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BOARD OF TAX APPEALS
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NOTICE OF APPEAL FROM THE BOARD OF TAX APPEALS

IN THE SUPREME COURT OF OHIO

12-2105

James L. Gesler and Angeline O. Gesler, Appellants, v. City of Worthington Income Tax Board of Appeals and Steven R. Gandee (Molly Roberts), Finance Director, Appellees,	:	Appeal from the Ohio Board of Tax Appeals Case No. 2009-K-1010

NOTICE OF APPEAL OF APPELLANTS JAMES L. GESLER AND ANGELINE O. GESLER

FILED
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SUPREME COURT OF OHIO

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Notice of Appeal of Appellants James L. Gesler and Angeline O. Gesler

Appellants James L. Gesler and Angeline O. Gesler ("Taxpayers") hereby give notice of appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from a Decision and Order ("Decision") of the Ohio Board of Tax Appeals ("Board"), journalized in Case No. 2009-K-1010 on November 16, 2012. A true copy of the Decision being appealed is attached hereto and incorporated herein by reference.

The Taxpayers appeal involves City of Worthington Codified Ordinance 1701.15 ("Tax Ordinance"). The Taxpayers assert the Tax Ordinance is either lawful for the reasons set forth in assignments of error one and three, in which case the Taxpayers are entitled to their requested refund or, the Tax Ordinance is unlawful in which case the Tax Ordinance should be invalidated and the Taxpayers are entitled to their requested refund. The Board ruled the Tax Ordinance was unlawful because the Tax Ordinance "is in direct contravention of R.C. 718.01(A)(7)" and "the Ohio General Assembly's expression must be deemed to govern the present situation." Decision at 4-5. The Board ruled that the effect of such illegality was to *expand* the Tax Ordinance to impose tax on subject matter not within the Tax Ordinance's terms.

The Taxpayers complain of the following errors in the Board's Decision:

1. The Board erred in determining the Tax Ordinance did not apply as written. The Board correctly cited the applicable rules of statutory construction as addressed in the Court's decision in *Bosher v. Euclid Income Tax Bd. of Rev.*, 99 Ohio St.3d 330, 2003-Ohio 3886, 792 N.E.2d 181 (2003), ¶ 14 quoting,

> In determining whether Euclid's ordinances permit taxation of lottery winnings, we must adhere to the following rules of statutory construction. First, in looking at the specific language contained in the ordinances, if the language is unambiguous, we must apply the clear meaning of the words used. *Roxane Laboratories, Inc. v. Tracy* (1996), 71 Ohio St.3d 125, 127, ***. In addition, R.C. 1.42

> declares, 'Words and phrases shall be read in context and construed according to the rules of grammar and common usage.' Also, statutory enactments that relate to the same general subject matter must be read in pari materia. *United Tel. Co. of Ohio v. Limbach* (1994), 71 Ohio St.3d 369, 372, ***. Finally, we must strictly construe tax ordinances and resolve any doubt as to their meaning in favor of the taxpayer. *Roxane Laboratories*, 75 Ohio St.3d at 127, ***.) Id. at ¶. (Parallel citations omitted.)

Decision at 3-4. The Board then stated,

> Upon review of the ordinance in question, and the testimony provided on the city's behalf, we are not persuaded by the city's arguments regarding its claimed intent in enacting the statute or the asserted existence of a scrivener's error. We consider Codified Ord. 1701.15 to be clear and its terms unambiguous, therefore requiring no interpretation by the board.

Decision at 4. Notwithstanding the Board's finding that the Tax Ordinance is clear and its terms unambiguous the Board failed to apply the Tax Ordinance as written. Accordingly the Board's decision is unreasonable and unlawful. See, *Bosher* and *Roxane Laboratories*.

2. The Board's decision interpreting the Tax Ordinance contrary to the Tax Ordinance's plain terms on the basis that the Tax Ordinance violates R.C. 718.01 is unreasonable and unlawful. The Board's decision expands the breadth of the Tax Ordinance to include subject matter beyond the Tax Ordinance's plain terms.

a. The Board's decision violates due process of law. A taxpayer must have notice of the subject matter to be taxed. See, *Dana Corp. v. City of Toledo*, 6th Dist. No. L-00-1128, 2000 Ohio App. LEXIS 6055, 5-6 (December 22, 2000).

> This is a rule of law for which there is a paucity of authority, because it is so fundamental that it is seldom discussed. There can be no secret rules. There can be no secret regulations. An agency of the government cannot enforce a rule which has never been properly enacted. Clearly, an attempt to do so would violate the tenets of fair play and, in the present circumstances, deprive appellee of property without due process. See, Ohio Constitution, Section 1,

> Article I; United States Constitution, Amendment V, Amendment XIV. In this matter, for the city of Toledo to have an enforceable regulation concerning amended consolidated tax returns, it must properly promulgate such regulation, approve and codify it, pursuant to the city's own ordinances. Absent compliance with these ordinances, there is no regulation for the Tax Commissioner to enforce. Consequently, any attempt of the Tax Commissioner or the board of review to enforce such a phantom regulation was, as the common pleas court ruled, "arbitrary, capricious, and unreasonable." We might also add, it was unlawful.

b. The Board's interpretation of R.C. 718.01 violates the Ohio Constitution Article XIII, Section 6 and Article XVIII, Section 3, Section 7, and Section 13. Article XVIII, Sections 3 and 7 provide that the power to impose a municipal tax is vested in the municipality alone. *See, e.g., Angell v. Toledo*, 153 Ohio St. 179, 91 N.E.2d 250 (1950); *Cincinnati Bell Telephone Co. v. City of Cincinnati*, 81 Ohio St.3d 599, 693 N.E. 2d 212 (1998). *See also, Northern Ohio Patrolmen's Benevolent Ass'n v. City of Parma*, 61 Ohio St. 2d 375, 402 N.E.2d 519 (1980). Article XIII, Section 6 allows the General Assembly to "restrict" the power of taxation of the municipality. Similarly, Article XVIII, Section 13 provides that "laws may be passed to limit the power of municipalities to levy taxes***." The Board's decision interprets R.C. 718.01 to *impose* municipal tax on behalf of the city upon subject matter that the city's own tax ordinances would not otherwise reach. The Board's interpretation ignores the fact that the General Assembly's powers are limited to *restricting* a municipality's power to tax. The General Assembly does not have the power to *impose* a tax ordinance at the municipal level. Accordingly, R.C. 718.01 may not be read to impose municipal tax outside the definitional limits of the subject city ordinance imposing tax. If a city ordinance imposing tax violates the requirements of R.C. 718.01 wherein the

General Assembly has exercised its Constitutional authority to restrict the city's powers of taxation, the ordinance must be invalidated as beyond the authority of the municipality to enact, not broadened to tax additional subject matter otherwise unaddressed by the ordinance.

c. The Board's decision is contrary to R.C. 715.013. R.C. 715.013(A) states in relevant part,

> Except as otherwise expressly authorized by the Revised Code, no municipal corporation shall levy a tax that is the same as or similar to a tax levied under Chapter 322., 3734., 3769., 4123., 4141., 4301., 4303., 4305., 4307., 4309., 5707., 5725., 5727., 5728., 5729., 5731., 5735., 5737., 5739., 5741., 5743., or 5749. of the Revised Code." Emphasis added.

The authority to adopt city code rests solely with a municipal corporation's city council, not the Ohio General Assembly. See, R.C. 701.05 ("Municipal corporations operating under a charter which provides for or authorizes a method of procedure in the passage and publication of legislation, the making of improvements, and the levying of assessments differing from the method prescribed by general law, may pass and publish such legislation, make such improvements, and levy such assessments under the general law or in accordance with the procedure provided for or authorized by its charter."). See, *Robinson v. Tax Commissioner of Village of Indian Hill*, 61 Ohio Misc.2d 95, 99, 574 N.E.2d 596, 1989 Ohio Misc. Lexis 39 (C.P. 1989), holding the Village unlawfully delegated the Village's taxing power to the Ohio General Assembly. "The taxing power of the Indian Hill Council is vested in the council by the residents of the village of Indian Hill***[t]he power and discretion vested in a legislative taxing body requires that the inclusion or exclusion of items for taxation purposes be

based on an evaluation of political and social considerations '<u>by the legislative authority imposing the tax</u>.'". Emphasis added. See also, *Ohio v. Gill*, 63 Ohio St.3d 53, 584 N.E.2d 1200 (1992).

d. The Board's decision is unreasonable and unlawful because the Board allowed the City to contravene its own Tax Ordinance. Within the jurisdictional limits of the city, the city ordinances have the force and effect of law. Neither the city Finance Director, nor the city itself may act contrary to city ordinance. *See, e.g., Lyden Co. v. Tracy*, 76 Ohio St. 3d 66, 69, 666 N.E.2d 556 (1996) ("administrative regulations issued pursuant to statutory authority have the force and effect of law; consequently, administrative agencies are bound by their own rules until those rules are duly changed.' *State ex rel. Cuyahoga Cty. Hosp. v. Bur. of Workers' Comp.*, 27 Ohio St. 3d 25, 28, 500 N.E.2d 1370, 1372 (1986)."). The city is bound by its own ordinances. Indeed cities do not have standing to argue their lawfully enacted ordinances are unlawful. Ohio courts have consistently held that political subdivisions lack standing to raise constitutional challenges or to otherwise assert infirmities in their own ordinances and resolutions. For example, in *Avon Lake City School Dist. v. Limbach,* 35 Ohio St.3d 118, 518 N.E.2d 1190 (1988), the Supreme Court of Ohio determined that a political subdivision may not invoke constitutional protections against its own state. See, also, *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision*, 68 Ohio St.3d 493, 625 N.E.2d 1365 (1994); *Bernardini v. Conneaut Area City School Dist. Bd. of Edn.*, 58 Ohio St.2d 1, 387 N.E.2d 1222 (1979); and *Ashland Cty. Bd. of Commrs. v. Ohio Dept.*

of Taxation, 63 Ohio St.3d 648, 590 N.E.2d 730 (1992). The City of Worthington cannot raise questions of ambiguity against its own ordinance.

3. The Board's decision that the Tax Ordinance violates R.C. 718.01 is contrary to law. The Board's decision is unreasonable and unlawful because the Board failed to read R.C. 718.01(A)(7) in pari materia with R.C. 718.01(D), R.C. 718.01(E)(1)(a) and R.C. 718.01(G). See, *Bosher*. R.C. 718.01(E)(1)(a) permits a municipal corporation, by ordinance or resolution, to exempt from income tax any compensation "arising from the sale, exchange, or other disposition of a stock option, the exercise of a stock option, or the sale, exchange, or other disposition of stock purchased under a stock option ***." The Taxpayers' stock option income is reported on schedule C. Thus, the Tax Ordinance is consistent with Worthington's authority to exclude stock option income. While R.C. 718.01(D) does place some limitations upon a municipality's ability to exempt certain compensation and net profits, this limitation must be read in *pari materia* with the explicit provisions of R.C. 718.01(E)(1)(a), which unequivocally grant a municipality the authority to carve out schedule C stock option income without contravening R.C. 718.01. After all,"[i]t is presumed that the entire statute is intended to have effect and meaning.***Accordingly, if possible, a statute must be construed so that some operative effect is given to every word used." *Taber v. Ohio Dept. of Human Serv.* 125 Ohio App.3d 742, 747, 709 N.E.2d 574 (10th Dist. 1998) citing *Richards v. The Market Exchange Bank Co.*, 81 Ohio St. 348, 90 N.E.2d 1000 (1910), and *State v. Arnold*, 61 Ohio St.3d 175, 573 N.E.2d 1079 (1991). See, also, R.C. 1.47(B). In construing these provisions, the Board did not adhere to the established principle that "[s]trict construction of taxing statutes is required, and any doubt must be resolved in favor of the citizen upon whom or the property upon which the burden is sought to be imposed." See, *Davis v. Willoughby,* 173 Ohio St. 338, 182 N.E.2d 552

(1962) at paragraph one of the syllabus. See also, *Gulf Oil Corp. v. Kosydar*, 44 Ohio St.2d 208, 218, 339 N.E.2d 820 (1975).

Respectfully submitted,

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COUNSEL FOR APPELLANTS,
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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was filed with appellee, Andrew M. Ferris, 65 East State Street, Suite 2100, Columbus, Ohio, via certified mail, this 17th day of December, 2012.

David A. Froling

COUNSEL FOR APPELLANTS,
JAMES L. GESLER AND ANGELINE O. GESLER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal was served upon Mike Minister, Law Director, 370 Highland Avenue, Worthington, Ohio 43085, via certified mail, this 17th day of December, 2012.

David A. Froling

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal was served upon Jerry A. Katz, Chair of the Worthington Board of Appeals, 6550 North High Street, Worthington, Ohio 43085, via certified mail, this 17th day of December, 2012.

David A. Froling

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal was served upon Molly Roberts, Finance Director, 6550 North High Street, Worthington, Ohio 43085, via certified mail, this 17th day of December, 2012.

David A. Froling

OHIO BOARD OF TAX APPEALS

James L. Gessler and Angeline O. Gessler,	)	CASE NO. 2009-K-1010
	)	
Appellants,	)	(MUNICIPAL INCOME TAX)
	)	
vs.	)	DECISION AND ORDER
	)	
City of Worthington Income Tax Board of Appeals and Steven R. Gandee, Finance Director,	)	
	)	
Appellees.	)	

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Entered NOV 16 2012

Ms. Margulies, Mr. Johrendt, and Mr. Williamson concur.

Through their appeal, appellants challenge a determination made by the City of Worthington Income Tax Board of Appeals ("MBOA") affirming the city's finance assistant's denial of their request for refund of city income tax paid for tax years 2005, 2006, and 2007. We proceed to consider and resolve this matter upon appellants' notice of appeal, the transcript certified by the MBOA pursuant to R.C. 5717.011, the record of the hearing convened before this board, and the written argument submitted on behalf of the parties.

The facts relevant to this appeal are generally undisputed. Appellants have been residents of the city of Worthington since 1996. James L. Gessler provided tax advisory services for which two of his clients compensated him with stock options that he exercised during tax years 2005, 2006, and 2007. The resulting income was reported on schedule C of appellants' federal income tax returns, as well as on Form 37 of their city tax returns, for the years in question on which tax was paid. In 2008, Mr. Gessler contacted the city of Worthington, disputing the taxable status, as prescribed by the city of Worthington, of the stock options exercised and seeking a refund of taxes paid. Said request was denied initially by the city and subsequently by the MBOA.

From the MBOA's decision, appellants filed the present appeal pursuant to R.C. 5717.011. As this board stated in *Marion v. Marion Bd. of Rev.* (Aug. 10, 2007), BTA No. 2005-T-1464, unreported, at 3, "[w]hen cases are appealed from a municipal board of review to the BTA, the burden of proof is on the appellant to establish its right to the relief requested. Cf. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121." Cf. *Tetlak v. Bratenahl* (2001), 92 Ohio St.3d 46, 51-52.

We begin by referring to Codified Ord. 1703.01 which provides in pertinent part:

> "To provide for the purposes of general Fire Department operation and general Municipal operations, maintenance, new equipment and capital improvements of the City, there is hereby levied a tax at the rate of Two Percent (2%) per annum upon the following:
>
> "***
>
> "(c)(1) On the net profits earned on and after January 1, 2004, of all unincorporated businesses, professions or other activities conducted by residents of the City."

Through Codified Ord. 1701.15, the city expressly defined "net profit" for purposes of its income tax:

> "'Net profit' means for a taxpayer other than an individual, the adjusted federal taxable income and 'net profit' for a taxpayer who is an individual means the individual's profit, *other than amounts required to be reported on schedule C*, schedule E, or schedule F." (Emphasis added.)

Under the preceding definition, the stock options exercised by Mr. Gessler and reported on schedule C of appellants' federal tax return would not constitute "net profit" for purposes of city income tax. Despite this express language, the city posits several grounds for the denial of appellants' refund request, two of which suggest concession that Codified Ord. 1701.15, as enacted, warrants a ruling in appellants' favor: (a) apparent from other city taxing provisions, its subsequent amendment of Codified Ord. 1701.15,[1] and the testimony of its witnesses, it was not the city's intent to exclude schedule C income from the city's definition of net profit and that the above-emphasized language was inadvertent; (b) this board should construe any ambiguity in the city's favor so as to avoid an unreasonable and absurd result; and/or (c) the city's definition of net profit is inconsistent with the definition of the same term as set forth in R.C. Chapter 718 and therefore the latter must prevail.

In *Bosher v. Euclid Income Tax Bd. of Rev.*, 99 Ohio St.3d 330, 2003-Ohio-3886, the Supreme Court, in concluding a city's ordinances did not provide for its taxation of individual lottery winnings, held as follows:

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[1] On October 20, 2008, the city amended this provision to read as follows:

> "'Net profit' means for a taxpayer other than an individual, the adjusted federal taxable income and 'net profit' for a taxpayer who is an individual means the individual's profit required to be reported on Federal Schedules C, E, or F, excluding those amounts exempted by Section 718.01(F) of the Ohio Revised Code."

> "In determining whether Euclid's ordinances permit taxation of lottery winnings, we must adhere to the following rules of statutory construction. First, in looking at the specific language contained in the ordinances, if the language is unambiguous, we must apply the clear meaning of the words used. *Roxane Laboratories, Inc. v. Tracy* (1996), 75 Ohio St.3d 125, 127, ***. In addition, R.C. 1.42 declares, 'Words and phrases shall be read in context and construed according to the rules of grammar and common usage.' Also, statutory enactments that relate to the same general subject matter must be read in pari materia. *United Tel. Co. of Ohio v. Limbach* (1994), 71 Ohio St.3d 369, 372, ***. Finally, we must strictly construe tax ordinances and resolve any doubt as to their meaning in favor of the taxpayer. *Roxane Laboratories*, 75 Ohio St.3d at 127, ***." Id. at ¶14. (Parallel citations omitted.)

Upon review of the ordinance in question, and the testimony provided on the city's behalf, we are not persuaded by the city's arguments regarding its claimed intent in enacting the statute or the asserted existence of a scrivener's error. We consider Codified Ord. 1701.15 to be clear and its terms unambiguous, therefore requiring no interpretation by this board.

Ultimately, however, we find more compelling, and dispositive of this appeal, the city's argument that while it appears appellants would be entitled to a refund under the language appearing in the city's ordinance, the Ohio General Assembly's expression must be deemed to govern the present situation. In *Fisher v. Neusser* (1996), 74 Ohio St.3d 506, the Supreme Court recognized:

> "Ohio municipalities 'have the right to exercise all powers of local self-government and may adopt and enforce such local regulations that are not in conflict with the general law. Sections 3 and 7, Article XVIII, Ohio Constitution. Included within the above grant of authority is the power of taxation. See *State ex rel. Zielonka, City Solr. v. Carrel, Aud.* [1919] 99 Ohio St. 220 ***.' *Thompson v. Cincinnati* (1965), 2 Ohio St.2d 292, 294, ***.

> "That power, however, is subject to 'pre-emption by the General Assembly of the field of income taxation and subject to the power of the General Assembly to limit the power of municipalities to levy taxes under Section 13 of Article XVIII or Section 6 of Article XIII of the Ohio Constitution.' *Angell v. Toledo* (1950), 153 Ohio St. 179, *** paragraph one of the syllabus." , 507. (Parallel citations omitted.)

See, also, *Cincinnati Imaging Venture v. Cincinnati* (1996), 116 Ohio App.3d 1.

R.C. 718.01(G)(1) provides:

> "In the case of a taxpayer who has a net profit from a business or profession that is operated as a sole proprietorship, no municipal corporation may tax or use as the base for determining the amount of the net profit that shall be considered as having a taxable situs in the municipal corporation, an amount other than the net profit *required to be reported by the taxpayer on schedule C* or F from such sole proprietorship for the taxable year."

Although the city has defined net income to mean an "individual's profit, other than amounts required to be reported on schedule C, schedule E, or schedule F," such language is in direct contravention of R.C. 718.01(A)(7):

> "For taxable years beginning on or after January 1, 2004, 'net profit' for a taxpayer other than an individual means adjusted federal taxable income and 'net profit' for a taxpayer who is an individual means the individual's profit *required to be reported on schedule C*, schedule E, or schedule F, other than any amount allowed as a deduction under division (E)(2) or (3) of this section or amounts described in division (H) of this section."[2] (Emphasis added.)

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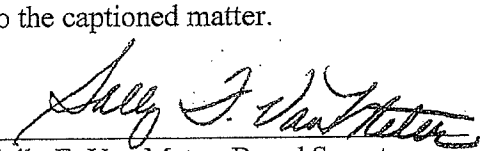
[2] The above-quoted version of the statute, referred to by the parties in their briefs, became effective on December 21, 2007, differing slight from the prior version of the statute:

> "For taxable years beginning on or after January 1, 2004, 'net profit' for a taxpayer other than an individual means adjusted federal taxable income and 'net profit' for a taxpayer who is an individual means the individual's profit, other than amounts described in division (F) of this section, required to be reported on schedule C, schedule E, or schedule F."

In this instance, the disputed income was required to be reported, and was in fact reported, on schedule C of appellant's federal income tax returns. While appellants assert the preceding provision be read in pari materia with R.C. 718.01(E)(1)(a), a statute which grants some latitude to municipalities regarding the taxation of stock option income, we do not find this more permissive provision subservient to the clear expression set forth within the definition enacted by the General Assembly in R.C. 718.01(A)(7). Moreover, nowhere does it appear the city expressly elected to grant exemption to stock option income and Codified Ord. 1701.15 cannot be reasonably read as doing so.

Accordingly, we are unpersuaded by appellants' arguments and it is therefore the decision and order of this board that the decision of the city of Worthington Income Tax Board of Appeals must be, and hereby is, affirmed.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



Sally F. Van Meter, Board Secretary