

IN THE SUPREME COURT OF OHIO

AT&T COMMUNICATIONS OF)
 OHIO, INC.,)
)
 Plaintiff-Appellant,)
)
 vs.)
)
 NASSIM M. LYNCH,)
)
 Defendant-Appellee.)

Case No: 11-0337
 On Appeal from the Cuyahoga
 County Court of Appeals,
 Eighth Appellate District
 Court of Appeals
 Case No. CA-09-094320

MEMORANDUM IN SUPPORT OF JURISDICTION
 OF APPELLANT NASSIM M. LYNCH

Robert J. Triozzi (001653)
 Director of Law
 Linda L. Bickerstaff (0052101) (COUNSEL OF RECORD)
 Assistant Director of Law
 City of Cleveland Department of Law
 205 W. St. Clair Avenue
 Cleveland, Ohio 44113
 (216) 664-4406
 (216) 420-8299 (facsimile)
 lbickerstaff@city.cleveland.oh.us

COUNSEL FOR APPELLANT,
 NASSIM M. LYNCH

Richard C. Farrin (0022850)
 McDonald Hopkins, LLC
 41 S. High Street, Suite 3550
 Columbus, Ohio 43215
 (614) 458-0035
 (614) 458-0028 (facsimile)
 rfarrin@macdonaldhopkins.com

COUNSEL FOR APPELLEE,
 AT&T COMMUNICATIONS OF OHIO, INC.

RECEIVED
 MAR 02 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

FILED
 MAR 02 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION	1
STATEMENT OF THE CASE AND FACTS	4
ARGUMENT IN SUPPORT OF PROPOSITION OF LAW	7
<u>Proposition of Law:</u> In a Chapter 2506 administrative appeal, the filing of a single notice of appeal vests jurisdiction in the common pleas court over the final decision of the administrative body and all issues therein without the necessity of each party filing a separate notice of appeal.	7
A. Jurisdiction of the common pleas court.	7
B. A R.C. Chapter 2506 appeal.	8
C. Review is "virtual de novo examination."	10
D. Court rules reflect de novo nature.	12
E. Such appeals governed by Civil Rules.	14
F. Cross-appeal requirement not applicable.	15
CONCLUSION	15
CERTIFICATE OF SERVICE	
APPENDIX	<u>Appx Page</u>
Judgment Entry of the Cuyahoga County Common Pleas Court, Case No. CV-06-608252 dated Apr. 4, 2007	Exhibit 1
Judgment Entry and Opinion of the Cuyahoga County Common Pleas Court, Case No. CV-06-608252 dated Nov. 3, 2009	Exhibit 2
Judgment Entry and Opinion of the Cuyahoga County Court of Appeals, Case No. CA-09-094320 dated Dec 16, 2010	Exhibit 3

APPENDIX

Appx Page

Judgment Entry of the Cuyahoga County Court of Appeals, Case No. CA-09-094320 dated Jan 27, 2011	Exhibit 4
Judgment Entry and Opinion of the Cuyahoga County Court of Appeals, Case No. CA-09-094320 dated Jan 27, 2011	Exhibit 5

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

This cause presents a critical issue for the future of R.C. Chapter 2506 appeals: whether the filing of a single notice of appeal grants jurisdiction in the common pleas court to review the entire decision of the administrative body without the necessity of each party filing a separate notice of appeal.

In this case, the common pleas court permitted the appellee in a Chapter 2506 appeal to file cross-assignments of error pursuant to its local rule which specifically authorized an appellee in an administrative appeal to "file assignments of error on his own behalf" without qualification. The court of appeals, however, held that the common pleas court did not have jurisdiction to consider such cross-assignments of error where the appellee had not appealed despite the fact that the cross-assignments of error involved matters that had been fully raised and determined in the administrative body.

The decision of the court of appeals threatens to limit R.C. Chapter 2506 appeals much like traditional error proceedings which was never intended by the Ohio General Assembly. Although labeled an "appeal" and commenced initially by the filing of a notice of appeal, the action in the common pleas court under R.C. 2506.01 allowing review of final decisions of administrative officers and bodies of political subdivisions is not a traditional error proceeding.

The implications of the decision of the court of appeals affect every Chapter 2506 appeal in Ohio, and threaten the rights of the parties thereto. R.C. 2506.03

clearly provides that "[t]he hearing of such appeals shall proceed as in the trial of a civil action[.]" This Court in *Cincinnati Bell, Inc. v. Glendale* (1975), 42 Ohio St.2d 368, 370, 328 N.E.2d 808 not only noted that a Chapter 2506 appeal "differs substantially from that of appellate courts in other contexts" but that it "often in fact resembles a de novo proceeding[.]" When an appellant files a notice of appeal to the common pleas court, it invokes said court's jurisdiction over both parties and the case and gives the common pleas court authority to fully adjudicate all issues that were before the administrative body. This point urgently needs to be made by this Court.

Apart from this very serious concern, which makes this case one of great public interest, the decision of the court of appeals has broad general significance. Chapter 2506 appeals can be taken from an administrative officer or body of any Ohio political subdivision which includes those of towns, municipalities, counties, school districts, regional transit authorities, metropolitan housing authorities, etc. Such appeals embrace all types of decisions which are too numerous to list. R.C. 2506.01 grants the court of common pleas jurisdiction to hear appeals of final decisions from such administrative officers or bodies. While the role of the court of common pleas in an administrative appeal pursuant to this provision may be limited to the authority provided by statute, such role is not "appellate jurisdiction" which resides in this Court and the courts of appeals. The fact that such appeals allow for the liberal introduction of new evidence and the cross-examination of witnesses clearly illustrates that it is not a true error proceeding.

The decision of the court of appeals sets a precedent that improperly equates a

final decision of an administrative body to a court judgment by imposing a cross-appeal requirement to an administrative appeal. Under this rule, any party to an administrative proceeding that is appealed by the other party pursuant to R.C. Chapter 2506 must likewise appeal or lose any claims they might have against the appealing party. No authority supports this conclusion. Further, in a Chapter 2506 appeal, the common pleas court is hearing the matter as a court of "original" and not "appellate" jurisdiction.

It cannot be disputed that the plain language of R.C. 2506.01 states that "every final [] decision" "may be reviewed" by the common pleas court; it does not state "every final decision in whole or in part may be reviewed." Nothing in Chapter 2506 authorizes any kind of so-called "limited" appeal. There is also nothing in Chapter 2506 suggesting that there might be "multiple" appeals dealing with the same decision of an administrative body. And, unlike in cases before the courts of appeals or this Court, an appellee has no right or option to file a cross-appeal in a Chapter 2506 appeal.

Moreover, since R.C. Chapter 2506 makes no provision for a cross-appeal, the result of such rule would mean that a second appeal by any party is governed by the same rules and time limits as the initial appeal. This clearly creates problems for a party who does not wish to appeal unless his opponent appeals because such party has substantially prevailed in the administrative proceeding. True appellate courts like this Court and the courts of appeals have provisions for cross-appeals which allow opposing parties' additional time to appeal. *See* S. Ct. Prac. R. 2.2(A)(2)(a); App. R. 4(B)(1). There is no provision for the filing of a cross-appeal in a R.C. Chapter 2506 appeal because none is needed.

The judgment of the court of appeals has great general significance also because it means that an appellee at the common pleas court level has fewer rights in regards to protecting such appellee's interests than an appellee at the intermediate appellate level. An appellee at the intermediate appellate level is clearly permitted to file a cross-appeal. An appellee at that level is also provided a limited right under R.C. 2505.22 to file assignments of error even where such appellee has not filed a notice of appeal.

Finally, this case involves a substantial constitutional question. By finding that the common pleas court did not have jurisdiction over matters that had clearly been part of the administrative body's final decision, the judgment of the court of appeals offends both the due course of law and access to the courts provisions of the Ohio Constitution. *See* Section 16, Article I, Ohio Constitution. The court of appeals' judgment results in an improper denial of judicial review.

In sum, this case puts in issue the question of whether an appellee in a Chapter 2506 appeal must file a notice of appeal to assert the same claims that the appellee had raised in the administrative body where the opposing party appeals. To prevent any misunderstanding as to how a R.C. Chapter 2506 appeal operates, this Court must grant jurisdiction to hear this case and review the erroneous and dangerous decision of the court of appeals.

STATEMENT OF THE CASE AND FACTS

This case arises from a decision issued by the Board of Review for the City of Cleveland ("Board"). It is a tax refund case where the issue before the Board was Appellee, AT&T Communications of Ohio Inc.'s ("AT&T") city income tax liability for tax

years ("TY") 1999-2002. Appellant, Nassim M. Lynch, the City of Cleveland's Tax Administrator, issued a Ruling finding that the refund claim for TY1999 was untimely since it was brought beyond the statute of limitations and that the refund claims for TY2000-2002 had to be adjusted and reduced because AT&T improperly claimed deductions for interest income in calculating its tax liability and further that such tax refund had to be reduced by withholding tax owed by AT&T.

AT&T appealed the Tax Administrator's Ruling to the Board. The Board issued a decision that affirmed in part and reversed in part the Ruling. The Board affirmed the Tax Administrator's Ruling as to the statute of limitations issue. The Board, however, reversed the Ruling as to the interest income and withholding tax issues.

AT&T then appealed the Board's Decision to the Common Pleas Court for Cuyahoga County. In accordance with the Common Pleas Court's Local Rule 28, the Tax Administrator as Appellee, asserted his own assignments of error as to the interest income and withholding tax issues. AT&T filed a motion to strike the Tax Administrator's assignments of error which motion challenged the Tax Administrator's right to assert assignments of error on his own behalf where he had not filed an appeal from the Board's Decision.

After separate briefing on the issue, the Common Pleas Court entered a judgment entry denying AT&T's motion to strike. *See* Judgment Entry of the Cuyahoga County Common Pleas Court dated April 3, 2007 (Appendix, Exh. 1).

Thereafter, the Common Pleas Court below entered a judgment and opinion affirming in part and reversing in part the decision of the Board. Specifically, the

Common Pleas Court found that” (i) “the Board correctly denied AT&T’s request for refund for tax year 1999 because the statute of limitations period for filing the refund claim had expired;” (ii) the Board erred in finding that AT&T’s so-called “interest” income met the definition of intangible income that could not be taxed by municipalities; and (iii) “the Board erred in granting AT&T’s request for [] refund” without reduction for the withholding tax owed. *See* Judgment Entry and Opinion dated November 3, 2009, slip op. at 5; 10; 12 (Appendix, Exh. 2).

After AT&T appealed, the Eighth District Court of Appeals affirmed in part and reversed in part the Common Pleas Court decision. The Eight District affirmed as to the statute of limitations issue but reversed as to the interest income and withholding tax issues finding that the Common Pleas Court lacked jurisdiction to consider the Tax Administrator’s cross-assignments of error because he did not separately appeal from the Board’s decision. *See* Opinion and Judgment dated December 16, 2010 (Appendix, Exh. 3). In reaching the latter conclusion, the Eighth District held that R.C. 718.11 required the Tax Administrator to file a notice of appeal. *See id* slip op. at 15.

The Tax Administrator filed an application for reconsideration since (among other things) the language the Court relied on in R.C. 718.11, which provided parties before local boards of income tax review an option to appeal to either the common pleas court or state board of tax appeals, was not included in the statute until 2003 (after the tax years at issue here) and only effective for tax years 2004 and thereafter. This new language was the result of an amendment. *See* Am. Sub. H.B. 95, 125th General Assembly, effective June 26, 2003. Prior to such amendment, nothing in R.C. 718.11

addressed appeals of such local boards' decisions at all. *See id.*

The Eighth District granted the application for reconsideration, vacating its original opinion and issued its final opinion. *See* Judgment Entry dated January 27, 2011 (Appendix, Exh. 4). While the Eighth District acknowledged that the "Court erroneously relied on statutory language inapplicable to the taxable years at issue," it did not change its position that the Tax Administrator could not file cross-assignments of error where he had not appealed the Board's decision. *See* Judgment Entry and Opinion dated January 27, 2011 (Appendix, Exh. 5).

The Court of Appeals erred in ruling that the Common Pleas Court lacked jurisdiction to consider the Tax Administrator's cross-assignments of error.

In support of his position on this issue, the Tax Administrator presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: In a Chapter 2506 administrative appeal, the filing of a single notice of appeal vests jurisdiction in the common pleas court over the final decision of the administrative body and all issues therein without the necessity of each party filing a separate notice of appeal.

A. Jurisdiction of the common pleas court.

The jurisdiction of the common pleas court is clear: "The Courts of Common Pleas shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law." Article VI, Section 4(B) of the Ohio Constitution. Under the Ohio Constitution, only the General Assembly has the power to grant jurisdiction to the common pleas court to review proceedings of administrative officers and agencies. *See City of*

Englewood v. Turner (2006), 168 Ohio App.3d 41, 45, 2006-Ohio-2667 ¶16, 858 N.E.2d 431, 434.

The review of proceedings of administrative officers and agencies authorized by the Ohio Constitution, however, is not "appellate" jurisdiction. "The [review of proceedings] provision is generally held to mean that the jurisdiction of the common pleas court is fixed by statute." *Green v. State Bd. of Registration for Prof'l Eng'rs & Surveyors*, Green App. No. 05CA121, 2006-Ohio-1581, at ¶18 (citing *Mattone v. Argentina* (1931), 123 Ohio St 292, 175 N.E. 6031).

B. A R.C. Chapter 2506 administrative appeal.

In R.C. Chapter 2506, the Ohio General Assembly granted the court of common pleas jurisdiction to review final orders or decisions of administrative officers and agencies of political subdivisions. Specifically, R.C. 2506.01 provides in pertinent part:

Except as ... modified by this section and sections 2506.02 to 2506.04 of the Revised Code, every final order, adjudication or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court ... as provided in Chapter 2505. of the Revised Code.

R.C. 2506.01 provides that R.C. Chapter 2505 applies except to the extent it is modified by Chapter 2506. As this Court noted, "R.C. Chapter 2505 applies to appeals from judgments of trial courts [while] R.C. Chapter 2506, was created by the General Assembly to specifically address appeals to the Court of Common Pleas from orders of administrative agencies." *Smith v. Chester Township Board of Trustees* (1979), 60 Ohio St.2d 13, 16, 396 N.E.2d 743, 746. Although R.C. Chapter 2505 applies to R.C. Chapter

2506 appeals, it is clear that, the provisions of R.C. 2506.01-2506.04 control and take precedence in regard to the procedure of such administrative appeals.

While R.C. 2506.01 grants the common pleas court authority to entertain administrative appeals, R.C. 2506.02-2506.04, describe the operation of such appeals. Section 2506.02 requires the administrative body to file "a complete transcript" with the court. Section 2506.03 then provides that "[t]he hearing of such appeals shall proceed as in the *trial* of a civil action, but [that] the court shall be confined to the transcript." (Emphasis added.) At the conclusion of the *trial*, R.C. 2506.04 authorizes the court to determine whether the decision below is unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by a preponderance of substantial, reliable and probative evidence on the whole record.

Although R.C. 2506.01-2506.04 prescribe the operation of a R.C. Chapter 2506 appeal, they do not address how such appeals are perfected. R.C. 2505.07 provides that an appeal must be perfected within 30 days after entry of a final order of the administrative board. R.C. 2505.04 explains that "[a]n appeal is perfected when a written notice of appeal is filed ... in the case of an administrative-related appeal, with the administrative officer, agency, board, department, tribunal, commission or other instrumentality involved." Unlike under the appellate rules, there is no requirement that the notice of appeal either (i) "specify the party or parties taking the appeal" or (ii) designate the "part" of the order "appealed from." *See* App. R. 3(D). There is also no provision for a cross-appeal or any suggestion that there might be "multiple" appeals as there are in the appellate rules. *See* App.R. 3(C) and App. R. 4(B)(1).

Once a notice of appeal is filed with the administrative body, R.C. Chapter 2506.01 vests jurisdiction in the common pleas court to review the final decision of such administrative body and all its component parts. As noted, this is supported by the plain language of R.C. 2506.01 ("every final [] decision" "may be reviewed;" not "every final decision in whole or in part"). The Common Pleas Court below was correct to exercise jurisdiction over the interest income and withholding tax issues since they were part of the Board's final decision. The Court of Appeals erroneously held otherwise improperly treating this case like it was a traditional error proceeding.

C. Review is "virtual de novo examination."

As this Court has explained, "when a party brings a Section 2506 appeal a virtual *de novo* examination of the record is conducted by the [common pleas] court pursuant to R.C. 2506.04." *Petition to Annex 320 Acres to South Lebanon v. Doughman* (1992), 64 Ohio St.3d 585, 594, 597 N.E.2d 463, 470 (italics in original). Such appeal

resembles a *de novo* proceeding [] [because] R.C. 2506.03 specifically provides that an appeal pursuant to R.C. 2506.01 'shall proceed as in the trial of a civil action,' and makes liberal provision for the introduction of new or additional evidence[] [and] R.C. 2506.04 requires the court to examine the 'substantial, reliable and probative evidence on the whole record,' which in turn necessitates both factual and legal determinations.

Cincinnati Bell, Inc. v. Glendale (1975), 42 Ohio St. 2d 368, 370, 328 N.E.2d 808, 809.

A trial is defined as "[a] judicial examination and determination of the issues between parties to [an] action." Black's Law Dictionary 435 (6th ed. 1990). A

"[h]earing de novo" is defined as follows:

Generally, a new hearing or a hearing for the second time, contemplating an entire trial in same manner in which matter was originally heard and a review of previous hearing. Trying matter anew the same as if it had not been heard before and as if no decision had been previously rendered. *On hearing "de novo" court hears matter as court of original and not appellate jurisdiction.*

Black's Law Dictionary 721 (6th ed. 1990) (citations omitted) (emphasis added). *See also Beker Industries Inc. v. Georgetown Irrigation Dist.*, (Idaho 1980) 101 Idaho 187, 190, 610 P.2d 546, 549 ("The term 'de novo' generally means a new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which the matter was heard and a review of previous hearing"); *Collier & Wallis, LTD v. Astor*, (Cal. 1937) 9 Cal. 2d 202, 205, 70 P.2d 171, 173 ("A hearing de novo literally means a new hearing, or a hearing the second time. Such a hearing contemplates an entire trial of the controversial matter in the same manner in which the same was originally heard"); *Farmingdale Supermarket, Inc. v. United States*, 336 F.Supp. 534, 536 (D. N.J. 1971) ("A trial 'de novo' means trying the matter anew, the same as if it had not been heard before and as if no decision had been previously rendered"). *See also* Editorial Note, *De Novo Appeals from Municipal Courts to Common Pleas Courts in Ohio*, 17 Cin. L. Rev. 159 (1948) (referring to an "appeal de novo" as a "new trial").

A de novo proceeding therefore is nothing more or less than a trial of the controverted matter that had been before the administrative body. It is not a limited hearing but a complete trial of that controversy. The phrase "de novo," however, also contemplates that the court has the authority to "make an independent determination of the issues." *United States v. First City National Bank of Houston* (1967), 386 U.S.

361. A Chapter 2506 appeal is not actually "de novo" because the common pleas court is not authorized with the full power to hear and determine the controversy as if it had never been before the administrative body since the court's standard of review is limited by R.C. 2506.04 to determining whether the decision of the administrative body was unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by a preponderance of substantial, reliable and probative evidence on the whole record.

D. Court rules reflect de novo nature.

It is also important to understand that a Chapter 2506 appeal only requires a hearing. *See* R.C. 2506.03. This hearing may be limited to a review of the record. *See Ohio Motor Vehicle Dealers Bd. v. Central Cadillac Co.* (1984), 14 Ohio St.3d 64, 67, 471 N.E.2d 488, 492 ("R.C. 119.12 requires only a hearing. The hearing may be limited to a review of the record, or, at the judge's discretion, the hearing may involve the acceptance of briefs and argument and/or newly discovered evidence"). Because administrative appeals represent a special category of case for common pleas courts, some common pleas courts have adopted local rules to address such appeals. As one Ohio appellate court explained such local rules function "to implement the appellate hearing process in the common pleas court." *Sepich v. W.C. Bell* (Feb. 8, 1988), 5th Distr. No. CA-7350, 1988 WL 17155 at *3.

Local Rule 28 of the Cuyahoga County Court of Common Pleas, Rules of the General Division, deals with administrative appeals and provides in pertinent part:

Rule 28.0 APPEALS TO THE COMMON PLEAS COURT

Except as otherwise provided by specific rules or statutes,
all cases filed by way of appeal from administrative

agencies, except Workers' Compensation cases, *shall be governed* by the same procedure.

(A) Within twenty (20) days after the filing of a complete transcript (of all the original papers, testimony and evidence offered, heard and taken into consideration in issuing the order appealed from) with the Clerk of Common Pleas Court, appellant shall file his assignments of error and brief.

(B) Within fifteen (15) days after filing of appellant's brief, appellee shall file his brief in opposition, and *may file* assignments of error on his own behalf.

...

Rule 19 of the Local Rules of Summit County Common Pleas Court, Rules of Practice and Procedure of the Court of Common Pleas states, in pertinent part,

Rule 19 APPEALS TO COURT OF COMMON PLEAS FROM ADMINISTRATIVE AGENCIES

19.01 Scope of Rule. All appeals to the Common Pleas Court provided in R.C. 119.12 and R.C. *Chapter 2506* from administrative agencies shall be governed by this Rule.

...

19.03 Time Table for Appeal. In all appeals where no additional evidence is required, the *case* shall be submitted to the Court on briefs on the following schedule;

...

(B) **Appellee's Brief.** Within thirty (30) days after the filing of the appellant's brief, the appellee shall file its brief and assignments of error, if any.

...

Rule 21 of the Local Rules of Court, Stark County Common Pleas Court, reads, in pertinent part:

Gen R 21 APPEALS TO THE COURT OF COMMON PLEAS FROM ADMINISTRATIVE AGENCIES

21.01 In all appeals to the Court of Common Pleas provided in Section 119.12 of the Ohio Revised Code and in *Chapter*

2506 of the Ohio Revised Code from administrative agencies, the time for filing the brief shall be as follows:

...
(B) Within twenty (20) days after the appellant's brief has been filed, the appellee shall file its brief and assignments of error, if any.

...
The right of an appellee to assign cross-errors can be determined by rule of court. *See* 4 Corpus Juris Secundum (2007) 650, Appeal and Error, Section 718. The local rules described above give an appellee the right to assign cross-assignments of error in a Chapter 2506 administrative appeal. Such rules reflect an understanding of the de novo nature of the common pleas courts' review in such appeals.

E. Such appeals governed by Civil Rules.

While in an administrative appeal the common pleas court acts similar to an appellate court, it is still nevertheless, a trial court of original jurisdiction where the Ohio Rules of Civil Procedure are clearly applicable except to the extent limited by Civ. R.

1(C). Rule 1(C) provides that:

These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment, order or ruling ... [or] (7) in all other special statutory procedures; provided, that where any statute provides for procedure by a general or specific reference to the statutes governing procedure in civil actions such procedure shall be in accordance with these rules.
(Emphasis added.)

The fact that R.C. 2506.01 provides that "[t]he appeal shall proceed as in the trial of a civil action" makes clear that the civil rules are generally applicable to such appeals.

How does a cross-assignment of error in a Chapter 2506 appeal differ from a counterclaim in any other civil action? It does not.

F. Cross-appeal requirement not applicable.

The cross-appeal requirement imposed in traditional error proceedings is simply a rule of practice (and not jurisdictional) that "[a] party who has not sought review by appeal or writ of error will not be heard in an appellate court to question the correctness of the decree of the lower court." *Langnes v. Green* (1931), 282 U.S. 531, 538 (quoting *Federal Trade Comm. v. Pacific Paper Assn.* (1927), 273 U.S. 52, 66).

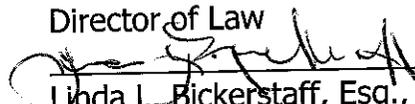
If allowed to stand, the decision of the court of appeals would elevate common pleas courts to appellate courts and administrative bodies to courts, denying many appellees their day in court. But common pleas courts are not "appellate courts" and these administrative officers and bodies are not "courts" at all. The requirement of a cross-appeal has no application to an administrative appeal. Further, clearly, implicit in a cross-appeal requirement is that a provision exist for asserting a cross-appeal which certainly is not the case in a R.C. Chapter 2506 appeal. The decision by the Eighth District violates the open court's provision of the Ohio Constitution.

CONCLUSION

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

Respectfully submitted,
Robert J. Triozzi, Esq., #0016532
Director of Law

By:


Linda L. Bickerstaff, Esq., #0052101
Assistant Director of Law

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, AT&T Communications of Ohio, Inc., Richard C. Farrin, Esq., McDonald Hopkins, LLC, 41 S. High Street, Suite 3550, Columbus, Ohio 43215 on March 1, 2011.



Linda L. Bickerstaff,
Assistant Director of Law

Attorney for Appellee,
Income Tax Administrator, Nassim M. Lynch

APPENDIX

EXHIBIT 1



44680272

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**



AT & T COMMUNICATIONS OF OHIO INC.
Plaintiff

NASSIM M. LYNCH
Defendant

Case No: CV-06-608252

Judge: PETER J CORRIGAN

JOURNAL ENTRY

APPELLANT'S MOTION TO STRIKE IS DENIED.

Judge Signature

04/03/2007

04/03/2007

VOL 3842 PG0729

RECEIVED FOR FILING
04/04/2007 08:40:51
By: CLKRM
GERALD E. FUERST, CLERK

APPENDIX

EXHIBIT 2

CASE NO. 608252

ASSIGNED JUDGE Peter J. Conaghan

AT + T

VS Lynch

- | | | | |
|--|--|--|--|
| <input type="checkbox"/> 02 REASSIGNED | D
I
S
P
O
S
I
T
I
O
N | <input type="checkbox"/> 81 JURY TRIAL | <input type="checkbox"/> 89 DIS. W/PREJ. |
| <input type="checkbox"/> 03 REINSTATED (C/A) | | <input type="checkbox"/> 82 ARBITRATION DECREE | <input type="checkbox"/> 91 COGNOVITS |
| <input type="checkbox"/> 04 REINSTATED | | <input type="checkbox"/> 83 COURT TRIAL | <input type="checkbox"/> 92 DEFAULT |
| <input type="checkbox"/> 20 MAGISTRATE | | <input type="checkbox"/> 85 PRETRIAL | <input type="checkbox"/> 93 TRANS TO COURT |
| <input type="checkbox"/> 40 ARBITRATION | | <input type="checkbox"/> 86 FOREIGN JUDGMENT | <input type="checkbox"/> 95 TRANS TO JUDGE |
| <input type="checkbox"/> 65 STAY | | <input type="checkbox"/> 87 DIS. W/O PREJ | <input checked="" type="checkbox"/> 96 OTHER |
| <input type="checkbox"/> 69 SUBMITTED | | <input type="checkbox"/> 88 BANKRUPTCY/APPEAL STAY | |

NO. JURORS _____	COURT REPORTER _____	<input type="checkbox"/> PARTIAL
START DATE ____/____/____	START DATE ____/____/____	<input checked="" type="checkbox"/> FINAL
END DATE ____/____/____	END DATE ____/____/____	<input checked="" type="checkbox"/> POST CARD

DATE 11 / 3 / 09 (NUNC PRO TUNC ENTRY AS OF & FOR ____/____/____)

CLERK OF COURTS

*Decision of the Board is affirmed in part +
 reversed in part. Court costs to appellant
 AT+T.*

Final.

OSJ
JUDGE

PROCESSED
 NOV 04 2009
 GERALD E. FUERST, CLERK
 IMAGING DEPARTMENT

20

60215653

CV06608252

FORM

JOURNAL

STATE OF OHIO)
)
CUYAHOGA COUNTY) SS:

IN THE COURT OF COMMON PLEAS
CASE NO. CV-06-608252

AT&T Communications of Ohio,)
)
Appellant/cross-appellee,)
)
vs.)
)
NASSIM M. LYNCH,)
)
Appellee/cross-appellant)

JOURNAL ENTRY AND
OPINION



Peter J. Corrigan, J.

AT&T Communications of Ohio, Inc. (AT&T Ohio), the taxpayer, and Nassim M. Lynch, the Income Tax Administrator (Tax Administrator), both appeal from the October 27, 2006 decision of the City of Cleveland Board of Income Tax Review (Board) regarding municipal income tax refund claims filed by AT&T Ohio for the 1999 through 2002 tax years.

The basis for AT&T Ohio's refund claims for these tax years was that the estimated tax payment made by AT&T Ohio exceeded the tax shown due on each yearly return. For 1999, AT&T Ohio reported a tax due of \$253,350, but made estimated quarterly payments totaling \$4,331,618; therefore, AT&T Ohio requested a refund of \$4,078,268. (Exh. 1) For 2000, AT&T Ohio reported a tax due of \$144,913 on its return, but made estimated quarterly payments totaling \$2,330,030; therefore, AT&T Ohio requested a refund of \$2,185,117. In 2000, AT&T also claimed a credit carry-forward for the \$4,078,268 overpayment

claimed on its 1999 return (Exh. 2) For 2001, AT&T Ohio reported a tax due of \$62,685, but made estimated quarterly payments totaling \$63,710; therefore, AT&T Ohio requested a refund of the \$1,025 overpayment. AT&T Ohio also included the credit carry-forward of \$4,078,268 for 1999 and \$2,185,117 overpayment claimed on its 2000 return. (Exh. 3) The basis of the claim for the 2002 tax year was that the credit carry-forwards from the 1999 and 2000 overpayments exceeded the \$149,774 tax due shown on the return. (Exh. 4)

In his decision, the Tax Administrator denied the overpayment claim for 1999 in full and denied a portion of the overpayment claims for 2000 through 2002. In denying the refund claim for 1999, the Administrator found that the claim had previously been denied by the income tax auditor in a letter dated February 6, 2001. (Exh. 14) The Administrator determined that the March 25, 2004 submission of information by AT&T Ohio constituted a new refund claim for 1999 and this claim was filed after the limitation period had run.

The partial denial of the 2000 through 2002 claims was based on the Administrator's disallowance of AT&T Ohio's deduction of interest income in computing its net profits subject to the city's income tax. The Administrator also applied \$57,344.97 of the refund allowed for the 2000 through 2002 tax years to a withholding tax liability of AT&T's parent corporation (AT&T Corporation).

AT&T Ohio appealed the Administrator's decision to the Board. The Board affirmed the Administrator's decision denying the 1999 refund claim and reversed the Administrator's partial denial of the 2000-2002 refund claims based on the disallowance of AT&T Ohio's deduction of interest income from its parent

corporation and the Administrator's offset against AT&T Ohio's refund for the withholding tax assessment against the parent corporation. Both parties appeal from this decision.

In its appeal, AT&T Ohio argues the Board erred in finding that the 1999 tax refund claim had been properly dismissed and that it had not been re-filed within the three-year statute of limitations period. This Court disagrees with AT&T Ohio.

Testimony on behalf of the Tax Administrator given by Robert Meaker, chief of tax audit at the Central Collection Agency (CCA), City of Cleveland, Division of Tax, establishes that on October 18, 2000, AT&T Ohio filed a return and request for refund for tax year 1999. (Tr. 233-34; Tr. Ex. A; Tr. Ex. 1). Thus, according to R.C. 718.12(A), the statute of limitations on the refund request began to run on October 18, 2000. By the standards established by CCA's rules and regulations refunds are not granted until all the information required to determine the validity of the request is received. (Tr. 426-27). According to Mr. Meaker's testimony, when the original refund request for tax year 1999 was filed it was not considered to be a complete return because AT&T Ohio did not submit enough information in order for CCA to determine the validity of the refund request. (Tr. 425-26). In order to process and determine the validity of the refund request CCA requested that AT&T Ohio provide additional specifically listed information by letter dated December 22, 2000. (Tr. 234; Tr. Ex. A; Tr. Ex. 13).

Mr. Meaker testified to the procedure that is followed when a refund request is made and stated that when a response to requested additional

information is not forthcoming within a reasonable time a letter denying the refund request for lack of response is issued. (Tr. 253). In this case AT&T Ohio failed to respond to this request for information. Therefore, CCA subsequently denied AT&T Ohio's refund request due to this failure to respond to the December 22, 2000, letter. (Tr. 234; Tr. Ex. A; Tr. Ex. 13).

AT&T Ohio's argument is predicated primarily on the fact that the statute of limitations on the refund request had not lapsed because the claim had not been denied. This establishes that AT&T Ohio was aware of the 3-year statute of limitations period. Yet, AT&T Ohio supports their claim in part with a letter dated January 6, 2005, that stated in error that the refund request had been approved. (Tr. Ex. H; Tr. Ex. 23). However, in regards to approving refund requests, Mr. Meaker testified to the presence and utilization of CCA's internal control procedures referred to as a sign-off process. (Tr. 316; Tr. 322-23; Tr. 326-27). In this case, Mr. Meaker testified that the internal control procedures were not applied to the letter dated January 6, 2005, erroneously approving the tax year 1999 refund request. (Tr. 328-29). Therefore, the February 6, 2001, letter served as an effective denial of the refund claim because the letter expressly states that the refund request had been denied. (Tr. Ex. A; Tr. Ex. 14). But the letter did not foreclose AT&T Ohio's ability to refile the refund claim with the requested necessary information before the statute of limitation lapsed because AT&T Ohio was made aware as early as December 22, 2000, that CCA required additional information in order to process the refund request. (Tr. 428). The actions of AT&T Ohio in 2004 reveal that they were aware of this because they

did submit additional information on March 24, 2004. (Tr. 304; Tr. Ex. E; Tr. Ex. 19). However, as previously stated, R.C. 718.12(A), the statute of limitations for the tax year 1999 refund claim had lapsed on October 18, 2003. Therefore, AT&T Ohio did not submit this additional requested information, in order for the return to be considered complete, within the 3-year statute of limitations period for the tax year 1999 refund claim. Therefore, this Court rejects AT&T Ohio's argument and instead finds the Board correctly denied AT&T's request for refund for tax year 1999 because the statute of limitations period for filing the refund claim had expired. The Board is affirmed on this issue.

In its appeal, the Tax Commissioner asserts two assignments of error. The first argument concerns intercompany receivables for tax years 1999-2002.

The Administrator withheld funds from AT&T Ohio's refund for tax attributable to amounts paid to AT&T Ohio by its parent corporation (AT&T Corporation) in respect of a receivable. The Administrator considered the transaction to be income shifting and also disputed whether the arrangement could actually be considered debt. The Board reversed, deciding that although it did not find debt for purposes of state law, it did find a valid intercompany receivable and according to R.C. 718.01(F)(3) it cannot be taxed. The Tax Commissioner seeks reversal of this finding.

It is established through both testimony and exhibits reflecting tax filings that AT&T Corporation files consolidated schedules for federal tax purposes together with its various subsidiaries including appellant AT&T Ohio. (Tr. 108; Tr. Ex. 9-12). Moreover, this Court finds that representations made by AT&T Ohio

have been incongruous concerning the elimination of interest income resulting from intercompany transactions on the consolidated schedules. For instance, in a letter to the CCA dated December 16, 2004, AT&T Ohio expressly stated to the Tax Administrator that these entries are the result of intercompany transactions and are therefore eliminated from the consolidated filing for tax year 1999 through tax year 2002. (Tr. 308-09; Tr. Ex. 22; Tr. Ex. G). However, examination of these consolidated schedules shows that there are no elimination entries for the interest income recorded in any of the filings for these tax years. (Tr. 354; Tr. Ex. 9-12). Jonathon Griebert, group manager for state and local income and franchise tax audits, testified that the interest income amount was not eliminated but rather reported as interest income on the federal consolidated return for each of the relevant tax years. (Tr. 117). Furthermore, AT&T Ohio confirmed this fact in their Brief in Opposition to Tax Administrator's Assignments of Error. (Br. at 7).

Aside from the fact that AT&T Ohio has been inconsistent in accurately stating how the interest income was recorded the amount categorized by AT&T Ohio as interest income does not meet the definition of intangible income [as defined in R.C. 5701.06(B)] that cannot be taxed by a municipality per R.C. 718.01(A)(5) and 718.01(H)(3). R.C. 5701.06(B) defines intangible income to include income from investments including, among other types of financial instruments, interest-bearing obligations, such as notes, and other similar evidences of indebtedness, either negotiable or nonnegotiable.

Testimony on behalf of AT&T Ohio given by Mr. Griebert provides insight into the corporate structure of the Corporation and its subsidiaries, including

AT&T Ohio, and the form of financial management that is in utilization. According to Mr. Griebert, the Corporation, as the parent, maintains one (1) central bank account, referred to as a centralized treasury system (bank account) that holds the monies from customer billings. (Tr. 70). The rationale for this system stems from a motivation for corporate efficiency in that monies derived from customer billings are maintained within this account as opposed to having separate accounts for each subsidiary. (Tr. 81-82).

Based on this centralized treasury system Mr. Griebert explained the source of the interest income as interest that the Corporation paid to AT&T Ohio for an outstanding obligation that the Corporation owes to AT&T Ohio; an obligation resulting from the monies that are kept in the centralized treasury system. (Tr. 78-80; Tr. 98).

Although AT&T Ohio views this as an ongoing interest-bearing obligation there is no record of a negotiable instrument, such as a note, recognizing the obligation owed by the Corporation to AT&T Ohio until September 30, 2001. (Tr. 82-84; Tr. Ex. 6). Moreover, in reaching its decision, the Board did not classify the interest income as a note but rather as an intercompany receivable. Therefore, the source from which AT&T Ohio states that the interest income is derived is not a negotiable interest-bearing obligation.

Although R.C.5701.06 (B) refers to other similar evidences of indebtedness, the amount categorized as interest income and held to be an intercompany receivable by the Board does not meet this definition either. In regard to the form of the transaction, Mr. Griebert testified that the obligation

claimed by AT&T Ohio is reflected on the balance sheets as accounts payable to AT&T Ohio and as accounts receivable to the Corporation. (Tr. 82-84; Tr. 89). Therefore, there is no movement of money and the transaction is in substance a paper transaction made up of general ledger entries. (Tr. 227-30).

Furthermore, according to Mr. Griebert the information on customer billings do not refer to AT&T Ohio but rather to the Corporation and the balance sheet reflects that the cash goes to the Corporation. (Tr. 79-80; Tr. 177). Thus, when a customer makes a payment the monies from the billings are maintained in the one (1) central bank account operated by the Corporation. (Tr. 70). Therefore, the Corporation already holds the monies from customer billings. (Tr. 70).

The facts in this case are analogous to the facts in *BB&T v. United States*, 2007 WL 37798 (Jan. 4, 2007, M.D.N.C.), which was also a refund case. In *BB&T*, the taxpayer sought a refund of \$4.5 million for tax paid involving a lease in/lease out (LILO) transaction. Under a LILO transaction, a taxpayer purports to lease property from the owner under a head lease and simultaneously purports to lease the property back to the owner under a sublease. The owner is usually a tax-exempt entity and does not pay tax and cannot claim certain tax benefits attributable to property ownership, such as depreciation deductions, etc. The owner continues to operate the property with all benefits and burdens of ownership while the taxpayer claims rent and interest deductions attributable to the head lease.

In *BB&T*, the taxpayer claimed certain deductions for interest expense, rent and other costs related to the LIFO transaction. Upon audit of its tax returns, the IRS disallowed the claimed deductions, increasing taxable income and therefore the amount of tax due. The taxpayer paid the tax and filed a request for a refund, which was denied. On appeal, the question was whether the taxpayer was entitled to the deductions when, in substance, the debt on which the interest deductions were claimed were not genuine.

The court found that the debt was not true debt, stating “[w]hen the intermediate payment steps are disregarded, which must be done in order to consider the substance of the loan transaction and not the form selected by the parties, it becomes clear that the loan transaction is only a circular transfer of funds in which the *** loan is paid from the proceeds of the loan itself. There was no money lent to [taxpayer] in a substantive sense and the ***loan does not reflect genuine indebtedness.” *Id.* at 11.

Addressing the documents purporting to evidence the debt, the court stated “although the loan documents—the form selected by the parties—may provide that [taxpayer] has a legal obligation to pay the loan, the transaction in fact—the substance—does not actually require [taxpayer] to pay any money *** through the circular nature of the transaction, [taxpayer’s] purported principal and interest payments are actually paid from the proceeds of the loan itself.” *Id.*

The same is true here. Once the monies from AT&T Ohio customer billings entered the AT&T Corporation, the monies never left the corporate umbrella, and no portion of the purported interest was derived from any source

other than the parent. For federal tax purposes, the interest income was completely offset by a related interest expense deduction claimed by the parent and the two offsetting entries were eliminated in the consolidation, never impacting or being included in federal consolidated taxable income. Just like in *BB&T*, the arrangement here is nothing more than the circular flow of offsetting entries within the corporation, despite the various bookkeeping entries made. Therefore, this Court finds that the income at issue is taxable income not exempt from city tax. The Court reverses the Board's finding that AT&T was entitled to interest income deductions.

The last issue for this Court's review concerns the Board's tax reduction for employee withholding tax for Tax Years 2000-2002. The Administrator withheld \$57,344.97 from AT&T Ohio's refund for an alleged withholding obligation of its parent corporation. The Board summarily reversed this decision finding that there was no evidence to establish a valid assessment. Appellee argues this was error.

A review of the record reflects that AT&T has been inconsistent with regard to their position on the withholding tax as well. AT&T states that it has no employees in Ohio for purposes of withholding tax, worker's compensation, and unemployment compensation. (Tr. 129). However, for tax years 1999 through 2002, AT&T claimed deductions on its pro forma federal return for wages paid during those tax years. (Tr. 313; Tr. 356-57; Tr. Ex. M-P). According to a letter dated December 16, 2004, AT&T responded to CCA regarding the issue of eliminated entries on the consolidated filing. (Tr. Ex. G; Tr. Ex. 22). However,

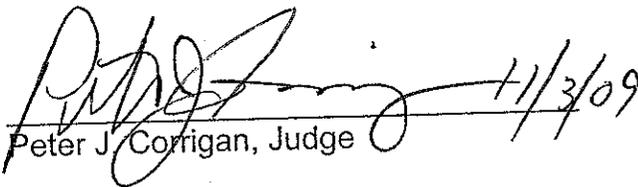
AT&T did not inform CCA at that time that it did not have employees. (Tr. 310; Tr. 356; Tr. 360; Tr. Ex. G; Tr. Ex. 22).

It was not until Mr. Griebert's testimony before the Board that AT&T Ohio's position with regard to employees was explained. Through his testimony Mr. Griebert explained that the deduction for wage and salaries is an allocation of expense for payroll expense that is paid by the Corporation for the Corporation's employees. Furthermore, AT&T Ohio utilizes the Corporation's employees in order to perform services in Ohio. (Tr. 174-75). But Mr. Griebert stated that AT&T Ohio does not file a withholding tax with the City because the employees are employees of the Corporation. In this regard, AT&T Ohio stated in the letter dated December 22, 2004, that the withholding taxes are recorded in the Corporation's Schedule Y. (Tr. 315; Tr. 360; Tr. Ex. G; Tr. Ex. 22). Thus, the Corporation is responsible for filing the federal and state withholding returns for employees utilized by AT&T Ohio for services performed in Ohio. (Tr. 70; Tr. 119-24).

Mr. Griebert testified that the Corporation does all of the accounting for itself and all of its subsidiaries including AT&T. (Tr. 205). However, Mr. Griebert also testified that AT&T Ohio had no knowledge of the withholding tax liability referred to in the letter dated January 27, 2005. (Tr. 130; Tr. Ex. I; Tr. Ex. 24). In this regard, Mr. Meaker testified that notices were sent to the Corporation regarding the assessments for the withholding tax prior to the issuance of the letter dated January 27, 2005. (Tr. 360-61). Therefore, although the assessment notices were not sent to AT&T Ohio, the information regarding the assessments

was still available to them because the Corporation handled AT&T Ohio's bookkeeping. Therefore, there was a paymaster relationship between AT&T Ohio and the Corporation, AT&T recognized a withholding tax liability recorded by the Corporation on its behalf, and AT&T was able to determine the extent of the liability based on the withholding tax. Therefore, this Court determines that the Board erred in granting AT&T's request for a refund for tax years 2000-2002 for employee withholding taxes and reversed this finding.

The decision of the Board is affirmed in part and reversed in part.


Peter J. Corrigan, Judge 11/3/09

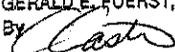
Date: _____

Copies sent to:

Attorney for appellant:
Richard C. Farrin
McDonald Hopkins Co., LPA
41 South High Street
Columbus, Ohio 43215

RECEIVED FOR FILING

NOV 03 2009

GERALD E. FUERST, CLERK
By  Deputy

Attorney for appellee:
Linda L. Bickerstaff, Assistant Director of Law
City of Cleveland
205 W. St. Clair Avenue
Cleveland, Ohio 44113

APPENDIX

EXHIBIT 3

DEC 16 2010

Vacated
1-27-11

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94320

AT&T COMMUNICATIONS OF OHIO

PLAINTIFF-APPELLANT

vs.

NASSIM M. LYNCH

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-608252

BEFORE: Boyle, J., Kilbane, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: December 16, 2010

CA09094320
66459650

VOL 0719 #00433



ATTORNEY FOR APPELLANT

Richard C. Farrin
McDonald Hopkins, LLC
41 South High Street, Suite 3550
Columbus, Ohio 43215

ATTORNEYS FOR APPELLEES

Robert J. Triozzi
Director of Law
City of Cleveland
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114-1077

Linda L. Bickerstaff
Assistant Director of Law
City of Cleveland
205 West St. Clair Avenue
Cleveland, Ohio 44113

FILED AND JOURNALIZED
PER APP.R. 22(C)

DEC 16 2010

GERALD E. FUEBST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

COPIES MAILED TO COUNSEL FOR
ALL PARTIES--COSTS PAID

MARY J. BOYLE, J.:

Appellant, AT&T Communications of Ohio, Inc. ("AT&T Ohio"), appeals from the trial court's judgment entry affirming in part and reversing in part a decision of the city of Cleveland Board of Income Tax Review ("the Board"). This case involves a dispute over AT&T Ohio's municipal income tax refund for tax years 1999-2002. AT&T Ohio contends that Nassim Lynch, the tax administrator, improperly denied its request for a refund for tax year ("TY") 1999, and otherwise improperly calculated the amount of refund for TY 2000-2002. For the reasons discussed below, we affirm in part and reverse in part — we affirm the trial court's decision upholding the Board's determination that the tax administrator properly denied AT&T Ohio's refund request for TY 1999, but we reverse the trial court's decision as to any modification of the Board's decision below.

Procedural History and Facts

The pertinent facts are set forth in the trial court's November 3, 2009 journal entry and opinion as follows:

"The basis for AT&T Ohio's refund claims for [the 1999 through 2002] tax years was that the estimated tax payment made by AT&T Ohio exceeded the tax shown due on each yearly return. For 1999, AT&T Ohio reported a tax due of \$253,350, but made estimated quarterly payments totaling \$4,331,618;

therefore, AT&T Ohio requested a refund of \$4,078,268. For 2000, AT&T Ohio reported a tax due of \$144,913 on its return, but made estimated quarterly payments totaling \$2,330,030; therefore, AT&T Ohio requested a refund of \$2,185,117. In 2000, AT&T also claimed a credit carry-forward for the \$4,078,268 overpayment claimed on its 1999 return. For 2001, AT&T Ohio reported a tax due of \$62,685, but made estimated quarterly payments totaling \$63,710; therefore, AT&T Ohio requested a refund of the \$1,025 overpayment. AT&T Ohio also included the credit carry-forward of \$4,078,268 for 1999 and the \$2,185,117 overpayment claimed on its 2000 return. The basis of the claim for the 2002 tax year was that the credit carry-forwards from the 1999 and 2000 overpayments exceeded the \$149,774 tax due shown on the return.

"In his decision, the Tax Administrator denied the overpayment claim for 1999 in full and denied a portion of the overpayment claims for 2000 through 2002. In denying the refund claim for 1999, the Administrator found that the claim had previously been denied by the income tax auditor in a letter dated February 6, 2001. The Administrator determined that the March 25, 2004 submission of information by AT&T Ohio constituted a new refund claim for 1999 and this claim was filed after the limitation period had run.

"The partial denial of the 2000 through 2002 claims was based on the Administrator's disallowance of AT&T Ohio's deduction of interest income in

computing its net profits subject to the city's income tax. The Administrator also applied \$57,344.97 of the refund allowed for the 2000 through 2002 tax years to a withholding tax liability of AT&T's parent corporation (AT&T Corporation).

"AT&T Ohio appealed the Administrator's decision to the Board. The Board affirmed the Administrator's decision denying the 1999 refund claim and reversed the Administrator's partial denial of the 2000-2002 refund claims based on the disallowance of AT&T Ohio's deduction of interest income from its parent corporation and the Administrator's offset against AT&T Ohio's refund for the withholding tax assessment against the parent corporation."

Following the Board's decision, AT&T Ohio filed a timely notice of appeal in the court of common pleas. The tax administrator subsequently filed a brief in opposition to AT&T Ohio's appellate brief and filed two cross-assignments of error, challenging (1) the Board's finding that AT&T Ohio was entitled to deduct interest from its parent company for tax years 2000-2002, and (2) the Board's reversal of the administrator's application of an offset to tax years 2000-2002 for a withholding tax obligation of AT&T Ohio's parent company.

AT&T Ohio moved to strike the tax administrator's cross-assignments of error on the grounds that he had not filed a notice of appeal. The trial court denied the motion and considered both parties' assignments of error.

The trial court ultimately found in favor of the tax administrator on all issues, thereby affirming the Board's decision finding that the TY 1999 request for refund was time-barred and reversing the Board's decision related to the administrator's partial denial of AT&T Ohio's claims for TY 2000-2002.

AT&T Ohio appeals, raising nine assignments of error.¹ Because some of the assignments of error involve the same application of facts and law, we will address them together where appropriate.

Standard of Review

Our standard of review in this R.C. Chapter 2506 appeal is "more limited in scope" than the standard applied by the trial court when reviewing the decision of the Board. *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 2000-Ohio-493, 735 N.E.2d 433. We "review the judgment of the common pleas court only on 'questions of law,' which does not include the same extensive power to weigh 'the preponderance of substantial, reliable and probative evidence,' as is granted to the common pleas court." *Id.* (citations omitted). "The trial court's application of law to undisputed facts involves a

¹ The assignments of error are set forth in the appendix.

'question of law' that we may review under R.C. Chapter 2506." *Wardrop v. Middletown Income Tax Rev. Bd.*, 12th Dist. No. CA2007-09-235, 2008-Ohio-5298, ¶14, citing *Henley* at 148. Similarly, we may consider whether the trial court abused its discretion in applying the law to the facts. *Id.*

With these standards in mind, we turn to the issues before us.

Statute of Limitations

AT&T Ohio's first six assignments of error address the same critical issue: whether the trial court properly determined that AT&T Ohio's TY 1999 claim for refund was time-barred. Arguing that the statute of limitations had not lapsed, AT&T Ohio's primary argument is that its claim for refund filed on October 18, 2000 for TY 1999 had not been properly denied and that the trial court erred in finding that AT&T Ohio's later submission of documentation constituted a new, separate claim for refund for TY 1999. It contends that the trial court wrongly concluded that the February 6, 2001 letter of the Central Collection Agency ("CCA" or "Agency") was a final denial of its TY 1999 claim for refund. According to AT&T Ohio, it could not have been a final denial because the letter did not contain the requisite notice, and the Agency's income tax auditor lacked the authority to issue a final denial of its refund claim. AT&T Ohio further argues that the Agency's handling of the claim further

evidences that it did not treat the February 2001 letter as a final denial. We find AT&T's arguments, however, unpersuasive.

Initially, we note that the statute of limitations for filing a claim for refund is three years "after the tax was due or the return was filed, whichever is later." R.C. 718.12(A) and (C). Here, because AT&T filed its claim for refund for TY 1999 on October 18, 2000, the statute of limitations began to run on that date and expired on October 18, 2003.

Before addressing the merits of AT&T Ohio's claim, we find it important to recognize the function of the statute of limitations. As recognized by the Ohio Supreme Court, "[s]tatutes of limitations seek to prescribe a reasonable period of time in which an injured party may assert a claim, after which the statute forecloses the claim and provides repose for the potential defendant." *Liddell v. SCA Servs. of Ohio, Inc.* (1994), 70 Ohio St.3d 6, 10, 635 N.E.2d 1233. Despite the fact that a plaintiff may otherwise be precluded from recovering on a valid claim, "sound policy" favors the adherence to a limitations period, which includes the following: "to ensure fairness to defendant; to encourage prompt prosecution of causes of action; to suppress stale and fraudulent claims; and to avoid the inconvenience engendered by delay, specifically the difficulties of proof present in older cases." *Id.*, citing *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 88, 447 N.E.2d 727. And while certain exceptions exist that toll

the running of statute of limitations, a plaintiff's failure to act and "sitting on his rights" will not bar the application. Id. at 13.

We now turn to the relevant facts related to AT&T Ohio's argument. The record reveals that after AT&T Ohio filed its TY 1999 claim for refund on October 18, 2000, the Agency sent a letter approximately 60 days later, dated December 22, 2000, requesting that AT&T Ohio provide additional specifically listed information within ten days. The additional information was necessary to determine the validity of the requested refund. According to the Agency, AT&T Ohio's October 18, 2000 filing was not considered to be a complete return due to the missing requisite information.

AT&T Ohio, however, failed to timely respond and provide the requested information. Consequently, the Agency issued a letter to AT&T Ohio on February 6, 2001, denying its refund request due to its failure to respond and provide the requested information. Over three years later, and after AT&T Ohio's subsequent filings for TY 2000-2002 were also denied for failing to provide information necessary to audit the tax returns, on March 25, 2004, AT&T Ohio finally submitted the requested information in support of its TY 1999 claim for refund. The Agency treated this submission as a new claim for refund and denied it as time-barred.

NOV 07 19 00 44 1

While AT&T Ohio urges this court to ignore the effect of the February 6, 2001 denial letter, we refuse to do so. Contrary to AT&T Ohio's position, we fail to see how this letter could be treated as anything other than a denial of its refund request. As noted by the trial court, "the letter expressly states that the refund request had been denied."

Due Process and Notice

Relying on several cases dealing with procedural due process requirements, AT&T Ohio contends that the February 6, 2001 letter is void because it failed to notify AT&T Ohio "that it was a final decision or that AT&T was required to do anything to preserve its right to a refund or right to appeal." But AT&T Ohio ignores a critical distinction between this case and the cases that it cites. The February 6, 2001 denial letter did not foreclose AT&T Ohio's ability to refile the refund claim with the requested necessary information before the statute of limitations expired. AT&T Ohio therefore was not deprived of any property interest by such denial. Indeed, AT&T Ohio was made aware as early as December 22, 2000 that the Agency needed additional information in order to process the refund request — AT&T Ohio could have immediately refiled a claim for refund for TY 1999 after being denied. But it simply chose to ignore the denial letter, and its own inaction is what ultimately resulted in its claim being time-barred.

We further must emphasize the procedural requirements involved in decisions of the Agency. Under CCA's Rules and Regulations, final administrative rulings by the tax administrator are issued *only* upon taxpayer requests. See former Articles 23:03(B) and 25:03 (these were the rules in effect for the TY 1999-2001 returns) and Articles 13:03(B), 15:03(1), and 15:04. Further, a tax administrator's final administrative ruling is a prerequisite to invoke the jurisdiction of the Board on appeal. See Cleveland Codified Ordinances 191.2503; R.C. 718.11.

Notably, AT&T Ohio did not challenge the constitutionality or validity of these administrative regulations below. Indeed, AT&T Ohio did in fact request a final ruling from the tax administrator on September 1, 2005, thereby evidencing its knowledge of this requirement. But unfortunately for AT&T Ohio, its request was made beyond the statutory period for its TY 1999 claim.

As for AT&T Ohio's claim that the denial letter failed to comply with the notice requirements of R.C. 718.11, we also find this argument lacks merit. The statute provides in relevant part:

"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.”

The statute, therefore, applies solely to rulings by the tax administrator. Notably, after AT&T Ohio requested a final administrative ruling on September 1, 2005, the tax administrator issued the same on February 7, 2006. This written ruling, which is subject to the statute, expressly sets forth the taxpayer's notice of appeal rights and the manner in which to appeal.

Authority and Actions of Agency

AT&T Ohio also contends that the denial of its claim for refund for TY 1999 was invalid because the decision was not rendered by the tax administrator but rather an income tax auditor of the Agency, who allegedly lacked the authority to issue a final decision. It cites several cases for the proposition that “final adjudicatory authority may not be subdelegated” and therefore, any final denial of a refund claim must be issued by the tax administrator. We find AT&T Ohio's application of these cases to the February 6, 2001 denial letter misplaced.

While we agree that the tax administrator is the sole person with authority to issue a final administrative ruling, we find the denial letter issued by the income tax auditor (as a result of the taxpayer's failure to submit the requested information) to be consistent with the administrator's authority to

delegate duties to review, investigate, and audit returns in connection with requests for refunds. See former Articles 23:06(A) and 23:07(A). Indeed, of the estimated 500-600 refunds that are pending before the Agency at any given time, we find no basis to conclude that the tax administrator is the sole person with authority to deny a request for refund based on a taxpayer's failure to comply with the Agency's request for information. Instead, we agree with the Board's disposition of this argument, noting that there is no provision in law "requiring that the Administrator personally execute every document issued by the Division," and there is "nothing unreasonable in a procedure that puts the onus on the taxpayer to request a ruling of the Tax Administrator from which to appeal."

Indeed, as noted by the Ohio Supreme Court, "[i]n the operation of any public administrative body, subdelegation of authority, impliedly or expressly, exists — and must exist to some degree." *Bell v. Bd. of Trustees* (1973), 34 Ohio St.2d 70, 74, 296 N.E.2d 276. We are unpersuaded that the February 6, 2001 denial letter had no effect simply because it was not a "final administrative ruling" from the tax administrator. Therefore, we find no legal basis to conclude that the denial letter is invalid solely because it was a form letter issued by a tax auditor. Again, AT&T Ohio could have requested a ruling from the tax administrator close in time to its receipt of the denial letter. To the

extent that it waited over three years to do so, its inability to now recover on the claim arises directly from its own inaction — not any wrongdoing by the Agency.

AT&T Ohio further argues that the trial court improperly disregarded the evidence of the Agency's contradictory actions in handling its TY 1999 claim. Specifically, AT&T Ohio relies on January 6, 2005 and January 27, 2005 approval letters of its TY 1999 claim as evidence that the Agency's intention to keep AT&T Ohio's claim open and pending. But this argument presupposes that the February 6, 2001 denial letter was somehow invalid. Having already found that the letter was valid, we find this argument to have no merit. And while these erroneous notifications clearly created some confusion, they did not (nor could they) alter the applicable statute of limitations. Indeed, at the time that the letters were sent, the statute of limitations had already run.

Finally, AT&T Ohio argues that the Agency's request for information related to its TY 1999 claim, after it issued the February 2001 denial letter, further evidences the Agency's intent to keep the claim open. The record reveals, however, that the Agency requested this information because AT&T Ohio carried its TY 1999 claim as a credit in its subsequent filings. We therefore find no merit to this argument.

In conclusion, while we recognize AT&T Ohio's frustration in not being

able to recover what appears to have been a valid claim, we cannot overlook that it sat on its rights for over three years, ignoring the Agency's request for additional information and ultimate denial of its claim. AT&T Ohio did not provide the requested information until March 24, 2004, thereby constituting a new claim, which was outside the statute of limitations period. Under such circumstances, we find that the statute of limitations was properly applied and that its TY 1999 claim is time-barred.

The first six assignments of error are overruled.

Trial Court's Jurisdiction to Consider Cross-Assignments of Error

In its seventh assignment of error, AT&T Ohio argues that the trial court lacked jurisdiction to consider the tax administrator's cross-assignments of error because he failed to separately appeal from the Board's decision. We agree.

Here, the tax administrator never filed a separate appeal from the Board's decision. And while we agree that (1) every final administrative decision may be reviewed under R.C. 2506.01, and (2) the procedures in reviewing the appeal are set forth in Chapters 2505 and 2506, with the provisions of R.C. 2506.01 through 2506.04 controlling, the trial court's jurisdiction is not invoked unless the appealing party files a timely notice of appeal. In this case, the trial court's jurisdiction to hear the appeal arises

VOLD 719 880447

specifically under R.C. 718.11, which recognizes "that the taxpayer or the tax administrator may appeal the board's decision as provided in section 5717.011 of the Revised Code." R.C. 5717.011 provides in relevant part:

"If the taxpayer or the tax administrator elects to make an appeal to the board of tax appeals or court of common pleas, the appeal shall be taken by the filing of a notice of appeal with the board of tax appeals or court of common pleas, the municipal board of appeal, and the opposing party. The notice of appeal shall be filed within sixty days after the day the appellant receives notice of the decision issued under section 718.11 of the Revised Code."

Thus, the statute specifically imposes a duty on the party seeking to appeal to file a timely notice of appeal.

Relying on the Ohio Supreme Court's decision in *Cincinnati Bell v. Glendale* (1975), 42 Ohio St.2d 368, 370, 328 N.E.2d 808, the tax administrator argues that, since a Chapter 2506 appeal "proceeds as in the trial of a civil action," AT&T Ohio's filing of a notice of appeal alone allowed the trial court to consider his cross-assignments of error seeking a partial reversal of the Board's decision, despite the tax administrator never having filed an appeal. But we find the tax administrator's reliance on *Cincinnati Bell* for this proposition misplaced. While we agree that *Cincinnati Bell* recognizes that a Chapter 2506 appeal differs substantially from other appeals in that an administrative appeal

may involve a de novo hearing at the common pleas court, it has no bearing on a trial court's jurisdiction to consider an appeal. Nor does it hold that a party to an administrative proceeding below can appeal the judgment of the administrative tribunal without filing a notice of appeal. We find no authority to support such a position.

We likewise find no merit to the tax administrator's claim that Loc.R. 28(B) authorizes the trial court to consider cross-assignments of error for purposes of modifying the Board's decision despite the appellee not filing a notice of appeal. But, this provision merely sets forth the time line for filing cross-assignments of error.

Further, the application of this rule must be applied consistently with R.C. 2505.22, which expressly governs cross-assignments of error. And it is well settled that while "[a]n appellee who has not filed a notice of appeal * * * can file cross-assignments of error under R.C. 2505.22, * * * such assignments of error are only for the limited purpose of preventing the reversal of the judgment under review." *Chapman v. Ohio State Dental Bd.* (1986), 33 Ohio App.3d 324, 515 N.E.2d 992, paragraph two of the syllabus. Indeed, while a cross-assignment of error "may be used by the appellee as a shield to protect the judgment of the lower court," it "may not be used by the appellee as a sword to destroy or modify that judgment." *Parton v. Weilnau* (1959), 169 Ohio St. 145,

171, 158 N.E.2d 719. Thus, to construe Loc.R. 28(B) as authorizing an appellee to challenge an administrative adjudication, despite not having filed a timely notice of appeal, would directly conflict with R.C. 2505.22 and therefore be unlawful. See *State ex rel. Mothers Against Drunk Drivers v. Gosser* (1985), 20 Ohio St.3d 30, 485 N.E.2d 706, paragraph three of the syllabus ("A local rule of court cannot prevail when it is inconsistent with the express requirements of a statute.").

Having found that the trial court lacked jurisdiction to consider the tax administrator's cross-assignments of error, we reverse its decision to the extent that it modified the Board's decision in favor of the tax administrator. The seventh assignment of error is sustained. We further find that our disposition of this assignment of error renders the two remaining assignments of error moot.

Judgment affirmed in part, reversed in part, and case remanded to the lower court for further proceedings consistent with this opinion.

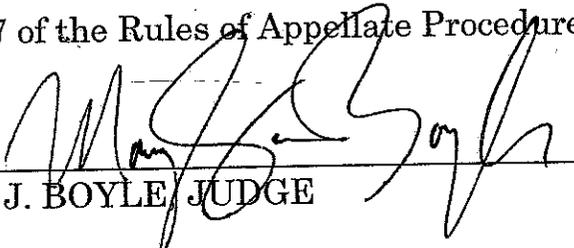
It is ordered that appellee and appellant share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to

Rule 27 of the Rules of Appellate Procedure.

A handwritten signature in black ink, appearing to read 'Mary J. Boyle', written over a horizontal line.

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR

APPENDIX

“[1.] The Common Pleas Court erred in finding that the City of Cleveland Board of Income Tax Review (‘Board’) correctly denied AT&T Communications of Ohio’s (‘AT&T’) tax year 1999 refund claim because the statute of limitations for filing the refund claim had expired.

“[2.] The Common Pleas Court erred in affirming the Board’s finding that the February 6, 2001 letter to AT&T from a Central Collection Agency (‘CCA’) auditor constituted a final denial of AT&T’s tax year 1999 refund claim.

“[3.] The Common Pleas Court erred in failing to address AT&T’s argument and hold that the CCA auditor did not have authority to issue a final order denying AT&T’s tax year 1999 refund claim.

“[4.] The Common Pleas Court erred in failing to address AT&T’s argument and hold that the Board’s finding that the February 6, 2001 form letter from the CCA auditor was a final denial of AT&T’s tax year 1999 refund claim results in a denial of AT&T’s procedural due process rights.

“[5.] The Common Pleas Court erred in failing to address AT&T’s argument and hold that the February 6, 2001 letter, to the extent it was intended as a final decision denying AT&T’s tax year 1999 refund claim, was void for failing to provide the requisite due process notice to AT&T.

“[6.] The Common Pleas Court erred in failing to address AT&T’s argument and hold that the February 6, 2001 letter, to the extent it was intended as a final decision denying AT&T’s tax year 1999 refund claim, was invalid for failing to comply with the notice requirements of R.C. 718.11.

“[7.] The Common Pleas Court erred in considering the holding of the Board on the interest income and withholding tax liability offset issues because the court lacked jurisdiction over those issues for the reason that the tax administrator did not file an appeal from the Board’s decision.

“[8.] The Common Pleas Court erred in reversing the holding by the Board that the tax administrator’s attempt to tax interest income deducted by AT&T on its 1999 - 2002 returns violated R.C. 718.01(F)(3) and in holding that the interest income did not meet the definition of intangible income in R.C. 718.01(A)(4).

"[9.] The Common Pleas Court erred in reversing the holding by the Board that the tax administrator improperly offset AT&T's refunds for the 2000 - 2002 tax years for an alleged withholding tax liability of AT&T's parent company and in concluding that a paymaster relationship existed between AT&T and its parent company."

APPENDIX

EXHIBIT 4

JAN 27 2011

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

AT&T COMMUNICATIONS OF OHIO

Appellant

COA NO.
94320

LOWER COURT NO.
CP CV-608252

COMMON PLEAS COURT

-vs-

NASSIM M. LYNCH

Appellee

MOTION NO. 440398

Date 01/27/11

Journal Entry

MOTION BY APPELLEE, NASSIM M. LYNCH, THE CITY OF CLEVELAND'S TAX ADMINISTRATOR FILED ON DECEMBER 23, 2010, FOR RECONSIDERATION IS GRANTED. AS POINTED OUT IN THE TAX ADMINISTRATOR'S MOTION FOR RECONSIDERATION, THIS COURT ERRONEOUSLY RELIED ON STATUTORY LANGUAGE INAPPLICABLE TO THE TAXABLE YEARS AT ISSUE IN THE UNDERLYING CASE. ACCORDINGLY, WE HAVE DELETED THAT PORTION OF THE OPINION THAT ERRONEOUSLY REFERENCED THE STATUTORY LANGUAGE. NONETHELESS, THE REMAINDER OF OUR ANALYSIS GOVERNING THE TRIAL COURT'S JURISDICTION TO CONSIDER THE CROSS-ASSIGNMENTS OF ERROR IS SOUND AND DISPOSITIVE OF THE ASSIGNMENT OF ERROR RAISED BY APPELLANT, AT&T COMMUNICATIONS OF OHIO, INC. ACCORDINGLY, THIS COURT'S JOURNAL ENTRY AND OPINION DATED DECEMBER 16, 2010, 2010-OHIO-6159, IS VACATED. SEE JOURNAL ENTRY AND OPINION DATED JANUARY 27, 2011.

FILED AND JOURNALIZED
PER APP.R. 22(C)

JAN 27 2011

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

Adm. Judge, MARY EILEEN KILBANE, Concurs _____

Judge COLLEEN CONWAY COONEY, Concurs _____

Mary J. Boyle
Judge MARY J. BOYLE

CA09094320
67046845

COPIES MAILED TO COUNSEL FOR ALL PARTIES - COSTS PAID

APPENDIX

EXHIBIT 5

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94320

AT&T COMMUNICATIONS OF OHIO

PLAINTIFF-APPELLANT

vs.

NASSIM M. LYNCH

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-608252

BEFORE: Boyle, J., Kilbane, A.J., and Cooney, J.

RELEASED AND JOURNALIZED: January 27, 2011

CA09094320
67007375

VOL 721 880939



ATTORNEY FOR APPELLANT

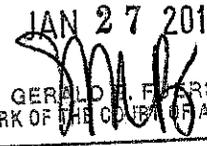
Richard C. Farrin
McDonald Hopkins, LLC
41 South High Street, Suite 3550
Columbus, Ohio 43215

ATTORNEYS FOR APPELLEES

Robert J. Triozzi
Director of Law
City of Cleveland
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114-1077

Linda L. Bickerstaff
Assistant Director of Law
City of Cleveland
205 West St. Clair Avenue
Cleveland, Ohio 44113

FILED AND JOURNALIZED
PER APP.R. 22(C)

JAN 27 2011

GERALD J. FIRST
CLERK OF THE COURT OF APPEALS
BY _____ DEP.

COPIES MAILED TO COUNSEL FOR
ALL PARTIES - 00810 TAKED

MARY J. BOYLE, J.:

Upon reconsideration, this opinion is the court's final, journalized decision in this appeal. The court's announcement of decision, previously released on December 16, 2010, 2010-Ohio-6159, is hereby vacated.

Appellant, AT&T Communications of Ohio, Inc. ("AT&T Ohio"), appeals from the trial court's judgment entry affirming in part and reversing in part a decision of the city of Cleveland Board of Income Tax Review ("the Board"). This case involves a dispute over AT&T Ohio's municipal income tax refund for tax years 1999-2002. AT&T Ohio contends that Nassim Lynch, the tax administrator, improperly denied its request for a refund for tax year ("TY") 1999, and otherwise improperly calculated the amount of refund for TY 2000-2002. For the reasons discussed below, we affirm in part and reverse in part — we affirm the trial court's decision upholding the Board's determination that the tax administrator properly denied AT&T Ohio's refund request for TY 1999, but we reverse the trial court's decision as to any modification of the Board's decision below.

Procedural History and Facts

The pertinent facts are set forth in the trial court's November 3, 2009 journal entry and opinion as follows:

"The basis for AT&T Ohio's refund claims for [the 1999 through 2002] tax

years was that the estimated tax payment made by AT&T Ohio exceeded the tax shown due on each yearly return. For 1999, AT&T Ohio reported a tax due of \$253,350, but made estimated quarterly payments totaling \$4,331,618; therefore, AT&T Ohio requested a refund of \$4,078,268. For 2000, AT&T Ohio reported a tax due of \$144,913 on its return, but made estimated quarterly payments totaling \$2,330,030; therefore, AT&T Ohio requested a refund of \$2,185,117. In 2000, AT&T also claimed a credit carry-forward for the \$4,078,268 overpayment claimed on its 1999 return. For 2001, AT&T Ohio reported a tax due of \$62,685, but made estimated quarterly payments totaling \$63,710; therefore, AT&T Ohio requested a refund of the \$1,025 overpayment. AT&T Ohio also included the credit carry-forward of \$4,078,268 for 1999 and the \$2,185,117 overpayment claimed on its 2000 return. The basis of the claim for the 2002 tax year was that the credit carry-forwards from the 1999 and 2000 overpayments exceeded the \$149,774 tax due shown on the return.

“In his decision, the Tax Administrator denied the overpayment claim for 1999 in full and denied a portion of the overpayment claims for 2000 through 2002. In denying the refund claim for 1999, the Administrator found that the claim had previously been denied by the income tax auditor in a letter dated February 6, 2001. The Administrator determined that the March 25, 2004 submission of information by AT&T Ohio constituted a new refund claim for

1999 and this claim was filed after the limitation period had run.

“The partial denial of the 2000 through 2002 claims was based on the Administrator’s disallowance of AT&T Ohio’s deduction of interest income in computing its net profits subject to the city’s income tax. The Administrator also applied \$57,344.97 of the refund allowed for the 2000 through 2002 tax years to a withholding tax liability of AT&T’s parent corporation (AT&T Corporation).

“AT&T Ohio appealed the Administrator’s decision to the Board. The Board affirmed the Administrator’s decision denying the 1999 refund claim and reversed the Administrator’s partial denial of the 2000-2002 refund claims based on the disallowance of AT&T Ohio’s deduction of interest income from its parent corporation and the Administrator’s offset against AT&T Ohio’s refund for the withholding tax assessment against the parent corporation.”

Following the Board’s decision, AT&T Ohio filed a timely notice of appeal in the court of common pleas. The tax administrator subsequently filed a brief in opposition to AT&T Ohio’s appellate brief and filed two cross-assignments of error, challenging (1) the Board’s finding that AT&T Ohio was entitled to deduct interest from its parent company for tax years 2000-2002, and (2) the Board’s reversal of the administrator’s application of an offset to tax years 2000-2002 for a withholding tax obligation of AT&T Ohio’s parent company.

AT&T Ohio moved to strike the tax administrator's cross-assignments of error on the grounds that he had not filed a notice of appeal. The trial court denied the motion and considered both parties' assignments of error.

The trial court ultimately found in favor of the tax administrator on all issues, thereby affirming the Board's decision finding that the TY 1999 request for refund was time-barred and reversing the Board's decision related to the administrator's partial denial of AT&T Ohio's claims for TY 2000-2002.

AT&T Ohio appeals, raising nine assignments of error.¹ Because some of the assignments of error involve the same application of facts and law, we will address them together where appropriate.

Standard of Review

Our standard of review in this R.C. Chapter 2506 appeal is "more limited in scope" than the standard applied by the trial court when reviewing the decision of the Board. *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 2000-Ohio-493, 735 N.E.2d 433. We "review the judgment of the common pleas court only on 'questions of law,' which does not include the same extensive power to weigh 'the preponderance of substantial, reliable and probative evidence,' as is granted to the common pleas court." *Id.* (citations omitted). "The trial court's application of law to undisputed facts involves a

¹ The assignments of error are set forth in the appendix.

‘question of law’ that we may review under R.C. Chapter 2506.” *Wardrop v. Middletown Income Tax Rev. Bd.*, 12th Dist. No. CA2007-09-235, 2008-Ohio-5298, ¶14, citing *Henley* at 148. Similarly, we may consider whether the trial court abused its discretion in applying the law to the facts. *Id.*

With these standards in mind, we turn to the issues before us.

Statute of Limitations

AT&T Ohio’s first six assignments of error address the same critical issue: whether the trial court properly determined that AT&T Ohio’s TY 1999 claim for refund was time-barred. Arguing that the statute of limitations had not lapsed, AT&T Ohio’s primary argument is that its claim for refund filed on October 18, 2000 for TY 1999 had not been properly denied and that the trial court erred in finding that AT&T Ohio’s later submission of documentation constituted a new, separate claim for refund for TY 1999. It contends that the trial court wrongly concluded that the February 6, 2001 letter of the Central Collection Agency (“CCA” or “Agency”) was a final denial of its TY 1999 claim for refund. According to AT&T Ohio, it could not have been a final denial because the letter did not contain the requisite notice, and the Agency’s income tax auditor lacked the authority to issue a final denial of its refund claim. AT&T Ohio further argues that the Agency’s handling of the claim further

evidences that it did not treat the February 2001 letter as a final denial. We find AT&T's arguments, however, unpersuasive.

Initially, we note that the statute of limitations for filing a claim for refund is three years "after the tax was due or the return was filed, whichever is later." R.C. 718.12(A) and (C). Here, because AT&T filed its claim for refund for TY 1999 on October 18, 2000, the statute of limitations began to run on that date and expired on October 18, 2003.

Before addressing the merits of AT&T Ohio's claim, we find it important to recognize the function of the statute of limitations. As recognized by the Ohio Supreme Court, "[s]tatutes of limitations seek to prescribe a reasonable period of time in which an injured party may assert a claim, after which the statute forecloses the claim and provides repose for the potential defendant." *Liddell v. SCA Servs. of Ohio, Inc.* (1994), 70 Ohio St.3d 6, 10, 635 N.E.2d 1233. Despite the fact that a plaintiff may otherwise be precluded from recovering on a valid claim, "sound policy" favors the adherence to a limitations period, which includes the following: "to ensure fairness to defendant; to encourage prompt prosecution of causes of action; to suppress stale and fraudulent claims; and to avoid the inconvenience engendered by delay, specifically the difficulties of proof present in older cases." *Id.*, citing *O'Stricker v. Jim Walter Corp.* (1983), 4 Ohio St.3d 84, 88, 447 N.E.2d 727. And while certain exceptions exist that toll

the running of statute of limitations, a plaintiff's failure to act and "sitting on his rights" will not bar the application. Id. at 13.

We now turn to the relevant facts related to AT&T Ohio's argument. The record reveals that after AT&T Ohio filed its TY 1999 claim for refund on October 18, 2000, the Agency sent a letter approximately 60 days later, dated December 22, 2000, requesting that AT&T Ohio provide additional specifically listed information within ten days. The additional information was necessary to determine the validity of the requested refund. According to the Agency, AT&T Ohio's October 18, 2000 filing was not considered to be a complete return due to the missing requisite information.

AT&T Ohio, however, failed to timely respond and provide the requested information. Consequently, the Agency issued a letter to AT&T Ohio on February 6, 2001, denying its refund request due to its failure to respond and provide the requested information. Over three years later, and after AT&T Ohio's subsequent filings for TY 2000-2002 were also denied for failing to provide information necessary to audit the tax returns, on March 25, 2004, AT&T Ohio finally submitted the requested information in support of its TY 1999 claim for refund. The Agency treated this submission as a new claim for refund and denied it as time-barred.

While AT&T Ohio urges this court to ignore the effect of the February 6, 2001 denial letter, we refuse to do so. Contrary to AT&T Ohio's position, we fail to see how this letter could be treated as anything other than a denial of its refund request. As noted by the trial court, "the letter expressly states that the refund request had been denied."

Due Process and Notice

Relying on several cases dealing with procedural due process requirements, AT&T Ohio contends that the February 6, 2001 letter is void because it failed to notify AT&T Ohio "that it was a final decision or that AT&T was required to do anything to preserve its right to a refund or right to appeal." But AT&T Ohio ignores a critical distinction between this case and the cases that it cites. The February 6, 2001 denial letter did not foreclose AT&T Ohio's ability to refile the refund claim with the requested necessary information before the statute of limitations expired. AT&T Ohio therefore was not deprived of any property interest by such denial. Indeed, AT&T Ohio was made aware as early as December 22, 2000 that the Agency needed additional information in order to process the refund request — AT&T Ohio could have immediately refiled a claim for refund for TY 1999 after being denied. But it simply chose to ignore the denial letter, and its own inaction is what ultimately resulted in its claim being time-barred.

We further must emphasize the procedural requirements involved in decisions of the Agency. Under CCA's Rules and Regulations, final administrative rulings by the tax administrator are issued *only* upon taxpayer requests. See former Articles 23:03(B) and 25:03 (these were the rules in effect for the TY 1999-2001 returns) and Articles 13:03(B), 15:03(1), and 15:04. Further, a tax administrator's final administrative ruling is a prerequisite to invoke the jurisdiction of the Board on appeal. See Cleveland Codified Ordinances 191.2503; R.C. 718.11.

Notably, AT&T Ohio did not challenge the constitutionality or validity of these administrative regulations below. Indeed, AT&T Ohio did in fact request a final ruling from the tax administrator on September 1, 2005, thereby evidencing its knowledge of this requirement. But unfortunately for AT&T Ohio, its request was made beyond the statutory period for its TY 1999 claim.

As for AT&T Ohio's claim that the denial letter failed to comply with the notice requirements of R.C. 718.11, we also find this argument lacks merit. The statute provides in relevant part:

"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.”

The statute, therefore, applies solely to rulings by the tax administrator. Notably, after AT&T Ohio requested a final administrative ruling on September 1, 2005, the tax administrator issued the same on February 7, 2006. This written ruling, which is subject to the statute, expressly sets forth the taxpayer's notice of appeal rights and the manner in which to appeal.

Authority and Actions of Agency

AT&T Ohio also contends that the denial of its claim for refund for TY 1999 was invalid because the decision was not rendered by the tax administrator but rather an income tax auditor of the Agency, who allegedly lacked the authority to issue a final decision. It cites several cases for the proposition that “final adjudicatory authority may not be subdelegated” and therefore, any final denial of a refund claim must be issued by the tax administrator. We find AT&T Ohio's application of these cases to the February 6, 2001 denial letter misplaced.

While we agree that the tax administrator is the sole person with authority to issue a final administrative ruling, we find the denial letter issued by the income tax auditor (as a result of the taxpayer's failure to submit the requested information) to be consistent with the administrator's authority to

delegate duties to review, investigate, and audit returns in connection with requests for refunds. See former Articles 23:06(A) and 23:07(A). Indeed, of the estimated 500-600 refunds that are pending before the Agency at any given time, we find no basis to conclude that the tax administrator is the sole person with authority to deny a request for refund based on a taxpayer's failure to comply with the Agency's request for information. Instead, we agree with the Board's disposition of this argument, noting that there is no provision in law "requiring that the Administrator personally execute every document issued by the Division," and there is "nothing unreasonable in a procedure that puts the onus on the taxpayer to request a ruling of the Tax Administrator from which to appeal."

Indeed, as noted by the Ohio Supreme Court, "[i]n the operation of any public administrative body, subdelegation of authority, impliedly or expressly, exists — and must exist to some degree." *Bell v. Bd. of Trustees* (1973), 34 Ohio St.2d 70, 74, 296 N.E.2d 276. We are unpersuaded that the February 6, 2001 denial letter had no effect simply because it was not a "final administrative ruling" from the tax administrator. Therefore, we find no legal basis to conclude that the denial letter is invalid solely because it was a form letter issued by a tax auditor. Again, AT&T Ohio could have requested a ruling from the tax administrator close in time to its receipt of the denial letter. To the

extent that it waited over three years to do so, its inability to now recover on the claim arises directly from its own inaction — not any wrongdoing by the Agency.

AT&T Ohio further argues that the trial court improperly disregarded the evidence of the Agency's contradictory actions in handling its TY 1999 claim. Specifically, AT&T Ohio relies on January 6, 2005 and January 27, 2005 approval letters of its TY 1999 claim as evidence that the Agency's intention to keep AT&T Ohio's claim open and pending. But this argument presupposes that the February 6, 2001 denial letter was somehow invalid. Having already found that the letter was valid, we find this argument to have no merit. And while these erroneous notifications clearly created some confusion, they did not (nor could they) alter the applicable statute of limitations. Indeed, at the time that the letters were sent, the statute of limitations had already run.

Finally, AT&T Ohio argues that the Agency's request for information related to its TY 1999 claim, after it issued the February 2001 denial letter, further evidences the Agency's intent to keep the claim open. The record reveals, however, that the Agency requested this information because AT&T Ohio carried its TY 1999 claim as a credit in its subsequent filings. We therefore find no merit to this argument.

In conclusion, while we recognize AT&T Ohio's frustration in not being

able to recover what appears to have been a valid claim, we cannot overlook that it sat on its rights for over three years, ignoring the Agency's request for additional information and ultimate denial of its claim. AT&T Ohio did not provide the requested information until March 24, 2004, thereby constituting a new claim, which was outside the statute of limitations period. Under such circumstances, we find that the statute of limitations was properly applied and that its TY 1999 claim is time-barred.

The first six assignments of error are overruled.

Trial Court's Jurisdiction to Consider Cross-Assignments of Error

In its seventh assignment of error, AT&T Ohio argues that the trial court lacked jurisdiction to consider the tax administrator's cross-assignments of error because he failed to separately appeal from the Board's decision. We agree.

Here, the tax administrator never filed a separate appeal from the Board's decision. And while we agree that (1) every final administrative decision may be reviewed under R.C. 2506.01, and (2) the procedures in reviewing the appeal are set forth in Chapters 2505 and 2506, with the provisions of R.C. 2506.01 through 2506.04 controlling, the trial court's jurisdiction is not invoked unless the appealing party files a timely notice of appeal.

Relying on the Ohio Supreme Court's decision in *Cincinnati Bell v. Glendale* (1975), 42 Ohio St.2d 368, 370, 328 N.E.2d 808, the tax administrator argues that, since a Chapter 2506 appeal "proceeds as in the trial of a civil action," AT&T Ohio's filing of a notice of appeal alone allowed the trial court to consider his cross-assignments of error seeking a partial reversal of the Board's decision, despite the tax administrator never having filed an appeal. But we find the tax administrator's reliance on *Cincinnati Bell* for this proposition misplaced. While we agree that *Cincinnati Bell* recognizes that a Chapter 2506 appeal differs substantially from other appeals in that an administrative appeal may involve a de novo hearing at the common pleas court, it has no bearing on a trial court's jurisdiction to consider an appeal. Nor does it hold that a party to an administrative proceeding below can appeal the judgment of the administrative tribunal without filing a notice of appeal. We find no authority to support such a position.

We likewise find no merit to the tax administrator's claim that Loc.R. 28(B) authorizes the trial court to consider cross-assignments of error for purposes of modifying the Board's decision despite the appellee not filing a notice of appeal. But, this provision merely sets forth the time line for filing cross-assignments of error.

Further, the application of this rule must be applied consistently with

R.C. 2505.22, which expressly governs cross-assignments of error. And it is well settled that while “[a]n appellee who has not filed a notice of appeal * * * can file cross-assignments of error under R.C. 2505.22, * * * such assignments of error are only for the limited purpose of preventing the reversal of the judgment under review.” *Chapman v. Ohio State Dental Bd.* (1986), 33 Ohio App.3d 324, 515 N.E.2d 992, paragraph two of the syllabus. Indeed, while a cross-assignment of error “may be used by the appellee as a shield to protect the judgment of the lower court,” it “may not be used by the appellee as a sword to destroy or modify that judgment.” *Parton v. Weilmann* (1959), 169 Ohio St. 145, 171, 158 N.E.2d 719. Thus, to construe Loc.R. 28(B) as authorizing an appellee to challenge an administrative adjudication, despite not having filed a timely notice of appeal, would directly conflict with R.C. 2505.22 and therefore be unlawful. See *State ex rel. Mothers Against Drunk Drivers v. Gosser* (1985), 20 Ohio St.3d 30, 485 N.E.2d 706, paragraph three of the syllabus (“A local rule of court cannot prevail when it is inconsistent with the express requirements of a statute.”).

Having found that the trial court lacked jurisdiction to consider the tax administrator’s cross-assignments of error, we reverse its decision to the extent that it modified the Board’s decision in favor of the tax administrator. The seventh assignment of error is sustained. We further find that our disposition

of this assignment of error renders the two remaining assignments of error moot.

Judgment affirmed in part, reversed in part, and case remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellee and appellant share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, A.J., and
COLLEEN CONWAY COONEY, J., CONCUR

APPENDIX

“[1.] The Common Pleas Court erred in finding that the City of Cleveland Board of Income Tax Review (‘Board’) correctly denied AT&T Communications of Ohio’s (‘AT&T’) tax year 1999 refund claim because the statute of limitations for filing the refund claim had expired.

“[2.] The Common Pleas Court erred in affirming the Board’s finding that the February 6, 2001 letter to AT&T from a Central Collection Agency (‘CCA’) auditor constituted a final denial of AT&T’s tax year 1999 refund claim.

“[3.] The Common Pleas Court erred in failing to address AT&T’s argument and hold that the CCA auditor did not have authority to issue a final order denying AT&T’s tax year 1999 refund claim.

“[4.] The Common Pleas Court erred in failing to address AT&T’s argument and hold that the Board’s finding that the February 6, 2001 form letter from the CCA auditor was a final denial of AT&T’s tax year 1999 refund claim results in a denial of AT&T’s procedural due process rights.

“[5.] The Common Pleas Court erred in failing to address AT&T’s argument and hold that the February 6, 2001 letter, to the extent it was intended as a final decision denying AT&T’s tax year 1999 refund claim, was void for failing to provide the requisite due process notice to AT&T.

“[6.] The Common Pleas Court erred in failing to address AT&T’s argument and hold that the February 6, 2001 letter, to the extent it was intended as a final decision denying AT&T’s tax year 1999 refund claim, was invalid for failing to comply with the notice requirements of R.C. 718.11.

“[7.] The Common Pleas Court erred in considering the holding of the Board on the interest income and withholding tax liability offset issues because the court lacked jurisdiction over those issues for the reason that the tax administrator did not file an appeal from the Board’s decision.

“[8.] The Common Pleas Court erred in reversing the holding by the Board that the tax administrator’s attempt to tax interest income deducted by AT&T on its 1999 - 2002 returns violated R.C. 718.01(F)(3) and in holding that the interest income did not meet the definition of intangible income in R.C. 718.01(A)(4).

"[9.] The Common Pleas Court erred in reversing the holding by the Board that the tax administrator improperly offset AT&T's refunds for the 2000 - 2002 tax years for an alleged withholding tax liability of AT&T's parent company and in concluding that a paymaster relationship existed between AT&T and its parent company."