

IN THE SUPREME COURT OF OHIO

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

Case No. 2011-0337

On Appeal from the Cuyahoga
County Court of Appeals,
Eighth Appellate District

Court of Appeals
Case No. CA-09-094320

**COMBINED MEMORANDUM IN SUPPORT OF JURISDICTION FOR THE
 CROSS-APPEAL AND MEMORANDUM IN RESPONSE TO
 APPELLANT/CROSS-APPELLEE'S MEMORANDUM IN
 SUPPORT OF JURISDICTION**

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MEMORANDUM IN SUPPORT OF JURISDICTION FOR THE CROSS-APPEAL

Explanation of Why a Substantial Constitutional Question is Involved and Why the Case is of Public or Great General Interest

This case presents a fundamental due process issue and two issues that are of public or great general interest. The due process issue is whether a taxpayer can be deprived of a municipal income tax refund by a form check-the-box letter from an income tax auditor that does not provide notice to the taxpayer that it constitutes a final decision denying the refund claim, what procedure is available for contesting the denial and what actions the taxpayer must take to avail itself of that procedure, or advising the taxpayer of the consequences of not taking such actions. The first issue of public and great general interest is whether a taxpayer's refund claim can be denied by a decision that does not provide the notice to the taxpayer mandated by R.C. 718.11. The second issue of public and great general interest is whether a city tax administrator's adjudicatory authority to issue final decisions denying tax refunds can be delegated to city income tax auditors. All three of these issues are of great interest to all taxpayers in Ohio. They go to the core of fundamental fairness to taxpayers.

AT&T Communications of Ohio, Inc. ("AT&T") filed a municipal income tax refund claim with the City of Cleveland ("City") for the 1999 tax year. That claim was filed on the tax return filed for that year. The basis of the refund claim was that because of an internal glitch in its tax payment system AT&T made estimated payments for the 1999 tax year of approximately \$4.3 million, which was over \$4 million more than its liability reported on its return. The City has never disputed that AT&T grossly overpaid its 1999 tax liability. Even accepting all of the City's proposed adjustments to its 1999 return, AT&T's liability would have been around \$345,000.

However, even after the City had continued to review and correspond with AT&T regarding the refund claim, and had sent two letters to AT&T stating that its 1999 refund claim was allowed with certain adjustments, the City reversed itself and sent a letter to AT&T on April 18, 2005 stating that its 1999 refund claim had been previously denied by a letter sent by an income tax auditor on February 6, 2001. The April 18, 2005 letter stated that the submission of information by AT&T in response to a request by the City, which submission led to the issuance of the two letters allowing the refund claim, constituted a new refund claim for 1999, but that this "new refund claim" was filed after the limitation period for filing a refund claim for the 1999 tax year had run.

The letter from the income tax auditor that the April 18, 2005 letter states was a final denial of AT&T's 1999 refund claim was a one-page form letter with a series of boxes to check. The letter stated that AT&T's 1999 city net profit return had been reviewed and adjusted. A box checked on the letter stated: "The above adjustment results in your refund/credit request being denied." The letter did not state that it was a final decision on the refund claim or notify A&T that it would become final if AT&T did not act to preserve its refund claim. Nor did the letter afford AT&T the right to a hearing, advise AT&T of its appeal rights or the procedure for exercising those rights, or set forth any time period within which AT&T was required to take whatever action was required to preserve its rights. The letter also failed to advise AT&T of the consequences of failing to appeal the letter.

The Due Process Clauses of the United States and Ohio Constitutions guarantee that a person's property interests cannot be denied without due process. The exaction of taxes constitutes a deprivation of property subject to procedural due process safeguards. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business and Regulation of Fla.*

(1990), 496 U.S. 18, 36. A fundamental requirement of procedural due process is that when the government takes an action depriving a person of its property interests which is to be accorded finality, the government must provide the person notice of its right to appeal, the procedure for taking an appeal, and the consequences of not appealing. *Memphis Light, Gas & Water Div. v. Craft* (1978), 436 U.S.1, 13-14; *Chirila v. Ohio State Chiropractic Bd.* (2001), 145 Ohio App.3d 589, 596; *Hamby v. Neel* (6th Cir. 2004), 368 F.3d 549, 560. The February 6, 2001 letter did not just fail to provide sufficient notice to AT&T of the availability of an appeal and the procedure for seeking an appeal or of the consequences of not appealing, it provided no notice at all.

Neither the Cleveland Income Tax Board of Review ("Board of Review") nor the Common Pleas Court addressed AT&T's due process argument. The Court of Appeals discarded that argument by stating that AT&T was not deprived of a property interest because it could have refiled its refund claim. But that does not address the abject failure by the City to provide AT&T the requisite due process notice. Because AT&T was not provided notice that the letter would become a final decision denying its refund claim if AT&T did not request a review by the Tax Administrator, or even of the existence of that procedure, AT&T had no reason to believe that its claim had been finally denied and that it needed to refile the claim within the statute of limitations period. The fact that the City continued to review the 1999 refund claim and to request information regarding that claim well after the February 6, 2001 letter was sent, and even sent two letters to AT&T stating that its refund claim was allowed, indicates that the City was also under the belief that the refund claim was still open.

The Court of Appeals suggested that AT&T could have obtained a final decision from the Tax Administrator by filing a request for a ruling by the Tax Administrator pursuant to the City's income tax regulations, CCA Articles 13:03(B) and 15:03(1) (formerly Articles 23:03(B) and

25.03 in effect during the 1999 tax year).¹ Again, however, this does not address the fundamental procedural due process violation. The February 6, 2001 letter does not notify AT&T that it must request a ruling from the Tax Administrator under the regulations to obtain a final decision from the Tax Administrator that can be appealed to the Board of Review. The letter contains no reference to the regulations. If requesting a ruling under the regulations was a necessary, jurisdictional requirement to obtaining such a ruling and a subsequent review by the Board of Review, due process would require that the letter give notice to AT&T of that requirement and the manner by which a ruling may be requested.

A review of the regulations quickly reveals that they too failed to provide any such notice. The special ruling regulation does not even suggest that it is a necessary, jurisdictional procedure for challenging a ruling by auditors and obtaining a final decision of the Tax Administrator regarding assessments or refund claims that may be appealed to the Board of Review. It does not contain any language referencing assessments or refund claims, or any provisions setting forth any procedure or time periods for requesting such a review. Nor does the regulation state that the Tax Administrator will issue a final decision on an assessment or refund claim only upon request of the taxpayer. If that was what the regulation was intended to do, due process would require that the regulation apprise taxpayers of that jurisdictional requirement. The Court of Appeals' statement that AT&T did not challenge the constitutionality or validity of the regulations below is also incorrect. AT&T's brief filed with the Common Pleas Court contained six pages challenging the regulations, including a due process challenge.

The Court of Appeals points to the fact that AT&T did eventually request a final ruling from the Tax Administrator as evidencing its knowledge of the requirement. However, AT&T

¹The Court of Appeals refers to the ruling authorized by Art. 13:03(B) as a "final administrative ruling." That is not the term used in the regulation; it uses the term "special ruling."

filed the request not because it had been given the requisite due process notice, but only after several communications with the Tax Administrator in 2005 in which the Tax Administrator insisted that he would only issue a final decision if a request for a ruling was filed.

The Court of Appeals' statement that AT&T failed to make a request for a ruling until after the limitation period for filing the 1999 refund claim had elapsed confuses the filing of a refund claim with requesting a ruling under the regulation. AT&T filed its 1999 refund claim with its return, well within the three-year limitation period of R.C. 718.12. Even assuming that the regulation is a valid jurisdictional appeal provision, AT&T did ultimately request a ruling and such request could not have been untimely because the regulation does not contain any time limitation within which a request must be made.

The first issue of public and great general interest raised by the ruling of the Court of Appeals is whether city tax agencies can end run the notice requirements of R.C. 718.11 by the simple expedient of having final decisions issued by tax auditors rather than by the city's tax administrator. R.C. 718.11 provides that when a decision is issued by a tax administrator regarding a municipal income tax obligation that is subject to appeal, the taxpayer shall be notified in writing of its right to appeal the decision and the manner in which the taxpayer may appeal the decision. Because the February 6, 2001 letter did not provide this notice to AT&T, AT&T argued that even if the letter was intended to be a final decision denying its 1999 refund claim, and that the authority to issue final decisions could be delegated to auditors, the letter was void for failing to comply with R.C. 718.11. The Court of Appeals held that R.C. 718.11 was not applicable because the decision was not issued by the Tax Administrator.

This holding is inconsistent with the holding by the Court of Appeals that the Tax Administrator's authority to issue final decisions was properly delegated to the auditor. If the

auditor was properly delegated that authority, the final decision was a final decision of the Tax Administrator. The City cannot have it both ways. The letter was either a final decision and was subject to the notice requirements or it was not a final decision and the 1999 refund claim was still pending at the time the Tax Administrator issued his final decision. If the Court of Appeals' ruling is allowed to stand, cities can totally avoid the fundamental notice requirements mandated by the General Assembly, which comport with due process notice, simply by delegating final decision-making authority to auditors or other agency personnel. The protection clearly intended to be afforded to taxpayers by the General Assembly would be wholly negated by the ruling. That is a matter of both public and great general interest to all taxpayers.

The purpose of the notice requirement is to make sure taxpayers are made aware of what they must do to protect their rights. This case presents a clear example of why the notice requirement was enacted. A city tax auditor sent a form check-the-box letter to AT&T. That letter did not state that it was a final decision denying AT&T's refund claim or notify AT&T of its right to appeal or the procedure for taking an appeal. If it had, AT&T would have known that it had to appeal to preserve its refund claim. Without such notice, AT&T had no reason to believe that it had to file an appeal, particularly given that the city continued to review and correspond with AT&T regarding the refund claim. Allowing cities to avoid paying refunds to taxpayers by sending form letters without advising taxpayers that they must take action to preserve their claims is fundamentally unfair to taxpayers. It is this unfairness that the notice requirement of R.C. 718.11, and the due process clause, was intended to prevent, but the Court of Appeals' ruling would allow.

The second issue of public and great general interest arises from the holding by the Court of Appeals that the final adjudicatory authority of city tax administrators can be delegated to city

income tax auditors. This holding is in direct conflict with this Court's admonition that final adjudicatory authority may not be subdelegated. *Bell v. Bd. of Trustees* (1973), 34 Ohio St.2d 70, 76. Accord *Waspe v. Ohio State Dental Bd.* (1985), 27 Ohio App.3d 13, 15-16 (Board may delegate investigatory and enforcement authority, but must retain final adjudicatory authority). The Court of Appeals cited only part of the statement in *Bell* regarding delegation of authority. *Bell* did state that some delegation of authority must exist, but what the Court of Appeals left out in quoting *Bell* is the proviso that the ultimate decision-making authority cannot be delegated. 34 Ohio St.2d at 76.

AT&T is not suggesting that the authority to investigate and audit cannot be delegated, only that the Tax Administrator cannot delegate the authority to issue final decisions regarding tax matters. It would be of great general interest to all taxpayers if the adjudicatory authority of city tax administrators could be delegated to tax auditors, not only because it would be counter to the established rule that final adjudicatory authority cannot be delegated, but also because it would lead to great uncertainty as to whether a letter or other communication received by an auditor in the course of an audit was a final decision and must be appealed or was simply routine correspondence.

The issues raised by the Court of Appeals' holdings go beyond the context of municipal income tax matters. The due process ruling could extend to all state and local tax adjudications, thus implicating taxpayers' fundamental due process rights on an even broader scale. It could even be extended to administrative adjudications in non-tax matters. The potential diminution of due process rights is of great general interest not only to taxpayers, but to all persons. The ruling that administrative adjudicatory authority can be delegated also has implications well beyond the context of municipal income tax adjudications. It would open up delegation of authority issues

regarding adjudications not only by other state and local tax agencies but also by all non-tax agencies, issues which have heretofore been well settled by the case law. Such a fundamental change in the authority of governmental entities to delegate clearly raises an issue of public interest. And the impact such a change would have on all persons dealing with those entities raises an issue of great general interest.

STATEMENT OF THE CASE AND FACTS

The rulings of the Court of Appeals that are the subject of AT&T's cross-appeal arise from a municipal income tax refund claim filed by AT&T with the City for the 1999 tax year²; the claim was filed with AT&T's 1999 tax return. On its 1999 tax return, AT&T reported a tax due of \$253,350, but had made estimated quarterly payments totaling \$4,331,618. AT&T sought a refund of the overpayment of over \$4 million.

A city income tax auditor sent a form letter to AT&T on December 22, 2000 requesting certain schedules from AT&T's 1999 federal return and the business allocation formula schedule (which schedule had already been provided with the return). After receiving no response, the income tax auditor sent the February 6, 2001 form, check-the-box letter discussed above to AT&T. The City continued to review AT&T's 1999 refund claim and request information regarding that claim subsequent to the February 6, 2001 letter.

Ultimately, subsequent to a conversation with the City's corporate audit supervisor, Jerry Heller, on March 24, 2004, AT&T's tax manager sent information requested for the 1999-2002 tax years to the supervisor. Mr. Heller followed with a letter requesting additional information for 1999 (including information regarding interest income and dividends, which was not previously requested). After receiving responses from AT&T's tax manager to his request for

² The case also involved refund claims filed by AT&T for the 2000-2002 tax years, but those years are not implicated by AT&T's cross-appeal.

additional information for the 1999-2002 tax years, Mr. Heller sent a letter to the tax manager thanking her for the responses and stating that certain deductions were being disallowed. The letter states that the adjustments were applied to the 1999-2002 refunds, and that as a result, the refund to be received by AT&T was adjusted to \$5,691,200; AT&T was told to allow 8 weeks to receive the refund. On January 27, 2005, Mr. Heller sent an additional letter to AT&T stating that a portion of the refund of \$5,691,200 has been applied to withholding taxes of \$57,344.97 due from the taxpayer's parent corporation, resulting in the refund being adjusted to \$5,633,855, which included approximately \$4 million of the 1999 claim. Robert Meaker, Chief of the Audit Department, instructed Mr. Heller to issue the January 27, 2005 letter.

However, on April 18, 2005, without any prior communication, Mr. Meaker sent AT&T a letter stating that its 1999-2002 refund claims had been previously denied and that its March 25, 2004 submission of information constituted new refund claims. Consequently, the letter states, the 1999 refund claim was untimely and is denied. After various communications between AT&T and the City, AT&T filed a request for a final decision by the Tax Administrator regarding AT&T's refund claims for 1999 through 2002.

In his final decision, the Tax Administrator denied the overpayment claim for the 1999 tax year, stating was that the claim had been denied by the February 6, 2001 letter and that the March 25, 2004 submission of information by AT&T constituted a new refund claim for 1999, but that this "new refund claim" was filed after the limitation period for filing a refund claim for the 1999 tax year had run.

AT&T appealed the Tax Administrator's decision to the Board of Review pursuant to R.C. 718.11. The Board of Review affirmed the Tax Administrator's denial of AT&T's 1999 refund claim, without, however, addressing AT&T's arguments that even assuming that the

auditor's letter was a final decision its 1999 refund claim it would be void because it violated AT&T's procedural due process rights and failed to comply with the notice requirements of R.C. 718.11. AT&T appealed to the common pleas court, which affirmed the Board of Review's ruling on the 1999 refund claim. That court also failed to address AT&T's due process and R.C. 718.11 notice arguments.

AT&T appealed to the Cuyahoga County Court of Appeals, which affirmed the common pleas court on the 1999 refund claim issue. This appeal follows.

ARGUMENT

Proposition of Law No. 1:

The Authority of City Tax Administrators to Issue Final Decisions on Refund Claims Cannot be Delegated to City Income Tax Auditors.

The Court of Appeals held that the authority of the City Tax Administrator to issue final decisions denying refund claims could be delegated to city income tax auditors. This holding is contrary to the well established rule that final adjudicative authority cannot be delegated, confirmed by this Court in *Bell v. Bd. of Trustees* (1973), 34 Ohio St.2d 70, 76. See also, *Waspe v. Ohio State Dental Bd.* (1985), 27 Ohio App.3d 13, 15-16 (Board may delegate investigatory and enforcement authority, but must retain final adjudicatory authority); *Wagner v. Cleveland* (1988), 62 Ohio App.3d 8, 19 (delegation of decision-making authority to commission-appointed psychologist is unlawful).

The Court of Appeals' reference to the Tax Administrator's authority to delegate the authority to review, investigate, and audit returns, and to the Board of Review's reliance on the absence of any provision requiring the Tax Administrator to execute every document issued by the City Income Tax Division, misperceives AT&T's argument. The issue is not whether the Tax Administrator has to personally investigate and audit all returns or execute every document

issued by the Division; of course he does not. The issue is whether the authority to issue final decisions or adjudications has been or could legally be delegated to city auditors. Under the uniform rulings on that issue, the answer is a clear no.

The Court of Appeals also ignored another basic rule regarding delegation of authority: delegation of authority must be effected by an affirmative act, such as by resolution or regulation. *Uniroyal Chem. Co. v. Kron* (1996), 116 Ohio App.3d 655, 657. Additionally, a regulation that purports to delegate authority must be strictly construed against the agency. *Id.* at 658. Nothing in R.C. Chapter 718 or the City tax ordinance or regulations authorizes persons other than the Tax Administrator to issue final decisions regarding municipal income tax matters, including refund claims. Nor was there any written authorization from the Tax Administrator delegating such authority to auditors. In any event, as the above authorities state, while an administrator may be given the authority to delegate investigatory and enforcement authority, final adjudicatory authority may not be delegated. Therefore, the Court of Appeals erred in holding that the February 6, 2001 letter constituted a valid final decision denying AT&T's 1999 refund claim.

Proposition of Law No. 2:

An Adjudication that Purports to Deny a Tax Refund Claim that does not Provide Notice to the Taxpayer of its Right to Appeal and the Specific Procedure for Taking an Appeal Violates the Taxpayer's Due Process Rights and is Therefore Void.

One of the most fundamental protections guaranteed by the Due Process Clauses of the United States and Ohio Constitutions is that a person's property interests cannot be denied without due process. That guarantee encompasses both substantive and procedural due process. The exaction of taxes constitutes a deprivation of property subject to procedural due process safeguards. *McKesson Corp.*, 496 U.S. at 36. The right to appeal is also a property interest that

cannot be denied without due process of law. *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 85. It is also settled law that due process applies in administrative proceedings. *Memphis Light*, 436 U.S.1; *Chirila*, 145 Ohio App.3d at 593.

In *Memphis Light*, the Court noted that an "elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated" to afford the parties an opportunity to present their objections. 436 U.S. at 13. The issue before the *Memphis Light* court was whether due process required the municipal utility to notify the customer of the availability of the procedure for contesting a disputed charge. *Id.* The final notice sent to the customer stated that payment was overdue and service would be terminated if payment was not made by a specified date, but it did not set forth the procedure for disputing the charge. *Id.* The court held that the notice did not comport with constitutional due process requirements because it did not advise the customer of the availability of a procedure for protesting a termination of utility service. *Id.* at 14.

Hamby v. Neel (6th Cir. 2004), 368 F.3d 549, addressed the sufficiency of notices issued by a Tennessee agency denying applications for Medicaid coverage. The Court found that the notices did not afford the applicants procedural due process. *Id.* at 562. The notices were found to be inadequate because they did not sufficiently advise the applicants of, among other things, their right to appeal and the consequences of not appealing. *Id.* at 560. Accord *Gonzalez v. Sullivan* (9th Cir. 1990), 914 F.2d 1197, 1203 ("One of the fundamental requirements of procedural due process is that a notice must be reasonably calculated to afford parties their right to present objections. * * * The notice given in this case does not clearly indicate that if no request for reconsideration is made, the determination is final. We conclude that the notice violates appellant's fifth amendment right to due process.").

Measured against these fundamental procedural due process requirements, the February 6, 2001 letter falls far short. The letter did not contain any notice to AT&T 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. It did not state that if AT&T did not take any action that it would be final, notify AT&T of any procedure for requesting a hearing (or even that a hearing was available), or notify AT&T that it had a right to appeal or contest that letter or of the procedure for making an appeal. The letter did not just fall somewhat short of giving AT&T proper notice of its rights; it provided absolutely no notice whatsoever. As in *Memphis Light*, no mention was made in the letter of a procedure for disputing the denial. 436 U.S. at 13. The letter is therefore void to the extent it was intended to constitute a final denial of AT&T's refund claim for 1999.

Proposition of Law No. 3:

A Final Decision by a City Denying a Taxpayer's Municipal Income Tax Refund Claim is Void if the Taxpayer is not Provided the Notice Mandated by R.C. 718.11.

R.C. 718.11 requires that taxpayers be given written notification of their right to appeal and the procedure for appealing decisions of city tax administrators affecting their municipal income tax obligations. The written notice is to be provided at the time the decision is issued. The February 6, 2001 letter does not provide the notice required by R.C. 718.11. It contains no mention of a right to appeal or any indication of the manner in which an appeal may be taken; it provides no notice whatsoever. Therefore, to the extent that the letter was intended as a final decision denying the 1999 refund claim, it is void for failing to comply with the notice requirements of R.C. 718.11.³ Because the letter is void as a final decision, AT&T's 1999 refund claim was not finally denied and there is no statute of limitations issue.

³ The absence of this requisite notification further confirms that the letter was never intended to be a final denial of AT&T's 1999 refund claim.

In *Sun Refining & Marketing Co. v. Brennan* (1987), 31 Ohio St.3d 306, paragraph one of the syllabus, this Court held that compliance with the procedural requirements of R.C. 119.09 is mandatory and that the limitation period for appealing an agency's order does not begin to run until the agency fully complies with those requirements. The Court's holding is tantamount to holding that the order is invalid until all of the procedural requirements are met. In *Hughes v. Ohio Dept. of Commerce*, 114 Ohio St.3d 47, 2007-Ohio-2877, paragraph one of the syllabus, the Court followed *Sun Refining*, holding that an administrative agency must strictly comply with the procedural requirements of R.C. 119.09. While the Court found that the notice in that case did comply with the requirement that it inform the party of the method of perfecting an appeal, the Court left no doubt that full compliance with that requirement was essential to the validity of the order.

In *Chirila*, the court held that the failure by the state Chiropractic Board to provide notice in the manner prescribed by R.C. 119.07 invalidated the board's order revoking Chirila's license. 145 Ohio App.3d at 594. R.C. 119.07 requires state agencies to provide notice of an opportunity to request a hearing and describes the information that must be contained in the notice. One of the requirements is that the agency notify the party that a request for a hearing must be made within thirty days of the mailing of the notice. Chirila mailed his request for a hearing within the thirty-day period, but it was received one day after the thirty-day deadline.

The board found that the request was not timely because it was not received within the thirty-day period and did not permit Chirila to present evidence at the hearing. Chirila appealed, claiming that the notice given by the board was vague as to the requirements for requesting a hearing in that it did not state that the request had to be received within the period. Although the trial court held that the notice language did not violate the intent of R.C. 119.07, the Court of

Appeals reversed that holding. Noting that the purpose of the notice requirement is to ensure that a person's due process rights are protected, the court held that the notice was deficient because it failed to advise Chirila exactly what he had to do to request a hearing. As a result of that failure, the court held that the board's order was void. *Id.* at 596.

Where a statute imposes notice and other procedural requirements regarding the issuance of orders or decisions of administrative agencies or officers, the failure to comply with those requirements renders the order or decision void. The February 6, 2001 letter gave AT&T no notice that it had a right to appeal the denial or provide any information as to the manner of taking an appeal. Therefore, to the extent it was intended as a final denial, the letter was void. At the least, because the letter did not comply with the notice requirements of R.C. 718.11, the period for appealing the denial did not commence to run.

CONCLUSION

For the reasons set forth above, AT&T requests the Court to accept the cross-appeal on the substantial constitutional question presented and grant jurisdiction to hear the case on the merits and accept the cross-appeal on the issues of public and great general interest presented in this memorandum.

**MEMORANDUM IN RESPONSE TO APPELLANT/CROSS-APPELLEE'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

**The Appeal of Appellant/Cross-Appellee does not Involve a Substantial
Constitutional Question or Issues of Public or Great General Interest**

The Appellant/Cross-Appellee Tax Administrator requests the Court to grant jurisdiction and hear the case on the merits of the holding by the Court of Appeals that in a R.C. Chapter 2506 appeal, a party that has not filed an appeal from an administrative agency's decision cannot seek a reversal of any portion of the decision by asserting cross-assignments of error. That is not an issue that involves a substantial constitutional question or that is of public or great general interest. The holding by the Court of Appeals simply applied the plain language of R.C. Chapters 2505 and 2506, which control appeals from administrative agencies. As the Court of Appeals noted, there is no authority to support the Tax Administrator's argument that he can challenge the decision of the Board of Review without filing a notice of appeal. The Tax Administrator's argument is contrary to fundamental principles of appellate review.

Prior to the enactment of R.C. 5717.011 and the amendment to R.C. 718.11, first applicable to matters involving the 2004 tax year, the jurisdiction of courts of common pleas to review decisions of municipal income tax boards of review was conferred by R.C. 2506.01. R.C. 2506.01, in turn, makes R.C. Chapter 2505 applicable to such appeals. R.C. 2505.04 sets forth what actions are required to perfect an appeal from an administrative agency to a court of common pleas. R.C. 2505.07 prescribes the time within which such an appeal must be perfected, thirty days. Neither R.C. Chapter 2506 nor R.C. Chapter 2505 provides for the filing of a cross-appeal after the thirty-day appeal period of R.C. 2505.07 has run. Nor does either of those chapters authorize an appellee in an administrative appeal who has not filed a timely appeal to

attack the decision of the administrative tribunal by filing assignments of error after the expiration of the appeal period.

The Tax Administrator's assertion that the General Assembly did not intend that administrative appeals under R.C. Chapter 2506 be subject to the limitations of R.C. Chapter 2505 is rebutted by the express language used by the General Assembly in R.C. 2506.01. That provision states that decisions of administrative tribunals may be reviewed "as provided in Chapter 2505." As this Court held in *Thomas v. Webber* (1968), 15 Ohio St.2d 177, paragraph one of the syllabus, "Sections 2505.04 and 2505.05, Revised Code (Administrative Appellate Procedure Act), apply to the perfection of an appeal and the form of a notice of appeal, pursuant to Chapter 2506, from the decision of an agency of a political subdivision." Pursuant to that chapter, if a party wishes to have the decision reviewed, the party must file an appeal and only a party that appeals can seek a reversal of the decision.

The argument by the Tax Administrator that an appeal by one party opens the entire judgment below to attack is contrary to fundamental principles of appellate review and was rejected in *Kaplysh v. Takieddine* (1988), 35 Ohio St.3d 170, paragraph two of the syllabus ("A court of appeals does not acquire jurisdiction over belated cross-appeals merely because an appeal by an opposing party has been properly perfected"). This basic rule is equally applicable to administrative appeals. *Chapman v. Ohio State Dental Bd.* (1988), 33 Ohio App.3d 324, 328, 515 N.E.2d 992, motion to certify overruled, Ohio Supreme Court Case No. 86-2031 (an appellee who has not filed a notice of appeal can file cross-assignments of error only for the limited purpose of preventing reversal of the judgment). The Court of Appeals applied the fundamental rule enunciated by this Court in *Parton v. Weilmann* (1959), 169 Ohio St. 145, 171, that that an assignment of error by an appellee who has not filed a notice of appeal "may be used

by the appellee as a shield to protect the judgment of the lower court but may not be used by the appellee as a sword to destroy or modify that judgment.”

Cincinnati Bell, Inc. v. Village of Glendale (1975), 42 Ohio St.2d 368, does not lend any support to the Tax Administrator’s argument. What *Cincinnati Bell* was referring to as “differing substantially” from other appeals is the fact that an administrative appeal may involve an additional evidentiary hearing at the common pleas court, and only if the appellant was not provided an opportunity to fully present evidence before the administrative tribunal. As the Court of Appeals properly discerned, that has no bearing on a common pleas court’s jurisdiction.

The Tax Administrator attempts to bolster his argument by suggesting statements of law that are wholly unsupportable. The statement that when an appellant files a notice of appeal with the common pleas court from an administrative tribunal, the notice of appeal confers jurisdiction on that court to adjudicate all issues that were before the administrative tribunal is not accompanied by a single citation to any supporting authority. The fact is that there is no supporting authority. The statement that in a R.C. Chapter 2506 appeal the common pleas court reviews the matter as a court of original and not appellate jurisdiction is not only unsupported by any cited authority, but it is contrary to the jurisdictional provisions in Section 4(B), Art. IV of the Ohio Constitution and R.C. Chapter 2506.

The Tax Administrator’s statement that the Court of Appeals’ ruling threatens the rights of parties is plainly wrong. Any party in an administrative proceeding has a full opportunity to obtain a judicial review of any holding of the administrative body by filing a notice of appeal from the decision in the manner provided in R.C. Chapter 2505 and within the period prescribed by R.C. 2505.07. This right to appeal rejects the Tax Administrator’s bare due course of law and open courts claims. The Tax Administrator simply failed to file a notice of appeal, which

resulted in a lack of jurisdiction by the common pleas court to consider his challenge to the decision of the Board of Review. *Helms v. Akron Health Dept.*, 9th Dist. No. 21735, 2004-Ohio-3408 at ¶11-13; See, also, *Nibert v. Ohio Dept. of Rehab. & Corr.* (1998), 84 Ohio St. 3d 100, 103 (failure to file notice of appeal within time mandated by R.C. 119.12 results in lack of jurisdiction of common pleas court to consider administrative appeal).

The Tax Administrator's complaint that requiring parties to administrative proceedings to file appeals to challenge an adverse ruling by the administrative tribunal rather than waiting to see if the other party files an appeal and then assert its challenge to the adverse ruling through a cross-assignment of error will cause problems does not present a justiciable issue. Although the allowance of cross-appeals may be more efficient to a particular party, the wisdom of allowing cross-appeals in administrative appeals is a matter within the province of the General Assembly.

ARGUMENT

Proposition of Law:

In a R.C. Chapter 2506 Appeal, a Court of Common Pleas Lacks Jurisdiction to Consider Cross-Assignments of Error by a Party that Seek Reversal of Any Portion of the Decision of the Administrative Agency if the Party has not Filed a Timely Notice of Appeal.

In its decision, the Board of Review decided three issues. First, it decided that AT&T's 1999 municipal income tax refund claim had been properly dismissed and that it had not been refiled within the statute of limitations for filing such claims. AT&T filed a notice of appeal with the common pleas court contesting the Board's decision on this issue.

Second, the Board of Review determined that the Tax Administrator's attempt to tax interest income deducted by AT&T on its tax returns for the years at issue violated R.C. 718.01(F)(3), which prohibits cities from taxing intangible income. Third, the Board of Review reversed the decision of the Tax Administrator offsetting AT&T's refund for the 2000-2002 tax

years for an alleged unpaid withholding tax liability of AT&T's parent corporation. The Tax Administrator did not file a notice of appeal contesting these determinations made by the Board. However, in his brief filed with the common pleas court in response to AT&T's brief, the Tax Administrator asserted cross-assignments of error seeking a reversal of the holdings of the Board of Review on the interest income and withholding tax issues. The Court of Appeals held that the lower court lacked jurisdiction to consider those assignments of error because the Tax Administrator had failed to file a notice of appeal from the decision of the Board of Review.

A. Jurisdiction of Courts of Common Pleas to Consider Appeals from Administrative Tribunals.

Courts of common pleas have only such revisory jurisdiction of proceedings of administrative agencies as is provided by law. Section 4(B), Art. IV, Ohio Constitution. For the taxable years at issue in this matter, the jurisdiction of courts of common pleas to review decisions of municipal income tax boards of review was conferred by R.C. 2506.01. R.C. 2506.01, in turn, makes R.C. Chapter 2505 applicable to such appeals. R.C. 2505.04 sets forth what actions are required to perfect an appeal from an administrative agency to a court of common pleas, and R.C. 2505.07 prescribes the time within which such an appeal must be perfected. The time period prescribed is thirty days. If an appeal from an administrative agency is not perfected in the manner and time prescribed by statute, the common pleas court lacks jurisdiction, and the appeal must be dismissed. *Helms v. Akron Health Dept.*, 9th Dist. No. 21735, 2004-Ohio-3408 at ¶ 11-13; See, also, *Nibert v. Ohio Dept. of Rehab. & Corr.* (1998), 84 Ohio St. 3d 100, 103 (failure to file notice of appeal within time mandated by R.C. 119.12 results in lack of jurisdiction of common pleas court to consider administrative appeal); *Zier v. Bureau of Unemp. Comp.* (1949), 151 Ohio St. 123, 125 (“[i]t is elementary that an appeal, the right to which is conferred by statute, can be perfected only in the mode prescribed by statute.”).

The Tax Administrator's assertion that the review by a common pleas court of an administrative tribunal decision under R.C. Chapter 2506 is not appellate jurisdiction is patently wrong. The various sections in R.C. Chapter 2506 and 2505 repeatedly refer to the review provided as an "appeal." R.C. 2506.01(B) states that "[t]he appeal provided in this section is in addition to any other remedy of appeal provided by law." R.C. 2506.02, 2506.03, and 2506.04 all refer to the proceeding as taking an appeal from an administrative tribunal. R.C. 2506.04 states that in an appeal under R.C. 2506.01, the common pleas court may affirm, reverse, vacate, or modify the adjudication of the administrative tribunal; that is the exercise of an appellate function.

R.C. 2505.01(A)(1) defines "appeal" as including a proceeding in which a court reviews a cause determined by another court or by an administrative tribunal. R.C. 2505.03(B) provides that where the appeal is from an administrative tribunal, the tribunal "shall be treated as if it were a trial court." R.C. 2505.04 and 2505.05 set forth the requirements for perfecting an appeal and the contents of a notice of appeal in an administrative-related appeal. R.C. 2505.07 prescribes the time for perfecting an appeal from an administrative tribunal.

The Tax Administrator's attempt to escape from the provisions of R.C. Chapter 2505 is precluded by the express language in R.C. 2506.01 that decisions of any agency or tribunal of a political subdivision may be reviewed by the common pleas court "as provided in Chapter 2505." His reliance on the language in R.C. 2506.03 discussed in *Cincinnati Bell, Inc. v. Village of Glendale* is unwarranted. R.C. 2506.03 states that "[t]he **hearing** of such appeal shall proceed as in the trial of a civil action." What *Cincinnati Bell* was referring to as "differing substantially" from other appeals is the fact that an administrative appeal may involve a hearing of additional evidence at the common pleas court. Additional evidence may be presented in an appeal under

R.C. Chapter 2506 only in the limited circumstances set forth in R.C. 2506.03(A)(1)-(5). Otherwise, in considering the appeal the common pleas court is limited to the transcript of the proceedings before the administrative tribunal. If the appellant is entitled to present additional evidence, it is the hearing at which that additional evidence is presented that is to proceed as in a civil trial.

Neither R.C. 2506.03 nor any other section in R.C. Chapter 2506 prescribes how an appeal is perfected or the scope of appellate review of the common pleas court. Therefore, those matters are governed by R.C. Chapter 2505 and, as provided in R.C. 2505.03(B), by the Rules of Appellate Procedure. *Thomas v. Webber*, paragraph one of the syllabus; *McCann v. City of Lakewood* (1994), 95 Ohio App.3d 226, 232. R.C. 2505.03(B) rejects the Tax Administrator's suggestion that a R.C. Chapter 2506 appeal is different than an appeal from a trial court to a court of appeals. That provision states that in an administrative appeal governed by R.C. Chapter 2505, the administrative tribunal "shall be treated as a trial court."

This Court has clearly recognized the review by a common pleas court of an administrative tribunal under R.C. Chapter 2506 as the performance of an appellate function. *Dvorak v. Athens Mun. Civ. Serv. Comm.* (1976), 46 Ohio St.2d 99, 103. See also, *Sudan, Inc. v. Village of Chagrin Falls* (1989), 63 Ohio App.3d 83, 89 ("in an appeal under R.C. Chapter 2506, the court sits in appellate review of the board's decision.").

No provision in R.C. Chapter 2506 or 2505 authorizes an appellee who has not filed a notice of appeal to file cross-assignments of error that seek a reversal of a portion of the judgment below. R.C. 2505.22 allows cross-assignments of error only for the limited purpose of preventing the reversal of the judgment. The Tax Administrator has not cited a single authority that holds otherwise. As the Court of Appeals properly held, there is no such authority.

The Tax Administrator's reliance on language in R.C. 2506.01 that decisions of administrative bodies of political subdivisions "may be reviewed" to support his argument that if an appeal is filed pursuant to R.C. 2506.01, the entire decision is open to attack, even by an appellee who did not appeal from adverse holdings by the administrative body, ignores the language in that statute that the review is "as provided in Chapter 2505." Pursuant to that chapter, if a party wishes to have the decision reviewed the party must file an appeal and only those parties who appeal can seek a reversal of the decision. The Tax Administrator's argument is also contrary to the holdings in *Kaplysh v. Takieddine* and *Chapman v. Ohio State Dental Bd.*

B. An Appeal to a Court of Common Pleas Pursuant to R.C. Chapter 2506 is not a De Novo Proceeding.

The Tax Administrator appears to be arguing that because the common pleas court in a R.C. Chapter 2506 appeal may allow an additional evidentiary hearing and reviews both questions of law and fact, the common pleas court may consider and determine all issues before the administrative tribunal, including issues decided against a party who did not file an appeal from the decision. That argument mischaracterizes the nature of a R.C. Chapter 2506 appeal and is not supported by a single authority.

Initially, while the additional hearing permitted by R.C. 2506.03, if the prerequisites of division (A) are met, is to be conducted as in a trial, the proceeding under R.C. Chapter 2506 is an appeal, not a trial de novo. As this Court ruled in *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 279, where the court of common pleas can hear additional evidence only under limited conditions, the proceeding can not be a trial de novo. Nor do the authorities referenced by the Tax Administrator state that a hearing conducted pursuant to R.C. 2506.03 is a trial de novo. To the contrary, *Cincinnati Bell* expressly states that the hearing is not de novo. 42 Ohio St.3d at 370. The cases relied on by the Tax Administrator in defining a trial de novo (Tax

Administrator's Memorandum at 11) actually show that a R.C. 2506.03 hearing is not a trial de novo. Those cases properly describe a trial de novo as a completely new trial as if the prior trial had not taken place. Clearly, as even the Tax Administrator later concedes (at 12), a R.C. 2506.03 hearing is not a trial de novo because the common pleas court is limited in its ability to conduct a full hearing and in its scope of review of the decision of the administrative tribunal.

In any event, it is irrelevant whether the hearing under R.C. 2506.03 is a de novo hearing. What is relevant is that the review under R.C. Chapter 2506 is an appellate review to which the provisions of R.C. Chapter 2505 are expressly made applicable. Under those provisions, a party that has not filed an appeal from the administrative decision cannot attack any portion of that decision simply by asserting cross-assignments of error.

C. A Local Rule of Court Cannot Expand the Revisory Jurisdiction of Courts of Common Pleas Beyond that Conferred by Statute.

The Tax Administrator argues that Loc. R. 28 of the Court of Common Pleas of Cuyahoga County authorizes a non-appealing party to attack the administrative tribunal's decision by asserting cross-assignments of error. The Tax Administrator's reliance on Loc. R. 28 is misplaced. Loc. R. 28 provides, in pertinent part:

(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.

As the Court of Appeals correctly noted, this provision regarding the filing of assignments of error by an appellee refers to those assignments of error authorized by R.C. 2505.22, i.e. assignments of error by an appellee used to protect the judgment under review from reversal. Loc. R. 28(B) simply prescribes the time period within which assignments of error authorized by R.C. 2505.22 to be filed by an appellee must be filed.

Construing Loc. R. 28(B) as permitting an appellee who has not filed a timely notice of appeal from an administrative adjudication pursuant to R.C. Chapters 2506 and 2505 to file assignments of error seeking a reversal or modification of the adjudication would render the rule invalid, because it would conflict with R.C. 2505.22. It would also be invalid because it would be an attempt to expand the jurisdiction of the common pleas court by conferring jurisdiction on the court to consider belated cross-appeals.

R.C. 2505.07 prescribes a thirty-day time limitation for filing administrative appeals to the courts of common pleas. This is a mandatory and jurisdictional requirement. R.C. 2505.22 permits the consideration by the reviewing court of assignments of error of an appellee only to protect the judgment under review. It does not confer jurisdiction on the reviewing court to consider an appellee's assignments of error that, if upheld, would require a reversal or modification of that judgment.

Plainly, to read Loc. R. 28(B) as asserted by the Tax Administrator would conflict with R.C. 2505.07 and 2505.22. It would extend the court's jurisdiction over administrative appeals beyond that conferred by statute. The jurisdiction of the courts to review decisions of administrative tribunals is a matter within the exclusive province of the Ohio General Assembly. The revisory jurisdiction of the courts of common pleas cannot be abridged or enlarged by a rule of court. *Akron v. Gay* (1976), 47 Ohio St. 2d 164, 165-166 (a jurisdictional statute is a substantive law of the state, and cannot be abridged, enlarged, or modified by the Civil Rules). A rule in conflict with a substantive jurisdictional appeal statute is invalid. *State v. Hughes* (1975), 41 Ohio St. 2d 208, 211 (rule providing an appeal of right in conflict with statute providing a limited appeal right must yield to the statute).

While courts unquestionably have the power to adopt rules regarding the administration of the court and the procedures to be followed, it is also beyond question that a local rule of court is invalid if it conflicts with a statute. In *State ex rel. Mothers Against Drunk Drivers v. Gosser* (1985), 20 Ohio St. 3d 30, paragraph three of the syllabus, this Court held that “[a] local rule of court cannot prevail when it is inconsistent with the express requirements of a statute.”

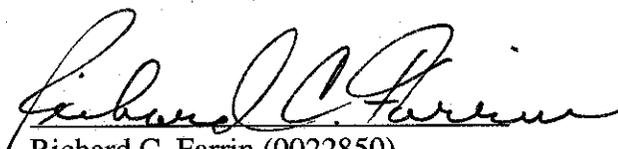
The Ohio Rules of Civil Procedure also reject the Tax Administrator’s construction of Loc. R. 28(B). Ohio Civ. R. 82 provides that the Civil Rules shall not be construed to extend or limit the jurisdiction of the courts of this state. And Ohio Civ. R. 83 states that a court may adopt local rules of practice that are not inconsistent with the Civil Rules. A local rule that attempted to extend the jurisdiction of the court would be inconsistent with Ohio Civ. R. 82.

The Tax Administrator’s construction of Loc. R. 28(B) as conferring jurisdiction upon the common pleas court to consider assignments of error filed by an appellee that has not filed a timely notice of appeal, which the appellee attempts to use as a sword to reverse or modify the administrative decision under review, would expand the Court’s jurisdiction beyond that conferred by statute. Such a construction would render Loc. R. 28(B) invalid. For this reason, the Tax Administrator’s construction of Loc. R. 28(B) was properly rejected by the Court of Appeals.

CONCLUSION

For the reasons set forth above, AT&T requests the Court to dismiss the Tax Administrator's appeal as not involving a substantial constitutional question and to decline jurisdiction to decide the case on the merits as not asserting a question of public or great general interest.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Combined Memorandum in Support of Jurisdiction for the Cross-Appeal and Memorandum in Response to Appellant/Cross-Appellee's Memorandum in Support of Jurisdiction was served upon Linda L. Bickerstaff, Assistant Director of Law, City of Cleveland Department of Law, 205 W. St. Clair Avenue, Cleveland, Ohio 44113, by regular U.S. Mail, postage prepaid, this 31st day of March, 2011.


Richard C. Farrin