Ordinance Section 191.15. A taxpayer is *not* exempt from filing a city income tax return because they are married, divorced or retired. Why the form suggests this is inexplicable.

{¶43} The City Income Tax Administrator seems to have somewhat cleared up the issue with his letter dated November 28, 2007. After receiving that letter, there should have been no question about the obligation to file a return. The jury obviously did not feel the defendant was justified in failing to file a return, but the misleading notices should not form the basis of any prosecution for failure to file.