

IN THE SUPREME COURT OF OHIO

WILLIAM E. MACDONALD III)
 and SUSAN W. MACDONALD)
)
 Plaintiffs-Appellees,)
)
 vs.)
)
 CITY OF SHAKER HEIGHTS)
 INCOME TAX BOARD OF REVIEW,)
 ROBERT BAKER and REGIONAL)
 INCOME TAX AGENCY)
)
 Defendants-Appellants.)

Case No: 2014-14-0574

On Appeal from the Franklin
County Court of Appeals,
Tenth Appellate District

Court of Appeals
Case No. 13 APH-01-71

MEMORANDUM OF AMICUS CURIAE CITY OF CLEVELAND IN SUPPORT OF JURISDICITON

Barbara A. Langhenry (0038838)
 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 AMICUS CURIAE,
THE CITY OF CLEVELAND

RECEIVED
 APR 11 2014
 CLERK OF COURT
 SUPREME COURT OF OHIO

FILED
 APR 14 2014
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF AMICUS CURIAE CITY OF CLEVELAND	1
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	6
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW	8
<u>Proposition of Law No. 1:</u> When appeals are taken from municipal boards of appeal to the Board of Tax Appeals, the Board of Tax Appeals acts in an appellate capacity and decisions of the municipal boards are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful.	8
<u>Proposition of Law No. 2:</u> Nonqualified deferred compensation taxable as qualifying wages under a municipality’s income tax ordinance is not exempt as pension benefits under the municipal ordinance even where the ordinance does not define the term “pension” or “deferred compensation.”	9
A. Taxable Wages For City Tax Purposes Is Adjusted FICA Wages.	9
B. Nonqualified Deferred Compensation Is Clearly FICA Wages.	10
C. Municipal Action Is Required To Exempt Such Wages.	10
D. When Deferred Amounts Are Taken Into Account For FICA Purposes.	11
E. State Law Also Provides For A Credit Related To City Tax.	12
F. The SERP Benefits Are Wages When Reported In Box 5 And When Paid.	12
G. There Is No “Special” Category Of Nonqualified Deferred Compensation.	13

TABLE OF CONTENTS (Cont'd)

	<u>Page</u>
H. Decision Conflicts With <i>Wardrop v. Middletown Income Tax Review Bd.</i>	14
I. Decision Gives SERP Wages Better Tax Treatment Than Pensions.	15
CONCLUSION	15

CERTIFICATE OF SERVICE

APPENDIX	<u>Appx Page</u>
Decision of the Income Tax Board of Review, City of Shaker Heights, Ohio, dated August 8, 2008	1
Decision and Order of the Board of Tax Appeals, Case No. 2008-K-1883, entered December 28, 2012	13
Decision and Judgment Entry of the Tenth Appellate District, Case No.13AP-71, dated February 27, 2014	25

INTEREST OF AMICUS CURIAE CITY OF CLEVELAND

The city of Cleveland's interest in this case is that the same Appellee-Taxpayers here have a separate case currently pending before the Ohio Board of Tax Appeals where they claim that wages paid in the form of nonqualified deferred compensation is exempt from city tax as a "pension" even though Cleveland law clearly defines both "pensions" and "nonqualified deferred compensation" and treats the two differently for Cleveland tax purposes.

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

This cause presents two critical issues for the future of municipal taxation in Ohio: (1) whether the Board of Tax Appeals acts in an appellate capacity when appeals are taken from municipal boards of tax appeals created pursuant to R.C. 718.11, and (2) whether taxpayers can evade the payment of taxes on wages paid in the form of nonqualified deferred compensation by claiming that such wages are exempt from city tax as a "pension."

In this case, the city of Shaker Heights' Income Tax Board of Review rejected Taxpayers' claim that income attributable to a nonqualified deferred compensation plan constituted a "pension" which was exempt from tax under Shaker's Income Tax Ordinance and held that such income was subject to city tax since Shaker had not enacted any resolution or ordinance exempting income attributable to a nonqualified deferred compensation plan from its tax. (Appx. at 8.) After the Taxpayers appealed the Shaker Board's decision to the Ohio Board of Tax Appeals ("BTA"), the BTA reversed finding that even though the income was attributable to "a nonqualified deferred compensation plan" "such designation" does not "necessarily mandate[] its exclusion from the commonly accepted definition of pension" "[w]here the city has left the

term pension open to interpretation[.]” (Appx. at 22.) The BTA found the income to be a “pension benefit and as such [was] not subject to tax by virtue of [the Shaker ordinance exempting pensions].” (Appx. at 23.) Following Shaker’s appeal, a divided court of appeals affirmed finding the BTA’s decision was not unreasonable or unlawful.” (Appx. at 29.)

The decision of the court of appeals is an affront to the uniformity of taxation requirement mandated by the General Assembly and set forth in R.C. 718.01(D)(1) that “[n]o municipal corporation shall exempt from a tax on income compensation for personal services of individuals over eighteen years of age[.]” The compensation at issue in this case is attributable to a nonqualified deferred compensation plan. There is no dispute that the General Assembly could have exempted nonqualified deferred compensation from tax if it chose—the General Assembly did not. And while state law plainly provides that a municipality “may, by ordinance or resolutions exempt from *** a tax on income *** [c]ompensation attributable to a nonqualified deferred compensation plan[.]” *see* R.C. 718.01(E)(1)(b), Shaker clearly has not done so as the Shaker Board found. (Appx. at 8.) Since neither Shaker nor the General Assembly has exempted wages attributable to nonqualified deferred compensation plans, this Court urgently needs to correct the decision depriving municipal coffers of tax revenue to which they clearly have a right to receive.

The implications of the decision affect every Ohio municipality and incorporated village that levies an income tax and has *chosen* not to exempt nonqualified deferred compensation from tax. The public’s interest in the uniformity of taxation is profoundly affected by a holding that the wages of a small select group of highly paid taxpayers are somehow exempt as a “pension.” The wages at issue are from a “supplemental executive retirement plan (SERP)”

which is nothing more than a “top hat” plan—a nonqualified deferred compensation plan “maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.” *Gilliam v. Nev. Power Co.*, 488 F.3d 1189, 1192-93 (quoting the federal Employment Retirement Income Security Act (ERISA) at 29 USC 1051(2), 1081(a)(3), 1101(a)(1)). A “top hat” plan is not a pension plan under the Internal Revenue Code since (among other things) “it discriminates [] in eligibility requirements, contributions or benefits in favor of employees who are officers ... or the highly compensated employees.” Treas. Reg. 1.401-1(b)(3).

Apart from this fairness consideration, which makes this case one of great public interest, the decision of the court of appeals has broad general significance. Millions of Ohio citizens are employed and make employee deferrals and contributions to pension and retirement plans as defined under Section 3121(a)(5) of the Internal Revenue Code. These employee deferrals and contributions are subject to municipal tax in Ohio since the income is included in “qualifying wages,” the taxable wage base state law requires every Ohio municipality to use. R.C. 718.03(A)(2)(b)(iii). By finding SERP wages are wholly exempt from city tax as so-called “pensions,” the court of appeals’ decision means that nonqualified deferred compensation under SERPs receives better tax treatment than pension plans for city tax purposes. Under *no* circumstance should that be the case.

The decision of the court of appeals also creates a bad and troublesome precedent that creates a “special” category or “classification” of nonqualified deferred compensation for city tax purposes not authorized by the Ohio General Assembly. The court of appeals’ decision essentially finds that municipalities can exempt some forms of nonqualified deferred

compensation but not others without legislative approval. Nothing in R.C. 718.03(A)(2)(c) supports that conclusion. In fact the statute reads “any amount attributable to a nonqualified deferred compensation plan” may be “exempted from taxation.” In construing a statute, courts have repeatedly recognized that the word “any” means “all.” *United States v. Gonzales*, 520 U.S. 1, 5 (where a statute uses the word “any” without limiting language it must be read to mean “all”); *Motor Lodge Inc. v. Board of Township Trustees*, 52 Ohio Op. 257 (1953) (“any” means “all” or “every”). No authority exists to recognize a “special” category of nonqualified deferred compensation.

As noted earlier, top-hat plans (like the one here) are not given favorable tax treatment under the Internal Revenue Code. This is so since Congress recognized that participants in top-hat SERPs “by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan *** and therefore would not need the substantive rights and protections of [ERISA].” DOL Op. Ltr. 90-14(A), 1990 WL 123933 at *1 (E.R.I.S.A.) Unlike pension plans which are heavily regulated by the Employee Retirement Income Security Act of 1974 (“ERISA”), the field of nonqualified deferred compensation plans represent a “wild west” of sorts in the tax planning area. There are no rules or regulations governing SERPs.

The judgment of the court of appeals has great general significance also because it simply allowed the BTA to substitute its judgment for that of the Shaker Heights Income Tax Board of Review. R.C. 5717.011 allows appeals from municipal boards of tax appeals created under R.C. 718.11 to the BTA. The BTA, however, made no suggestion that there was any flaw in the Shaker Board’s findings. Clearly, the BTA is acting in an appellate capacity and simply

substituting its judgment for that of the Shaker Board is clearly not proper in any administrative appeal in Ohio.

Finally, this case raises a substantial constitutional question as well. The decision offends the Home-Rule Amendment to the Ohio Constitution since Shaker's taxing power is an exercise of local self-government. The decision in this case limiting Shaker's taxing power violates the Home-Rule Amendment.

This Court has held time and again that because municipal taxing power is derived directly from the Ohio Constitution and not from the General Assembly, only other constitutional provisions and express acts of the General Assembly can limit or restrict that taxing power. *Cincinnati Bell Telephone Co. v. Cincinnati*, 81 Ohio St.3d 599, 493 N.E.2d 212 (1998). This is because "[a] fundamental power of government is the power to raise revenue." *Angell v. City of Toledo*, 153 Ohio St. 179, 182, 91 N.E.2d 250, 252 (1950). The decision of the court of appeals thwarts this fundamental power.

If allowed to stand, the decision of the court of appeals would seriously harm municipal tax collection. Since no rules or regulations govern SERPs, such plans could easily be designed to undermine the municipal income tax base. For example, a SERP could be designed to allow an executive to defer all of his wages until retirement. Would those wages be *pensions* too?

Further, is it not well established that "[e]xemption [from tax] is the exception to the rule and statutes granting exclusions *** are to be strictly construed[?]" *National Tube Co. V. Glander*, 157 Ohio St. 407, 105 N.E.2d 648, (1952) paragraph two of the syllabus. This is so since statutes that allow an exemption from tax is "in derogation of equal rights."

Anderson/Maltbie Partnership v. Levin, 127 Ohio St.3d 178, 2010-Ohio-4904 at ¶16. The decision here therefore implicates equal protection as well.

In sum, this case puts in issue the importance of preserving the uniformity of taxation. To assure such uniformity, 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 Income Tax Board of Review for the City of Shaker Heights ("Shaker Board"). It is a tax case where Taxpayers, William E. MacDonald III and Susan W. MacDonald appealed a Ruling issued by the City's Tax Administrator, the Regional Income Tax Agency ("RITA"), concerning an assessment of additional tax due for tax year 2006.

The wages at issue are solely attributable to William E. MacDonald's ("Taxpayer") employment. At all relevant times, Taxpayer was a resident of the city of Shaker Heights, Ohio and employed by National City Corporation ("NCC") located in the city of Cleveland, Ohio. As part of his overall compensation package, Taxpayer had been selected to participate in a nonqualified deferred compensation plan set up by NCC which it termed a "Supplemental Executive Retirement Plan ("SERP"). (Appx. at 14.) Taxpayer retired from NCC as Vice-Chairman on December 31, 2006. Upon retirement, Taxpayer's SERP wages were included in his total taxable qualifying wages for city tax purposes and reported in Box 5 of his Form-W-2. Those SERP wages totaled \$9,107,013.

Taxpayers filed their 2006 joint city tax return paying city tax on amounts reported in Box 18 of Taxpayer's Form W-2 totaling \$5,459,598. Thereafter, Shaker's Tax Administrator,

RITA, assessed additional tax due based on the amounts reported in Box 5 of the Form W-2 totaling \$14,566,611. Taxpayers appealed the assessment to the Shaker Board. (Appx. at 15.)

Before the Shaker Board, Taxpayers argued that the SERP wages were not subject to city tax because the deferred compensation constituted a “pension” under Shaker’s Income Tax Ordinance and therefore is exempt from city tax. *Id.*

The Shaker Board rejected Taxpayers’ arguments finding that “Chapter 718” “controls what is taxable [] income” for city tax purposes and that state law requires Ohio municipalities to tax wage income on “the basis” of “qualifying wages” which is “the amount calculated and reported in Box 5 of [the] Form W-2.” (Appx. at 7.) The Shaker Board noted that “qualifying wages” “includes amounts attributable to a nonqualified deferred compensation plan” “unless such amounts have been exempted from tax by [] municipal[] [] ordinance or resolution” and “since Shaker Heights has not enacted any resolution or ordinance” “that exempts nonqualified deferred compensation” “from its income tax ordinance” such wages were subject to city tax. (*Id.* at 7-8.) Taxpayers appealed that decision to the BTA.

The BTA reversed the decision of the Shaker Board despite finding (i) that “the parties [were] in agreement that the amount in controversy is attributable to” “a nonqualified deferred compensation plan, and that such amount appeared in Box 5 of MacDonald’s Form W-2” and (ii) that “[i]t [was] also uncontested that the city ha[d] not, by resolution or ordinance, expressly exempted from taxation amounts attributable to a nonqualified deferred compensation plan.” (Appx. at 18-19.) Shaker appealed the BTA’s decision to the court of appeals. A divided court of appeals affirmed the BTA’s decision. (Appx. 25-42.)

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: When appeals are taken from municipal boards of appeal to the Board of Tax Appeals, the Board of Tax Appeals acts in an appellate capacity and decisions of the municipal boards are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful.

As with any appeal, the appellant has the burden to establish the appropriate grounds for the appellate tribunal to sustain the appeal. And, of course, as with any appeal, the appellate tribunal may disagree with certain findings of the inferior tribunal.

The problem with the BTA's decision in this case was explained by the dissent: "At no point does the BTA address the reasonableness of the Shaker Heights Board's findings let alone address the question whether MacDonald has demonstrated that those findings are clearly unreasonable. Instead, the BTA acted as if it were writing on a clean slate." (Appx. at 39.) Clearly, the BTA, acting in an appellate capacity, may not simply substitute its judgment for that of the Shaker Board but must evaluate whether the Shaker Board's findings support the result reached, not whether a different result could have been reached. *State ex rel. Celebrezze v. Envtl. Enterprises, Inc.*, 53 Ohio St.3d 147, 154, 559 N.E.2d 1335, 1342 (1990) (Resnick, J., concurring in part and dissenting in part) ("[I]t is axiomatic that an appellate court may not simply substitute its judgment for that of the trial court so long as there is some competent, credible evidence to support the lower court findings").

Furthermore, as the dissent noted, the BTA gave "no deference to [the] factual findings, or interpretation of Shaker Heights' city code by the Shaker Heights Board." (Appx. at 38.) In *Nusseibeh v. Zaino*, 98 Ohio St.3d 292, 2003-Ohio-855, 784 N.E.2d 93, ¶10, this Court held that "the Tax Commissioner's findings are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful" in an appeal before the BTA. And in *Standards*

Testing Laboratories, Inc. v. Zaino, 100 Ohio St.3d 240, 2003-Ohio-5804, 797 N.E.2d 1278, ¶130, this Court made clear that the taxpayer carries the burden “to show the manner and extent of the error in the Tax Commissioner’s final determination.” Why wouldn’t these holdings equally apply to an appeal from a municipal board of appeal to the BTA? The majority’s claim that “deference to a board of review decision is illogical,” simply because R.C. 5717.011 gives the parties the right to submit “additional evidence” is clearly not a legitimate reason. (Appx. at 32-33.) See *AT&T Communications of Ohio, Inc. v. Lynch*, 132 Ohio St.3d 92, 2012-Ohio-1975, 969 N.E.2d 1166, ¶¶13-15 (noting that “while a common pleas court in an R.C. 2506.01 appeal may consider evidence outside the administrative record” it “nevertheless ‘performs an appellate function’”).

Proposition of Law No. 2: Nonqualified deferred compensation taxable as qualifying wages under a municipality’s income tax ordinance is not exempt as pension benefits under the municipal ordinance even where the ordinance does not define the term “pension” or “deferred compensation.”

Taxable wages for city tax purposes clearly includes wages attributable to a nonqualified deferred compensation plan unless the municipality has exempted such wages from its tax in accordance with R.C. 718.03(A)(2)(c). In this case, Shaker has not exempted income from a nonqualified deferred compensation plan as provided by state law. An ordinance exempting pension benefits does not encompass wages attributable to a nonqualified deferred compensation plan. This is true notwithstanding the fact that the ordinance may not define the term “pension” or “deferred compensation.”

A. Taxable Wages For City Tax Purposes Is Adjusted FICA Wages.

State law requires Shaker and every other Ohio municipality to tax on the same wage base which is defined in terms of “qualifying wages.” Am.Sub. H.B. 95, 150 Ohio Laws 629; R.C.

718.01(H)(10); 718.03. "Qualifying wages" are the Internal Revenue Code 3121(a) wages without regard to wage limitations adjusted as provided in Revised Code Sections 718.03(A)(2)(a)-(d). So for city tax purposes, taxable wages are the wages subject to the Medicare tax on wages imposed by the Federal Insurance Contributions Act ("FICA").¹ These are the wages reported in Box 5 of the federal Form W-2.

B. Nonqualified Deferred Compensation Is Clearly FICA Wages.

Under FICA, "wages" are defined as all remuneration for employment including the cash and the cash value of benefits unless specifically excepted under 3121(a). 26 USC 3121(a). Nonqualified deferred compensation are wages for FICA tax purposes. *See Hoerl & Associates, P.C. v. U.S.*, 996 F.2d 226, 228 (10th Cir. 1993) ("wages paid under a nonqualified deferred compensation plan must be taken into account for FICA purposes[.]").

C. Municipal Action Is Required To Exempt Such Wages.

For Ohio municipal income tax purposes, "qualifying wages" plainly includes wages attributable to a nonqualified deferred compensation plan unless exempted under R.C. 718.03(A)(2)(c). State law permits a municipality to "[d]educt any amount attributable to a nonqualified deferred compensation plan [from qualifying wages] ... if the compensation is included in wages and has by resolution or ordinance, been exempted from taxation by the municipal corporation." R.C. 718.03(A)(2)(c). If the municipality has not exempted wages

¹ 26 USC 3101; 3111. The FICA payroll tax has two pieces, social security and Medicare. The Medicare tax is imposed on the full amount of IRC 3121(a) wages earned; while the social security portion of the tax is imposed only on wages up to a certain amount. Since R.C. 718.03 provides that qualifying wages means 3121(a) wages "without regard to any wage limitations" the municipal income tax is specifically tied to the Medicare wage base reported in Box 5 of federal Form W-2.

attributable to a nonqualified deferred compensation plan, that compensation is clearly subject to city tax.

D. When Deferred Amounts Are Taken Into Account For FICA Purposes.

When wages attributable to a nonqualified deferred compensation plan must be included in FICA wages and subject to FICA tax is governed by special rules.

Under 26 USC 3121(v)(2)(A), nonqualified deferred compensation is considered FICA wages and included in Box 5 wages when earned (i.e., services are performed) unless the right to receive the wages is subject to a substantial risk of forfeiture. Once services are performed however, the right to receive the compensation vests and is no longer subject to a substantial risk of forfeiture and the wages must be reported in Box 5. Treas. Reg. 31.3121(v)(2)-1(a)(2)(ii).

With some nonqualified deferred compensation plans like the SERP at issue, a modified timing rule exist where the amounts are not required to be taken into account as FICA wages until such amounts are reasonably ascertained. Treas. Reg. 31.3121(v)(2)-1(e)(4)(i)(A). This is so even though services have been performed and the right to receive wages is vested, if during the calendar years deferred, the amounts cannot be calculated because based on factors not known at that time (like the form of payment, when payments begin, etc).

Deferred amounts are "reasonably ascertained" (can be calculated) on the first date the amount, form and beginning date of benefit payments are known (the resolution date) and the only assumptions needed to determine the present value actuarial equivalent of that future benefit is assumptions as to interest rate and life expectancy. Treas. Reg. 31.3121(v)(2)-1(c)(2); 31.3121(v)(2)-1(e)(4)(i)(B).

On the first date that amounts deferred are “reasonably ascertained,” employers are required to take into account (include) the present value of the amount deferred in calculating FICA wages for that calendar year. Treas. Reg. 31.3121(v)(2)-1(e)(4)(i)(A); 31.3121(v)(2)-1(e)(5).

When taken into account as FICA wages, amounts deferred are treated as wages paid by the employer and received by the employee; FICA tax is imposed and employers are required to withhold and remit such tax at that time. Treas. Reg. 31.3121(v)(2)-1(d)(i); 31.3121(v)(2)-1(e)(5); 31.3121(v)(2)-1(f)(1). The employer may then claim a deduction for wages paid as well. This is true for the Ohio municipal income tax too unless (as noted below), the municipality has specifically exempted nonqualified deferred compensation from its tax.

E. State Law Also Provides For A Credit Related To The City Tax.

It would be noted that state law requires municipalities to issue a refundable tax credit under certain circumstances where city tax has been paid on nonqualified deferred compensation that is not received. R.C. 718.021. The fact that state law mandates a refundable tax credit is again conclusive proof that state law contemplates taxation of nonqualified deferred compensation unless it has specifically been exempted by ordinance or resolution.

F. The SERP Benefits Are Wages When Reported In Box 5 And When Paid.

In the decision, the court of appeals found that “[n]othing in Shaker[’s] [] code or in state law clearly indicates whether or not benefits from a nonqualified deferred compensation plan, such as the SERP at issue here, is a pension.” (Appx. at 28.) However, the character of the SERP income as wages *never* changes. There are of course two sides to every deferred compensation transaction—the deferral side—when the services are performed and the wages

are deferred—and the payment side—when those same wages are paid. Because “qualifying wages” is tied to FICA wages, necessarily, it captures the deferral side of the transaction. The benefits under a SERP are taxable wages when deferred and taken into account as FICA wages; and they *remain* taxable wages when paid to the Taxpayer. Treas. Reg. 31.3121(v)(2)-1(d)(i); 31.3121(v)(2)-1(e)(5); 31.3121(v)(2)-1(f)(1). Despite the court of appeals’ finding to the contrary, the income does not somehow convert from taxable wage income when deferred and taken into account as FICA wages to nontaxable pension income when paid.

G. There Is No “Special” Category Of Nonqualified Deferred Compensation.

In finding that the SERP benefits were exempt as a pension benefit, the court of appeals created a “special” category of nonqualified deferred compensation that was not authorized by the Ohio General Assembly. Nothing in R.C. 718.03(A)(2)(c) supports the finding that municipalities can exempt some forms of nonqualified deferred compensation but not others. In calculating qualifying wages, state law authorizes a municipality to “[d]educt *any* amount attributable to a nonqualified deferred compensation plan or program described in section 3121(v)(2)(C) of the Internal Revenue Code if the compensation is included in wages and has by resolution or ordinance, been exempted from taxation by the municipal corporation.” R.C. 718.03(A)(2)(c). (Emphasis added.) “Any” means “all.” *United States v. Maxwell*, 285 F.3d 336, 341 (4th Cir. 2002) (“Webster’s [] Dictionary provides that when the word ‘any’ is used as a function word *** the word ‘any’ means ‘all’”); *United States v. Gonzales*, 520 U.S. at 5 (“read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind[.]’”) R.C. 718.03(A)(2)(c) can only properly be read as referring to *all* “amount[s] attributable to a nonqualified deferred compensation plan or program.” If the Ohio General

Assembly had intended to authorize municipalities to exempt amounts attributable to *some* nonqualified deferred compensation plans, it certainly knew how to use language to indicate such intent. Nothing in that statute allows a municipality to pick and choose which form of nonqualified deferred compensation to tax or not tax.

H. Decision Conflicts With *Wardrop v. Middletown Income Tax Review Bd.*

Wardrop v. Middletown Income Tax Review Bd., 2008 WL 4541996, 2008-Ohio-5298 also dealt with a SERP. In that case the Ohio appellate court rejected the argument that the SERP benefit constituted a “pension” and found that such benefits were subject to city tax.

The court of appeals found that “the language of the ordinance was substantially different than the Shaker Heights ordinance” as “the ordinance [in *Wardrop*] expressly stated that earnings designated as ‘deferred compensation’ were taxable.” (Appx. at 29-30.) This finding ignores the fact that *Wardrop* was decided prior to the Ohio General Assembly requiring municipalities to tax on the same wage base. See Am.Sub.H.B. 95, 150 Ohio Laws 629. As noted, state law now requires that wages attributable to nonqualified deferred compensation plans to be taxed unless specifically exempted by the municipality. This particular finding amounts to nothing more than a judicial red herring.

The court of appeals also emphasized the fact that “*Wardrop* involved an R.C. Chapter 2506 appeal—not an appeal pursuant to R.C. Chapter 5717.” (Appx. at 30.) Apparently, for the court of appeals this means that while the court of common pleas in a R.C. 2506.01 appeal must give deference to the findings of municipal boards of appeal, the BTA in a Chapter 5717 appeal is not at all bound by such findings and is completely free to substitute its judgment for that of the municipal board. However, like the municipal board, “the BTA is [only] a quasi-judicial body

when discharging its adjudication duties." *TBC Westlake, Inc. v. Hamilton Cnty. Bd. of Revision*, 81 Ohio St.3d 58, 62, 1998-Ohio-445, 689 N.E.2D 32, 35. The term "quasi-judicial" does not imply that such boards possess judicial powers like courts. Moreover, quasi-judicial bodies do not have the power to ignore, invalidate, or declare unenforceable legislative directives used in making quasi-judicial determinations. The SERP benefits at issue were clearly subject to Shaker's income tax as qualifying wages under R.C. 718.03. The BTA was not free to simply ignore and disregard that fact.

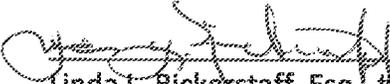
I. Decision Gives SERP Wages Better Tax Treatment Than Pensions.

Currently and even before state law changed the municipal wage base to qualifying wages, employee deferrals and contributions to pensions and retirement plans were subject to city tax. By completely exempting SERP wages from city tax, the court of appeals' decision gives those wages better tax treatment than pension plans for city tax purposes.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and raises a substantial constitutional question. Amicus Curiae, City of Cleveland, urges this Court to accept jurisdiction of this case so that the important issues presented can be reviewed on the merits.

Respectfully submitted,
Barbara A. Langhenry, Esq., #0038838
Director of Law

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

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum of Amicus Curiae City of Cleveland in Support of Jurisdiction was served by regular U.S. mail on William Gruber, Esq., 3400 Lee Road, Shaker Heights, Ohio 44120, counsel for the City of Shaker Heights Income Tax Board of Review and Robert Baker; Amy Arrighi, Esq., 10107 Brecksville Road, Brecksville, Ohio 44141, counsel for the Regional Income Tax Agency; and Christopher J. Swift, Esq. 3200 PNC Center, 1900 East Ninth Street, Cleveland, Ohio 44114-3458, counsel for William E. MacDonald III and Susan W. MacDonald on this 10th day of April 2014.


Linda L. Bickerstaff,
Assistant Director of Law

Counsel for Amicus Curiae,
The City of Cleveland

APPENDIX



SHAKER HEIGHTS

INCOME TAX BOARD OF REVIEW
CITY OF SHAKER HEIGHTS, OHIO

William E. MacDonald, III,)
 Susan W. MacDonald,)
)
 Appellants,)
)
 v.)
)
 Regional Income Tax Agency,)
 On behalf of Robert Baker,)
 Tax Administrator,)
)
 Appellee.)

DECISION

ISSUED: AUGUST 8, 2008

In this matter before the Income Tax Board of Review ("Board"), Appellants challenge the final determination issued on February 28, 2008, by the Regional Income Tax Agency ("RITA") as Tax Administrator for the City of Shaker Heights ("City"), which concluded that RITA's income tax adjustments to Appellants' tax year 2006 liability, as set forth in RITA's change of liability notice of May 8, 2007, were correct and, therefore, the Appellants' 2006 municipal income tax liability to the City should be calculated on the wages reported in Box 5 of the Appellant's 2006 W-2, not on the wages reported in Box 18, Local wages, tips, etc. of the 2006 W-2.

This appeal was brought before this Board pursuant to Section 111.2503 of the Codified Ordinances (C.O.) of the City. The Board established Procedural Rules for the Board pursuant to Section 111.2501 C.O. at its meeting of June 6, 2008. The hearing in this matter was held pursuant to said Procedural Rules.

The hearing in this matter was held on July 9, 2008. A Court Reporter recorded the proceedings. The hearing was held in private.

In recognition of the confidential nature of this matter, this Decision does not include any specific income tax or financial data related to Appellants' specific circumstances. The Board has found that such specific information is not relevant or necessary to its Decision in this appeal.

Procedural History

1. On March 27, 2008, the City's Board received a Notice of Appeal from a final determination of the City's Tax Administrator, RITA, issued February 28, 2008, filed on behalf of William E. MacDonald, III (individually denoted as "Appellant") and Susan W. MacDonald (together denoted as "Appellants") by their legal counsel.

2. On May 9, 2008, the Board sent a letter to Appellants' counsel advising him that the Board had received the Notice and that the hearing was tentatively scheduled on July 9, 2008. The letter was sent by facsimile, electronic mail and regular U.S. mail.

3. On May 16, 2008, the Board sent a letter to legal counsel for RITA advising her of the filing, sending her a copy of the filing, and notifying her that the tentative hearing date was July 9, 2008.

4. On June 6, 2008, the Secretary to the Board issued a Pre-hearing Order, sent by facsimile and regular mail, which ordered the following:

A. The hearing of this matter shall be held on Wednesday, July 9, 2008, starting at 8:30 a.m., in Conference Room B, at Shaker Heights City Hall, 3400 Lee Road, Shaker Heights Ohio 44120.

B. Any additional brief or supporting argument on behalf of Appellant may be filed with the Secretary and served on the Appellee no later than June 18, 2008.

C. Any reply brief or supporting argument on behalf of the Appellee may be filed with the Secretary and served on the Appellant no later than June 30, 2008.

D. Any reply by Appellant to Appellee's brief or supporting argument may be filed with the Secretary and served on the Appellee no later than July 7, 2008.

E. The parties shall file with the Secretary and serve the other party a list of witnesses that party intends to call at the hearing and any documents or other material that the party intends to introduce into evidence, other than what the parties file as part of their pre-hearing briefs, no later than July 2, 2008.

F. The parties may file with the Secretary a proposed Stipulation of facts, and any such proposed Stipulation shall be filed with the Board no later than July 2, 2008.

G. The Rules and Procedure for the Hearing attached to the Order have been adopted by the Board and shall be used to conduct this process, including the hearing. These Orders and the various dates may be extended or modified at the discretion of the Board or the Board Secretary.

H. The term "served" as used in this Order means actual delivery and receipt by the receiving party by 4:59 p.m. on the required date by E-mail, facsimile or hand delivery.

5. On June 13, 2008, the Board received a letter from Appellant stating that the Notice of Appeal and attachments would serve as Appellants' brief in response to the Prehearing Order, paragraph 2.

6. On June 30, 2008, the Board received the Reply Brief of Appellee.
7. On July 2, 2008, the Board received the witness and exhibit lists from Appellants and Appellee.
8. On July 7, 2008, the Board received Appellants' Reply to Appellee's Reply Brief.
9. On July 9, 2008, the Hearing in this matter was held. After a pre-hearing conference held just prior to the start of the Hearing, certain stipulations were agreed to by the parties (which are set forth in their entirety below). At the conclusion of the Hearing, the Board and parties agreed that the appeal would be decided based on the pre-filed briefs and documentary evidence, as well as the evidence and argument presented at the Hearing, and that no post-hearing briefs would be filed. The Board then met in Executive Session to reach its decision, which is set forth in this document.

Issues Presented

The parties agreed that the issues before the Board for determination in this appeal are as follows:

1. Is the Appellant's Supplemental Executive Retirement Plan (SERP), which is a nonqualified deferred compensation plan, a "pension" as that term is used in Section 111.0901 (b) and (c) of the City's Codified Ordinances?
2. If the SERP is a "pension" under Section 111.0901 (b) and (c) of the City's Codified Ordinances, does the City's exemption set forth in that section apply only to payments made to Appellants under the SERP or does the exemption apply also to the amount stated in Box 5 of Appellant's 2006 Form W-2, which represents the present value of the portion of Appellant's SERP benefit that was not previously reported?

Standard of Proof

The Appellant must show by a preponderance of the evidence and by the applicable rules of law that the issues before the Board should be answered in the affirmative in order to prevail in this appeal.

Stipulations

1. Pre-filed Exhibits of the parties are admitted into evidence without objection:
 - A. Appellants' Exhibits A – I, and
 - B. Appellee's Exhibits 1 – 3.

2. Administrative notice is taken and accepted by the parties of the Municipal Tax Code, Chapter 111, of the City of Shaker Heights Codified Ordinances.

3. Administrative notice is taken and accepted by the parties of the Regional Income Tax Agency (RITA) Rules.

4. Appellant William E. MacDonald III was an employee of National City Corporation (NCC)¹ for over 38 years.

5. Appellant qualified for NCC's Supplemental Executive Retirement Plan (SERP).

6. Appellant's SERP is a nonqualified deferred compensation plan.

7. Appellant retired on December 31, 2006.

8. The present value of the portion of Appellant's SERP benefit that was not previously reported was included in Box 5 of his 2006 Form W-2.

9. On or about April 12, 2007, Mr. and Mrs. MacDonald filed with RITA their 2006 Individual Income Tax Return as residents of the City of Shaker Heights.

10. Attached to the return was Mr. MacDonald's Form W-2 Wage and Tax Statement issued to him by his employer, National City Bank (NCB).

11. In Box 5 on the NCB W-2, Mr. MacDonald's Medicare wages and tips for Tax Year 2006 equaled \$ A².

12. The MacDonalds calculated their tax liability to the City of Shaker Heights not on the compensation reported in Box 5 of the W-2 but on Box 18, Local wages, tips, etc..., in the amount of \$ B and arrived at a tax liability to Shaker Heights, before payments and credits, of \$ C.

13. On May 9, 2007, RITA issued a notice to Mr. and Mrs. MacDonald that their tax liability to Shaker Heights was to be calculated on the wages reported in Box 5 of the W-2 and provided a proposed change of tax liability for Shaker Heights from \$ C to \$ D.

¹ NCC is the parent of National City Bank ("NCB"), which is referred to in Appellant's Exhibit E as an "affiliated service group" of NCC (see Appendix A of Exhibit E.) NCC and NCB are used interchangeably in this Decision.

² The actual amounts set forth in the Stipulation have been left out of this Decision in order to maintain Appellants' privacy, and each separate amount is represented by a letter. It should be noted that the amount represented by "A" is substantially greater than the amount represented by "B" (i.e. more than 2.5 times greater) and, therefore, the amount represented by "D" is substantially greater than the amount represented by "C" (i.e. more than 3 times greater).

14. A final determination by RITA was issued to the MacDonalds on February 28, 2008.

Findings of Fact

1. The Board accepts the Stipulations agreed to by the parties and incorporates them into these Findings of Fact. There is no dispute as to the amounts of money actually stated in the Stipulations, on Appellant's W-2 Form, and in the Appellants' Tax Form for 2006 and RITA's change of liability, which amounts are not stated in this Decision.

2. As to the letters provided by Appellant as Exhibit G dated July 16, 1993 and September 29, 1993, which Appellant asserts are relevant to this appeal:

A. The relevance and probative value of these letters to this appeal are questionable due to the following:

(i) The first letter is self-serving, in that it was prepared on behalf of, among other clients, National City Corporation (NCC), the former employer of the Appellant and the entity funding the Appellant's SERP.

(ii) The second letter was prepared by the Tax Administrator for the City of Cleveland, which is a member of the Central Collection Agency (CCA), and as such it is not binding on the City of Shaker Heights, the Regional Income Tax Agency (RITA), or this Board.

(iii) The first letter also specifically asks CCA for a review of "our interpretation of the CCA Rules and Regulations." Thus, these letters did not review whether the issues and conclusions in the letters apply in matters subject to the ordinances of the City of Shaker Heights or the rules and regulations of RITA.

(iv) Both letters are dated prior to the 2004 change in State law referenced in Appellants' initial brief, at p. 7, when "[e]ffective January 1, 2004, the provisions of H.B. 95 became applicable (and)...[p]ursuant to H.B. 95, nonqualified deferred compensation reflected in Box 5 of an individual's Form W-2 became subject to municipal income taxation." Thus, these letters preceded in time the change in State law that mandates that cities use the amount stated in Box 5 of an individual's Form W-2, which included the Appellant's SERP amount, as the basis for the application of municipal income tax.

B. If the letters are relevant and probative to some degree, then:

(i) The letter dated July 16, 1993 on behalf of NCC states as to "Supplemental Retirement Plans", such as the Appellant's SERP: "Conclusion: First, there is no employer or employee contribution to tax while the individual is employed. Second, the payments received after termination of employment would be considered pension income, and thus excepted from tax." However, the City is not, in this case, attempting to tax either pre-retirement employee or employer contributions or after-retirement payments. The City is attempting to tax the pre-retirement present value of the Appellant's nonqualified deferred compensation plan as set forth in Box 5 of the Appellant's W-2, pursuant to State law. Thus, Exhibit G is silent on the issue before the Board.

(ii) The letter dated July 16, 1993 does not refer to nonqualified deferred compensation plans as pensions. It does, however, assert that "the payments received after termination of employment would be considered pension income, and thus excepted from tax."

3. As to the letters provided by Appellant as Exhibit H dated July 26, 1995 and October 31, 1995, which Appellant asserts are relevant to this appeal:

A. The relevance and probative value of these letters to this appeal are questionable for the same reasons listed in finding no. 2, above.

B. If the letters are relevant and probative to some degree, the letter dated October 31, 1995 simply states that "under current ordinance and regulations CCA will not tax unfunded, nonqualified deferred compensation plans." The letter does not explain on what basis the plans are to be exempt from municipal taxation or whether the benefits under these plans are considered to be "pensions."

4. The Internal Revenue Code does not define "pension."

5. The federal Employment Retirement Income Security Act (ERISA) definition of pension includes nonqualified deferred compensation plans, according to testimony on behalf of Appellants. However, the same witness stated that the ERISA definition of pension would also include true deferred compensation plans in which the employee's income is actually withheld in the employee's plan.

6. The Appellant's SERP is an unfunded promise to pay by his former employer, NCC. When the amount is fixed, determinable, and not subject to forfeiture, at the time of the employee's retirement, the present value of the entire benefit is included in Box 5 on the employee's W-2 for that year. The benefit could be paid as an annuity, as the Appellant decided to take it, or as a lump sum. The form of payment chosen by the employee does not affect the amount that appears in Box 5 on the W-2. No actual payments were made to the Appellants in 2006. Payments began in 2007.

7. The Appellant was always aware of the SERP to which he was entitled. He was aware that the longer he worked for NCC the greater the benefit under the plan.

8. Appellant, Mr. MacDonald, was a resident of Shaker Heights at least until December 27, 2006.

9. According to testimony at the hearing of this appeal, the Shaker Heights exemption language in Section 111.901 C.O. is very similar to the language of many other cities in the State.

10. Cleveland's CCA has notified Appellants that Cleveland's ordinance does not exempt Appellant's SERP from taxation when included in Box 5 of Appellant's 2006 W-2.

11. Testimony at the hearing identified the City of Findlay, Ohio as possibly the only or one of a very few cities that has specifically exempted nonqualified deferred compensation plans from local taxation since 2004.

12. No evidence was presented that indicated that Appellants were discriminated against or were otherwise singled out for taxation of these particular benefits.

Conclusions of Law

1. There is no dispute that no payments were made to Appellants under the SERP until 2007. Whether such payments are taxable by the City or not is not at issue in this case.

2. There is no dispute that Appellant's SERP was not specifically funded by National City Corporation prior to Appellant's retirement and that none of Appellant's cash salary was deferred to fund the SERP; however, whether Appellant's SERP was funded or not funded prior to retirement, and/or whether it includes deferred cash salary payments owed to Appellant, are not relevant factors in determining whether the Appellants should prevail or not in this appeal.

3. There is no dispute that, as a matter of law, Appellant's SERP is a nonqualified deferred compensation plan as described in section 3121 (v) (2) (C) of the United States Internal Revenue Code ("IRC"), and that, once the amount of the SERP was fixed, determinable, and not subject to forfeiture, the present value of the portion of Appellant's SERP benefit that was not previously reported was included in Box 5 of Appellant's 2006 Form W-2.

4. State law, and in particular, Chapter 718 R.C., controls what is taxable as income by the City.

5. Chapter 718 was amended by the General Assembly through House Bill 95, which amendments went into effect for tax years beginning January 1, 2004.

6. Chapter 718 requires that local governments use the State's definition of "qualifying wages" as the basis for application of any local income tax. (Section 718.01 (F) (10) R.C.)

7. "Qualifying wages" under Chapter 718 is the amount calculated and reported in Box 5 of an individual's Form W-2, which is the Medicare wage base, as defined in section 3121 (a) IRC; such amount includes amounts attributable to a nonqualified deferred compensation plan as described in section 3121 (v) (2) (C) IRC, unless such amounts have been exempted from tax by a municipality by ordinance or resolution. (Section 718.03 (A) (2) (c)).

8. Section 718.01 R.C. provides as follows:

(E) The legislative authority of a municipal corporation may, by ordinance or resolution, exempt from withholding and from a tax on income the following:
(2) Compensation attributable to a nonqualified deferred compensation plan or program described in section 3121(v)(2)(C) of the Internal Revenue Code.

9. Section 718.03 R.C. provides as follows:

(A) As used in this section: (2) "Qualifying wages" means wages, as defined in section 3121(a) of the Internal Revenue Code, without regard to any wage limitations, adjusted as follows: (c) Deduct any amount attributable to a nonqualified deferred compensation plan or program described in section 3121(v)(2)(C) of the Internal Revenue Code if the compensation is included in wages and has, by resolution or ordinance, been exempted from taxation by the municipal corporation.

10. Section 718.03 (A) (2) (c) R.C. allows the deduction of "any amount attributable to a nonqualified deferred compensation plan or program," if the compensation "has, by resolution or ordinance, been exempted from taxation by the municipal corporation."

11. There is no dispute that under Ohio law, the present value of Appellant's SERP at the time of Appellant's retirement, as a nonqualified deferred compensation plan, was included in local qualifying wages and included in Box 5 of Appellant's 2006 W-2, becoming the requisite basis for application of the City's income tax, unless an exemption permitted in Chapter 718 R.C. applies.

12. Shaker Heights has not enacted any resolution or ordinance since the adoption of Section 718.03 R.C. that exempts nonqualified deferred compensation included in wages from its income tax ordinance.

13. The relevant Shaker Heights income tax ordinances were enacted in 1966, long before the current version of Section 718.03 R.C.

14. Section 111.901 C.O. sets forth the exemptions from the City's income tax, as follows:

111.0901 SOURCES OF INCOME NOT TAXED.

The tax provided for herein shall not be levied on the following:

(a) Pay or allowance of active members of the Armed Forces of the United States, or the income of religious, fraternal, charitable, scientific, literary or educational institutions to the extent that such income is derived from tax exempt real estate, tax exempt tangible or intangible property, or tax exempt activities.

(b) Poor relief, unemployment insurance benefits, old age pensions or similar payments including disability benefits received from local, State or Federal governments, or charitable, religious or educational organizations.

(c) Proceeds of insurance paid by reason of the death of the insured, pensions, disability benefits, annuities, or gratuities not in the nature of compensation for services rendered from whatever source derived.

(d) Receipts from seasonal or casual entertainment, amusements, sports events and health and welfare activities when any such are conducted by bona fide charitable, religious or educational organizations and associations.

(e) Alimony received.

(f) Personal earnings of any natural person under eighteen (18) years of age.

(g) Compensation for personal injuries or for damages to property by way of insurance or otherwise.

(h) Interest, dividends and other revenue from intangible property.

(i) Gains from involuntary conversion, cancellation of indebtedness, interest on Federal obligations, items of income already taxed by the State of Ohio from which the City is specifically prohibited from taxing, and income of a decedent's estate during the period of administration, except such income from the operation of a business.

(j) Salaries, wages, commissions, and other compensation and net profits, the taxation of which is prohibited by the United States Constitution or any act of Congress limiting the power of the States or their political subdivisions to impose net income taxes on income derived from interstate commerce.

(k) Salaries, wages, commissions, and other compensation and net profits, the taxation of which is prohibited by the Constitution of the State of Ohio or any act of the Ohio General Assembly limiting the power of the City of Shaker Heights to impose net income taxes.

15. Section 111.901 C.O. does not specifically exempt amounts included in wages that are attributable to a "nonqualified deferred compensation plan or program" described in section 3121 (v) (2) (C) IRC.

16. According to testimony at the hearing of this appeal, the Shaker Heights exemption language in Section 111.901 C.O. is very similar to the language of many other cities in the State. The NCC letter in support of Appellants dated June 14, 2007 (Appellee Exhibit 3), states that Shaker's and Cleveland's exemption language are "virtually identical." Testimony at the hearing also confirmed that Cleveland's CCA has notified Appellants that Cleveland's ordinance does not exempt Appellant's SERP from taxation when included in Box 5 of Appellant's 2006 W-2. Testimony at the hearing also identified the City of Findlay, Ohio as possibly the only or one of a very few cities that has specifically exempted nonqualified deferred compensation plans from local taxation since 2004. The Board finds that these facts are relevant to the extent that they indicate that at the time the Ohio General Assembly enacted the current version of Section 718.03 through H.B. 95, local income tax laws in Shaker and Cleveland, as well as in other cities around the State, already exempted "pensions and similar retirement payments." However, the General Assembly did not specifically refer, though it could have referred, to "pensions and similar payments" in describing the exemption a municipality could adopt for any amount attributable to a nonqualified deferred compensation plan or program described in section 3121(v)(2)(C) of the Internal Revenue Code.

17. The General Assembly specified the language of exemption that local governments were to use by ordinance or resolution if they wanted to exempt such benefits from tax. The plain language of Section 718.01 provides that a municipality may by ordinance exempt from taxation the following: "compensation attributable to a

nonqualified deferred compensation plan or program described in section 3121(v)(2)(C) of the Internal Revenue Code." The language in Section 718.03 is almost identical.

18. Chapter 718 R.C. and Section 111.901 C.O. must be interpreted in their plainest meaning, if possible, without lengthy fact finding and legal argument as to whether a nonqualified deferred compensation plan benefit as set forth in Box 5 of a W-2 at the time of retirement is or is not a "pension or similar payment" or otherwise falls within the wording of the City's ordinance. Clearly, the language used by the General Assembly has not been incorporated into the City's exemption language, either before H.B. 95 was enacted in 2003 or since. Thus, the City did not specifically exempt nonqualified deferred compensation plan benefits under the IRC from taxation, either before or after passage of the current Chapter 718 R.C. The City would have had to enact legislation after the effective date of the current form of Chapter 718 R.C., amending Chapter 111 C.O. to include the specific language of Chapter 718, in order to exempt this specific type of qualifying wages from taxation.

19. Even if it is assumed that the City did not have to amend its ordinance and specifically use the language in Chapter 718 R.C. in order to exempt nonqualified deferred compensation plan benefits from taxation under the City's ordinances, the City's exemption in Chapter 111 C.O. of "pensions and similar payments" and the "proceeds" from pensions, does not include Appellant's SERP benefit set forth in his 2006 W-2.

A. First, such benefit is not a "pension." The nonqualified deferred compensation plan benefits included in Box 5 of the 2006 W-2 was not an amount that had been paid to Appellants; rather the amount was the portion of the present value of the Appellant's SERP that had not been previously reported, and that was, at the time of its reporting, known, fixed and not subject to forfeiture to the benefit of Appellant. It was not a pension as that term is commonly used, which is a payment of retirement benefits after retirement.

B. Second, the amount on the W-2 had not yet been paid to Appellants and Appellants had not received any proceeds from the benefit. Section 111.901 C.O. exempts payments or proceeds from pensions.

C. Appellants argue that the words "proceeds of" found in Section 111.0901 (c) applies only to the first item, namely, "...insurance paid by reason of the death of the insured," and not to the word "pension." However, this does not change the legal conclusion that the common understanding of the word "pension" contemplates payments made in some form to the employee. Thus, there is no legal need to refer to the "proceeds" of a "pension"; the word itself contemplates payments made to a former employee.

20. Appellants' argument that the City's exemption ordinance does exempt Appellant's SERP amount stated on his W-2 fails to distinguish between pension payments (which are exempt from Shaker Heights income tax) and the employer's actions by which it funds or commits itself to fund these pension payments, as explained below:

A. At the end of 2006, NCC committed its general assets to the payment of Appellant's SERP. It is the present value of that commitment (which is found in Box 5 of the 2006 W-2 Form) which constituted income to Appellants subject to the City's income tax.

B. The employer has the option, when it commits itself to these future payments, to set aside specific funds for this purpose, thereby giving to the employee a secured claim if the future payments are not made, or the employer may simply commit its general assets to these future payments. The latter is what NCC did as to the Appellant's SERP. In either case, the present value of these actions (as found in Box 5 of the W-2 Form) is income to the employee under State law and, therefore, under the City's income tax ordinance.

C. Appellants argue that this cannot be compensation to Appellant, since no "cash" was ever deducted from his monthly pay checks to fund the amount stated in Box 5. However, Appellant's "payments" to create this fund took place by his previous ongoing service to NCC. As a senior executive, Appellant had the contractual right to SERP benefits if and when he completed his time and other requirements set out in the NCC SERP program. Thus, with each month of service to NCC, Appellant, by his employee services, was "paying" for his contractual right to get those SERP benefits following his retirement.

D. This "deferred" compensation continued to accrue in Appellant's favor until the end of 2006 when, in fact, its present value, shown in Box 5 of his W-2, was actually recognized as due and owing, though as yet unpaid and, thus, is income subject to the City's income tax.

E. Appellant chose to use that "income" to purchase a joint life annuity. But Appellant had the option to take this sum in cash, emphasizing that it was deferred compensation to which Appellant was now entitled.

21. The federal "moving statute" prohibits the taxation of retirement benefits of non-residents, which are defined, according to Section 114 of Title 4 of the United States Code, as the income from a plan under section 3121 (v) (2) (C) IRC, if such plan is part of a series of periodic payments or is a payment received after termination of employment (ref. Appellants' Notice of Appeal, at pp. 8-9.) Appellants claim in their Appeal statement that taxation of the amount included in Box 5 of Appellant's 2006 Form W-2 violates the federal moving statute (4 U.S.C. Section 114). As discussed above, the issue before this Board does not involve the taxation of such payments. Thus, the evidence and argument presented does not demonstrate that the federal moving statute prohibits the City from taxing Appellant's SERP amount set forth in Box 5 of Appellant's 2006 W-2.

22. The Board therefore finds that the Appellant's SERP as set forth in Box 5 of Appellant's 2006 Form W-2:

A. is not a "pension" as that term is used in Section 111.901 (b) or 111.901 (c) C.O.

B. is not a pension payment, and is not proceeds from a pension, as those terms are used in Section 111.901 C.O.

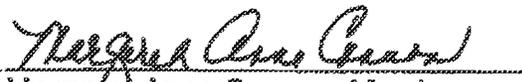
C. is not exempt from taxation under any other language of Section 111.901 C.O.

23. The Board also finds that taxation of the amount included in Box 5 of Appellant's 2006 Form W-2 does not violate the federal moving statute (4 U.S.C. Section 114.)

Wherefore, this Board finds that by a preponderance of the evidence and law, the amount included in Box 5 of Appellant's 2006 Form W-2 related to his SERP is taxable by the City as income, and is not exempt from taxation under Section 111.901 C.O. or any other law, and that Appellants' appeal to this Board is denied.

Approved this 07th day of August, 2008.


Robert Zimmerman, Chairperson


Margaret Anne Cannon, Member


Morris Shanker, Member

OHIO BOARD OF TAX APPEALS

DEC 31 2012

William E. MacDonald, III, and Susan W. MacDonald,

CASE NO. 2008-K-1883 SHAKER HEIGHTS

(MUNICIPAL INCOME TAX)

LAW DEPARTMENT

Appellants,

DECISION AND ORDER

vs.

City of Shaker Heights, Robert Baker, Tax Administrator, and Regional Income Tax Agency,

Appellees.

APPEARANCES:

For the Appellants - Baker & Hostetler, LLP
Christopher J. Swift
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114-3485

For the Appellees City of Shaker Heights and Tax Administrator - Margaret Anne Cannon
Director of Law
William M. Ondrey Gruber
Chief Counsel
3400 Lee Road
Shaker Heights, Ohio 44120

For the Appellee Regional Income Tax Authority - Amy L. Arrighi
Chief Legal Counsel
10107 Brecksville Road
Brecksville, Ohio 44141

For the Amicus Curiae City of Cleveland Urging Affirmance - Robert J. Triozzi
Director of Law
Linda L. Bickerstaff
Assistant Director of Law
205 W. Saint Clair Avenue
Cleveland, Ohio 44113

For the Amicus Curiae Greater Cleveland Partnership Urging Reversal - Shana F. Marbury
The Higbee Building
100 Public Square, Suite 210
Cleveland, Ohio 44113

Entered DEC 28 2012

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

Appellants filed the present appeal seeking to overturn a decision issued by the city of Shaker Heights Income Tax Board of Review, hereinafter referred to as "MBOA",¹ which affirmed an adjustment effected by the city's tax administrator, in this instance the Regional Income Tax Agency ("RITA"),² to appellants' jointly filed 2006 municipal income tax return. We proceed to consider this matter upon appellants' notice of appeal, the statutorily required transcript ("S.T.") certified by the MBOA pursuant to R.C. 5717.011, the record of the hearing convened before this board, and the briefs submitted on behalf of the parties and amici curiae.³

The pertinent facts are generally not in dispute. William E. MacDonald, III, a resident of the city of Shaker Heights until December 27, 2006, had been employed by National City Corporation for thirty-eight years until his retirement on December 31, 2006. At the time of his retirement, MacDonald was vice-chairman of National City and qualified for benefits under the company's Non-Contributory Retirement Plan and Supplemental Executive Retirement Plan ("SERP"). See Exs. 1 through 4. MacDonald elected to receive SERP benefits beginning in 2007 in the form of a joint and survivor annuity that will cease upon the second death of either of the MacDonalds. S.T., Tab 11A at 34-35; Ex. 5. Pursuant to the

¹ While the city of Shaker Heights established a "board of tax review" to hear and decide appeals involving challenges to decisions made by the city's tax administrator, see S.T., Ex. 13, Codified Ordinance Section ("COS") 111.2501, consistent with language appearing in R.C. 718.11 and 5717.011, as well as prior decisions of this board, we will continue to refer to such tribunal as a municipal board of appeal ("MBOA").

² While COS 111.0302 discloses that the "[a]dministrator" means the Director of Finance," through COS 111.2311 the city authorized RITA to administer and enforce the city's income tax provisions, authorizing it to perform the duties and act with the authority of the city's administrator. S.T., Ex. 13.

³ Through prior order, two exhibits attached to the brief filed on behalf of the city of Cleveland were stricken from consideration. *MacDonald v. City of Shaker Hts.* (Interim Order, Dec. 21, 2010), BTA No. 2008-K-1883, unreported.

parties' stipulation submitted to the MBOA, S.T., Tab 10,⁴ the present value of MacDonald's SERP benefit not previously reported was included in Box 5 of his 2006 Form W-2, entitled "medicare, wages, and tips," and totaled \$14,566,611. S.T., Tab 11D. Appellants jointly filed their 2006 city income tax return, calculating their tax liability on the amount reported in Box 18 of MacDonald's Form W-2, entitled "local wages, tips, etc.," i.e., \$5,459,597.84. S.T., Tab 10.

Thereafter, RITA, acting as the city's tax administrator, noticed appellants that their tax liability would be recalculated so as to include as taxable income the amount appearing in Box 5 on Form W-2, resulting in an increase in their city tax liability from \$71,447 to \$230,820. *Id.* As provided for in R.C. 718.11, appellants appealed to the MBOA, presenting the testimony of Patricia M. Emond, then senior vice president with National City responsible for the management of the company's executive compensation programs, Richard Toman, a tax attorney with National City, and appellant William MacDonald. The city's tax administrator called as its witnesses Mark Taranto, RITA's assistant director of tax, and Jim Neusser, former tax commissioner for the city of Akron. The MBOA ultimately denied appellants' objection to the tax administrator's recalculation, concluding the amount included in Box 5 of MacDonald's Form W-2 related to his SERP benefits was not a pension or otherwise exempted from taxation under the city's ordinances, that the taxation of such amount did not violate federal law, and that it therefore constituted income taxable by the city of Shaker Heights.

⁴ While the "proposed stipulations" are unsigned, the parties acknowledged their agreement to their terms during the MBOA's hearing. S.T., Tab 11A at 10.

From this decision, appellants filed the present appeal pursuant to R.C. 5717.011, where the parties were accorded an opportunity to present evidence in addition to that provided to the MBOA. At this board's hearing, appellants again called Patricia Emond as a witness, as well as William J. Dunn, a certified public accountant, certified financial planner, and partner with PricewaterhouseCoopers, Dr. Ray G. Stephens, a professor of accounting, and Thomas M. Zaino, former Tax Commissioner of Ohio, the latter testifying regarding Am.Sub.H.B. No. 95.⁵

Initially, we acknowledge the standard by which our review is to be conducted. Although the Supreme Court has not yet considered an appeal filed pursuant to R.C. 5717.011,⁶ it has reviewed similar appeals taken from municipal boards of appeal to common pleas courts pursuant to R.C. 2506.01, commenting in *Tetlak v. Bratenahl* (2001), 92 Ohio St.3d 46, as to the burden borne by an appellant:

"The taxpayer, not the village, has the burden of proof on the nature of the income at issue. It is well settled that "when an assessment is contested, the taxpayer has the burden '*** to show in what manner and to what extent ***' the commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect.'" *Maxxim Med., Inc. v. Tracy* (1999), 87 Ohio St.3d 337, 339, *** quoting *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215 ***. Furthermore, the 'Tax Commissioner's findings are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful.' *Id.*, 87 Ohio St.3d at 339-340, ***."

⁵ Since we do not find the legislation discussed by Zaino to be dispositive of the outcome of this appeal, we simply note the limitations which exist regarding this board's ability to rely upon extrinsic evidence to divine the General Assembly's intent in its enactment. See, generally, *Financial Indemnity Co. v. Cargile* (1972), 32 Ohio Misc. 103. See, also, *Jack Schmidt Lease, Inc. v. Tracy* (July 14, 1995), BTA No. 1994-M-13, unreported, affirmed sub nom. *Zalud Oldsmobile Pontiac, Inc. v. Tracy* (1996), 77 Ohio St.3d 74.

⁶ For taxable years beginning on or after January 1, 2004, the General Assembly, through Am.Sub.H.B. No. 95, effective September 26, 2003, and uncodified section 156, enacted R.C. 5717.011, thereby establishing the Board of Tax Appeals as an alternative forum with concurrent jurisdiction to hear and decide appeals from municipal boards of appeal with regard to taxable years beginning on or after January 1, 2004.

"This reasoning is applicable at the municipal level." *Id.* at 51-52. (Parallel citations omitted.)

See, also, *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.>").

In order to provide funding for its municipal functions, the city of Shaker Heights has levied an annual tax "on all salaries, wages, commissions and other compensation[.]" COS 111.0101 and 111.0501. While it is constitutionally permissible for a municipality to impose such a tax, the General Assembly may nevertheless restrict such authority:

"Municipal taxing power in Ohio is derived from the Ohio Constitution. Section 3, Article XVIII of the Constitution, the Home Rule Amendment, confers sovereignty upon municipalities to 'exercise all powers of local self-government.' As this court stated in *State ex rel. Zielonka v. Carrel* (1919), 99 Ohio St. 220, 227, *** '[t]here can be no doubt that the grant of authority to exercise all powers of local government includes the power of taxation.'

"However, the Constitution also gives to the General Assembly the power to limit municipal taxing authority. Section 6, Article XIII provides that '[t]he General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation *** so as to prevent the abuse of such power.' Section 13, Article XVIII provides that '[l]aws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes ***.' See *Franklin v. Harrison* (1960), 171 Ohio St. 329, ***." *Cincinnati Bell Tel. Co. v. Cincinnati* (1998), 81 Ohio St.3d 599, 602. (Parallel citations omitted.)

In this regard, the General Assembly enacted R.C. 718.01(F),⁷ which provides in part:

“A municipal corporation shall not tax any of the following:

“(10) Employee compensation that is not ‘qualifying wages’ as defined in section 718.03 of the Revised Code[.]”

Relevant herein, R.C. 718.03(A) defines the term “qualifying wages” in the following manner:

“As used in this section:

“(2) ‘Qualifying wages’ means wages, as defined in section 3121(a) of the Internal Revenue Code, without regard to any wage limitations, adjusted as follows:

“(c) Deduct any amount attributable to a nonqualified deferred compensation plan or program described in section 3121(v)(2)(C) of the Internal Revenue Code if the compensation is included in wages and has, by resolution or ordinance, been exempted from taxation by the municipal corporation.”⁸

In this instance, the parties are in agreement that the amount in controversy is attributable to MacDonald’s SERP, a nonqualified deferred compensation plan, and that such amount appeared in Box 5 of MacDonald’s Form W-2 entitled “local wages, tips, etc.” It is

⁷ Applicable to taxable years beginning on or after January 1, 2008, this provision now appears in R.C. 718.01(H)(10). See Am.Sub.H.B. No. 24, uncodified section 3.

⁸ Consistent with the above-referenced provision, R.C. 718.01(E) also indicated that “[t]he legislative authority of a municipal corporation, may, by ordinance or resolution, exempt from withholding and from tax on income the following: **** (2) Compensation attributable to a nonqualified deferred compensation plan or program described in section 3121(v)(2)(C) of the Internal Revenue Code.” Applicable to taxable years beginning on or

also uncontested that the city has not, by resolution or ordinance, expressly exempted from taxation amounts attributable to a nonqualified deferred compensation plan. It is therefore the city's position that such amounts are taxable.

However, appellants argue that the amount attributable to National City's SERP constitutes a pension which is nontaxable pursuant to COS 111.0901:

"The tax provided for herein shall not be levied on the following:

"(b) Poor relief, unemployment insurance benefits, old age pensions or similar payments including disability benefits received from local, State or Federal governments, or charitable, religious or educational organizations.

"(c) Proceeds of insurance paid by reason of the death of the insured, pensions, disability benefits, annuities, or gratuities not in the nature of compensation for services rendered from whatever source derived."

The MBOA rejected appellants' claim that the National City SERP was a pension, holding as follows:

"A. First, such benefit is not a 'pension.' The nonqualified deferred compensation plan benefits included in Box 5 of the 2006 W-2 was not an amount that had been paid to Appellants; rather the amount was the portion of the present values of the Appellant's SERP that had not been previously reported, and that was, at the time of its reporting, known, fixed and not subject to forfeiture to the benefit of Appellant. It was not a pension as that term is commonly used, which is a payment of retirement benefits after retirement.

"B. Second, the amount on the W-2 had not yet been paid to Appellants and Appellants had not received any proceeds from the benefit. Section 111.901 [sic] C.O. exempts payments or proceeds from pensions.

Footnote contd.-----

after January 1, 2008, this provision now appears in R.C. 718.01(E)(1)(b). See Am.Sub.H.B. No. 24, uncodified section 3.

“C. Appellants argue that the words ‘proceeds of’ found in Section 111.0901(c) applies [sic] only to the first item, namely, ‘... insurance paid by reason of the death of the insured,’ and not to the word ‘pension.’ However, this does not change the legal conclusion that the common understanding of the word ‘pension’ contemplates payments made in some form to the employee. Thus, there is no legal need to refer to the ‘proceeds’ of a ‘pension’; the word itself contemplates payments made to a former employee.” S.T., Tab 12 at 10.

Appellants assert that the MBOA’s characterization of pension is unduly restrictive and is inconsistent with both the terms and purpose of the National City SERP. Because the term “pension” is not defined in the city’s tax code, appellants refer to several other sources, including a U.S. Treasury regulation,⁹ dictionaries,¹⁰ the testimony of its witnesses, and the terms of the SERP itself, when advocating it is a pension.

Patty Emond, manager of National City’s executive compensation program, testified that National City implemented its SERP in order “[t]o provide competitive pension benefits to executives.” She explained that SERPs became popular in the 1980s when federal tax law changes established limits on the amount of annual compensation that could be used in calculating benefits for employee pension plans and, as a result, companies sought ways to provide benefits through supplemental plans. National City’s SERP is considered a defined benefit plan where the employer provides a specific benefit or sets forth a specific formula

⁹ Appellants refer to example 8 set forth in Treasury Regulation §31.3121(v)(c), which describes one particular type of SERP as a pension.

¹⁰ In their brief, appellants state that “[f]or example, Webster’s Third New International Dictionary of the English Language defines ‘pension,’ in part, as ‘one paid under given conditions to a person following his retirement from service (as due to age or disability) or to the surviving dependents of a person entitled to such pension.’ Similarly, Black’s Law Dictionary (9th Ed.) defines ‘pension’ as ‘[a] fixed sum paid regularly to a person (or to the person’s beneficiaries), esp. by an employer as a retirement benefit.’” Appellants’ brief at 13-14. It is not uncommon for courts to refer to such sources when looking to ascribe a definition to common, undefined words. See, e.g., *Sunoco, Inc. (R&M) v. Toledo Edison Co.*, Slip Opinion No. 2011-Ohio-2720, at ¶39; *Global Knowledge Training, L.L.C. v. Levin*, 127 Ohio St.3d 34, 2010-Ohio-4411, at ¶35.

used to derive such benefit. In this instance, a targeted replacement ratio of approximately 60% of pre-retirement income was established as the intended benefit, derived by employing a calculation that takes into consideration salary, bonuses, and total years of service, limited in part by Social Security compensation and MacDonald's qualified pension plan benefit. See Ex. 5.

Emond distinguished the National City SERP from other deferred compensation programs in place, both qualified and non-qualified,¹¹ indicating that while National City withheld city income tax on the forms of deferred compensation received by MacDonald, it did not do so with regard to SERP benefits as they were treated by National City as an unfunded obligation to pay pension benefits to MacDonald. She also indicated that National City reflected its SERP as a pension plan in its 2006 annual report to its shareholders. See Ex. 7, at 76-78. Emond's testimony in this regard is consistent with the stated purpose of the National City SERP as set forth in section 1.2:

1.2 Purpose. The purpose of the SERP is to provide for the payment of certain pension, disability and survivor benefits in addition to benefits which may be payable under other plans of the Corporation. The Corporation intends and desires by the provisions of the SERP to recognize the value to the Corporation of the past and present service of employees covered by the SERP and to encourage and assure their continued service to the Corporation by making more adequate provision for their future security than other plans of the Corporation provide." Exs. 1 and 2.

William Dunn, who testified that he advises companies with regard to the establishment of compensation programs, identified several factors impacting the

¹¹ In this regard, Emond testified that National City "offer[ed] a qualified deferred compensation plan which would be the 401(k) plan that allowed for deferrals of salary and bonus. We also had non-qualified deferred

establishment and tailoring of pension plans over the past thirty years, e.g., economic, regulatory, employer/employees' goals, as well as the variances amongst such plans. Dunn indicated that "pension' is a term unfortunately that is not a term of art, it's a term of common usage, and as a result different people will call pensions different things." H.R. at 68. Continuing, "I would personally say a pension is any plan sponsored by an employer that provides for post-retirement income that's designed to supplement their income for life." Id. at 69. Ray Stevens, a professor of accounting, testified that the manner by which National City reported its SERP was consistent with Generally Accepted Accounting Principles ("GAAP").

While the National City SERP falls within the ambit of a nonqualified deferred compensation plan, we do not find such designation necessarily mandates its exclusion from the commonly accepted definition of pension which has not been otherwise limited by the city. As the MBOA pointed out in its decision, "[t]here is no dispute that Appellant's SERP was not specifically funded by National City Corporation prior to Appellant's retirement and that none of Appellant's cash salary was deferred to fund the SERP." S.T., Tab 12 at 7. Where the city has left the term pension open to interpretation, it is appropriate to look to other sources in order to determine what may be considered pension benefits. See, generally, *Wardrop v. Middletown Income Tax Review Bd.*, Butler App. No. CA2007-09-235, 2008-Ohio-5298, at ¶24 ("It is beyond dispute, however, that the Superintendent of Taxation, who is charged with promulgating rules and regulations to define and amplify Middletown's tax ordinance, cannot add to or exceed the plain language of the ordinance itself. See, e.g., *Ransom & Randolph Co. v. Evatt* (1944), 142 Ohio St. 398, 407-408; *City of Cincinnati v. De Golyer* (1969), 26 Ohio

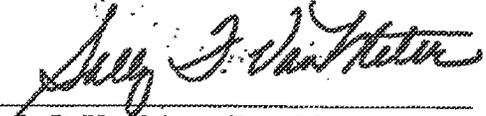
Footnote contd. _____
compensation which allowed for deferrals of salary and bonus as well, uh, and those were allowed in excess of the limits imposed on the 401(k) plan." H.R. at 38.

App.2d 178, 181-182, affirmed (1971), 25 Ohio St.2d 101.”). Although we reach a different outcome based upon the language employed, consistent with the approach adopted by the court in *Wardrop*,¹² we need look no further than the terms of National City’s SERP to discern its purpose, i.e., “to provide for the payment of certain pension, disability and survivor benefits in addition to benefits which may be payable under other plans,” and the city’s tax code to determine taxable status, i.e., “[t]he tax provided for herein shall not be levied on *** pensions[.]” Cf. *Ladd v. City of Oregon* (Mar. 29, 2011), BTA No. 2008-K-2371, unreported.

We conclude that the amount reflected in Box 5 of MacDonald’s Form W-2 attributable to SERP payments constitutes a pension benefit and as such is not subject to tax by virtue of COS 111.0901. Given our conclusion in this regard, we need not reach the other arguments made by appellants. Consistent with the preceding, it is the decision and order of this board that the decision of the city of Shaker Heights Income Tax Board of Review must be, and hereby is, reversed.

¹² The *Wardrop* court held that “to determine whether payments made under AK Steel’s SERP plan are taxable by Middletown, we need only to examine the language of the plan and the city tax code. Article I of the SERP plan itself identifies it as ‘an unfunded deferred compensation arrangement maintained by the Company for the purpose of providing supplemental retirement benefits for a select group of management or highly compensated employees[.]’ (Emphasis added.) Middletown’s code authorizes a tax on ‘qualifying wages, commissions, other compensation, and other taxable income[.]’ MCO §890.03(a)(2). The code defines ‘other compensation’ to include ‘earnings designated as deferred compensation.’ MCO §890.02(a)(26) (emphasis added). Because the SERP plan describes itself as a ‘deferred compensation arrangement’ and Middletown’s ordinances impose

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

Footnote contd. _____
a tax on 'earnings designated as deferred compensation,' the trial court correctly concluded that SERP payments are not exempt from municipal taxation." Id. at ¶39. (Emphasis sic.)

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

William E. MacDonald, III, et al.,	:	
Appellants-Appellees,	:	
v.	:	No. 13AP-71 (BTA No. 2008-K-1883)
City of Shaker Heights Income Tax Board of Review et al.,	:	(REGULAR CALENDAR)
Appellees-Appellants.	:	

DECISION

Rendered on February 27, 2014

Baker & Hostetler LLP, and Christopher J. Swift, for William E. MacDonald, III and Susan MacDonald.

William M. Ondrey Gruber, for City of Shaker Heights and Robert Baker.

Barbara A. Langhenry, Director of Law, and Linda L. Bickerstaff, for amicus curiae city of Cleveland.

Shana F. Marbury, for amicus curiae The Greater Cleveland Partnership; and Linda Woggon, for amicus curiae Ohio Chamber of Commerce.

APPEAL from the Ohio Board of Tax Appeals

KLATT, J.

{¶ 1} Appellants, City of Shaker Heights, Robert Baker, Tax Administrator, and Regional Income Tax Agency, appeal from a decision and order of the Board of Tax Appeals ("BTA") finding that the supplemental executive retirement plan ("SERP") of

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Feb 27 12:17 PM-13AP000071

No. 13AP-71

2

appellee, William E. MacDonald, III, constituted a pension benefit that was not subject to tax by the city of Shaker Heights. Because the BTA's decision is not unreasonable or unlawful, we affirm.

Facts and Procedural History

{¶ 2} The relevant facts in this case are undisputed. MacDonald was employed by National City Corporation ("National City") for over 38 years. MacDonald was a resident of the city of Shaker Heights until December 27, 2006. On December 31, 2006, MacDonald retired from his employment at National City. At the time of his retirement, MacDonald was vice chairman of National City and he qualified for benefits under National City's qualified retirement plan and SERP. The SERP is a nonqualified deferred compensation plan that was intended to supplement the qualified retirement plan.

{¶ 3} MacDonald received his benefit from the qualified plan and the SERP in the form of a joint and survivorship annuity measured by the joint lives of MacDonald and his wife, appellee, Susan MacDonald. The MacDonalds began receiving monthly annuity payments in 2007. Those payments will cease upon the death of the last surviving spouse. MacDonald received no 2006 payments under the SERP. However, at the time of MacDonald's December 31, 2006 retirement, the present value of his SERP benefit became fixed and determinable.

{¶ 4} The National City SERP was unfunded before MacDonald's retirement and did not represent a salary deferral. Rather, the SERP, in conjunction with the qualified plan, provided an income replacement ratio of approximately 60 percent of pre-retirement income as a benefit upon retirement, after taking into account the other benefits receivable by MacDonald including social security.

{¶ 5} The MacDonalds jointly filed their 2006 city income tax return for Shaker Heights. The present value of MacDonald's SERP benefit not previously reported was included in box 5 of their 2006 form W-2 [REDACTED] "Medicare, wages and tips," and totaled \$14,566,611. The MacDonalds calculated [REDACTED] 2006 city income tax liability based upon the amount reported in box 18 of MacDonalds' form W-2 [REDACTED] "local wages, tips, etc." Box 18 indicated an amount of \$5,459,597.

{¶ 6} The Regional Income Tax Agency, acting as Shaker Height's tax administrator, issued a notice to the MacDonalds indicating that their 2006 municipal tax

liability would be calculated based on the value listed in box 5 of his form W-2 (\$14,566,611), rather than the amount listed in box 18 (\$5,459,597). Shaker Heights sought to tax in 2006 the present value of the future monthly payments to the MacDonalds under the SERP. This determination by the tax administrator significantly increased the MacDonalds' municipal tax liability. The MacDonalds contended that the SERP benefit was a pension, and therefore, exempt from municipal taxation pursuant to the Codified Ordinances of the City of Shaker Heights ("C.O.") 111.0901. They appealed the tax administrator's determination to the Shaker Heights Income Tax Board of Review ("board of review").

{¶ 7} The matter proceeded to hearing before the board of review. The parties were afforded the opportunity to call witnesses, submit evidence, and argue their respective positions. The board of review found that (1) the SERP benefit was not a pension as that term is used in the city's income tax ordinance; (2) the SERP benefit was not a pension payment or proceeds from a pension as these terms are used in the city's income tax ordinance; and (3) the SERP benefit is not exempt from taxation under any other provision of the city's taxing ordinances.

{¶ 8} The MacDonalds appealed the board of review's decision to the BTA pursuant to R.C. 5717.011. The record of proceedings before the board of review was filed with the BTA. After the BTA allowed discovery, the matter proceeded to hearing. Over appellants' objection, the BTA permitted the parties to introduce additional evidence at the hearing. The BTA reversed the decision of the board of review, finding that the SERP benefit was a pension, and therefore, not subject to municipal tax under C.O. 111.0901.

{¶ 9} Appellants appeal, assigning the following errors:

[I.] The Board of Tax Appeals erred when it found that the amounts attributable to the Appellee's, William E. MacDonald III ("MacDonald"), non-qualified deferred compensation plan constitute a pension benefit and are not subject to tax by the City of Shaker Heights as a "pension".

[II.] The Board of Tax Appeals erred in allowing the introduction of new evidence and new witnesses, and conducting a de novo review of the decision of the Shaker Heights Municipal Income Tax Board of Review, when the Appellees, William E. MacDonald, III and Susan W. MacDonald were afforded every opportunity to introduce

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Feb 27 12:17 PM-13AP000071

witnesses and testimony before the Shaker Heights Municipal Board of Review.

Legal Analysis

{¶ 10} An appellate court reviews a decision of the BTA to determine whether it is reasonable and lawful. R.C. 5717.04; *HIN, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 124 Ohio St.3d 481, 2010-Ohio-687, ¶ 13; *Cousino Constr. Co. v. Wilkins*, 108 Ohio St.3d 90, 2006-Ohio-162, ¶ 10. "It is well settled that [an appellate] court will defer to factual determinations of the BTA if the record contains reliable and probative support for them." *Strongsville Bd. of Edn. v. Wilkins*, 108 Ohio St.3d 115, 2006-Ohio-248, ¶ 7; *Am. Natl. Can Co. v. Tracy*, 72 Ohio St.3d 150, 152 (1995).

A. First Assignment of Error

{¶ 11} Appellants contend in their first assignment of error that the BTA erred in finding that the SERP benefit constitutes a pension that is not subject to Shaker Heights municipal tax. Appellants advance three arguments to support this contention. First, appellants contend that the BTA erred when it examined whether the SERP benefit constituted a pension. According to appellants, because a benefit from a nonqualified deferred compensation plan such as the SERP is not expressly exempted from the municipal tax under C.O. 111.0901(b) and 111.0901(c), it is by definition taxable. We disagree.

{¶ 12} State law permits a municipality to tax "qualifying wages." R.C. 718.01(H)(10). Qualifying wages include amounts attributable to a nonqualified deferred compensation plan unless the municipality has exempted that compensation from taxation. The city of Shaker Heights has exempted pensions from its municipal tax. C.O. 111.0901(b) and (c). The term "pensions" is not defined in Shaker Heights municipal code. The MacDonalds argued before the board of review and the BTA that a benefit from a nonqualified deferred compensation plan such as the SERP is a pension, and therefore, its value must be deducted from the qualifying wage. Nothing in Shaker Heights municipal code or in state law clearly indicates whether or not benefits from a nonqualified deferred compensation plan, such as the SERP at issue here, is a pension. Therefore, we reject appellants' argument that the BTA erred when it examined whether the SERP benefit constitutes a pension for purposes of C.O. 111.0901(c).

{¶ 13} In their second argument, appellants contend that the pension exemption contained in C.O. 111.0901(b) and (c) is limited to payments made to a retired employee from the employer after retirement. Because the present value of the SERP benefit listed in box 5 of the MacDonald's 2006 form W-2 [REDACTED] reflect payments received by MacDonald in 2006, appellants contend that the [REDACTED] benefit is not a pension, and therefore, it is taxable as qualifying wages. In support of this argument, appellants primarily rely on the testimony of Mark Taranto, the assistant tax director for the Regional Income Tax Agency. Mr. Taranto testified that the common usage and interpretation of the term pension as used in the city's income ordinance is a payment after retirement.

{¶ 14} However, the BTA relied upon other testimony presented at the hearing indicating that benefits from a nonqualified deferred compensation plan, such as the SERP at issue, is a pension. Patricia Edmond, former executive vice president at National City, testified that the SERP was intended to provide a pension. Edmond also stated that National City classified its SERP as a pension in its 2006 annual report to shareholders. William Dunn, a senior benefits partner at PriceWaterhouseCoopers testified that National City's SERP was a pension. In addition, professor Ray Stephens, an accounting expert, testified that the reporting of National City's SERP as a pension was proper under general accepted accounting principles ("GAAP").

{¶ 15} Both appellants and the MacDonalds presented evidence and advanced arguments that supported their respective positions. The BTA examined all the evidence presented at the hearing and reflected in the record. Based upon this evidence, the BTA concluded that the MacDonalds' SERP benefit listed in box 5 of their 2006 form W-2 [REDACTED] pension and, therefore, that amount must be deducted from the MacDonalds' income [REDACTED] calculating the taxable qualifying wage. This determination is not unreasonable or unlawful.

{¶ 16} Appellants also contend that the BTA's decision conflicts with *Wardrop v. Middletown Income Tax Review Bd.*, 12th Dist. No. CA2007-09-235, 2008-Ohio-5298. Although the *Wardrop* case also involved the issue of whether a SERP benefit was taxable under Middletown's ordinance, the language of the ordinance was substantially different than the Shaker Heights ordinance at issue here. In *Wardrop*, the Middletown

ordinance expressly stated that earnings designated as "deferred compensation" were taxable. *Id.* at ¶ 36. In addition, the Middletown ordinance expressly distinguished tax-exempt "pensions" from taxable "earnings designated as deferred compensation." *Id.* at ¶ 38. Because the SERP plan at issue in *Wardrop* described itself as a "deferred compensation arrangement" and because Middletown's ordinance expressly imposed a tax on earnings designated as deferred compensation, the appellate court affirmed the trial court's judgment that the SERP payments were not exempt from municipal taxation. These facts are in marked contrast to those presented in this case. Here, the Shaker Heights ordinance does *not* expressly tax deferred compensation. Moreover, *Wardrop* involved an R.C. Chapter 2506 appeal—not an appeal pursuant to R.C. Chapter 5717. For the reasons discussed in connection with appellants' second assignment of error, there are significant differences between these two avenues of appeal. For all these reasons, we find *Wardrop* distinguishable, and therefore, unpersuasive.

{¶ 17} In their third and final argument in support of their first assignment of error, appellants contend that the BTA should not have concluded that the SERP benefit is a pension based solely upon National City's characterization and treatment of the SERP as a pension. We disagree with appellants' characterization of the rationale used by the BTA in arriving at its decision.

{¶ 18} The BTA did not conclude that MacDonalds' SERP benefit was a pension solely because National City treated the SERP as a pension. The BTA's decision also notes the testimony of William Dunn who stated that "a pension is any plan sponsored by an employer that provides for post-retirement income that's designed to supplement their income for life." The SERP at issue meets this definition. Ray Stevens, a professor of accounting, also testified that the manner in which National City reported the SERP (as a pension) was consistent with GAAP. Lastly, the BTA noted that MacDonald's SERP benefit was not specifically funded by National City prior to MacDonald's retirement and that none of MacDonald's cash salary was deferred to fund the SERP benefit. The BTA found that all these factors supported its determination that MacDonald's SERP benefit constituted a pension. Because the BTA's decision is not unreasonable or unlawful, we overrule appellants' first assignment of error.

B. Second Assignment of Error

{¶ 19} In its second assignment of error, appellants contend that the BTA erred by (1) holding a hearing and allowing the introduction of additional evidence and additional witnesses that could have been presented to the board of review; and (2) conducting a de novo hearing without giving deference to the board of review's decision. We disagree with both of these arguments.

{¶ 20} In support of their argument that the BTA erred by allowing the MacDonalds to present additional evidence at the hearing, appellants cite to the process for an appeal of a "final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state" to a court of common pleas. R.C. 2506.01(A). Appellants point out that in an appeal of a board of review decision to a court of common pleas, R.C. 2506.03 limits the reviewing court's authority to consider evidence outside the administrative record. However, those limitations do not exist in an appeal to the BTA pursuant to R.C. 5717.011(C). In fact, upon the application of any interested party, the BTA is required to "order the hearing of additional evidence, and the board may make such investigation concerning the appeal as it considers proper." R.C. 5717.011(C). Here, the MacDonalds requested a hearing before the BTA. Therefore, appellants' contention that the BTA erred when it permitted the introduction of additional evidence conflicts with the express language in R.C. 5717.011(C). The BTA did not err by permitting the introduction of additional evidence.

{¶ 21} Appellants also contend that the BTA erred by conducting a de novo hearing without giving deference to the board of review's decision. In essence, appellants contend that the BTA failed to apply the correct standard of review. Again, we disagree.

{¶ 22} Pursuant to R.C. 5717.011(C), the BTA may hear an appeal based solely upon the record and any evidence considered by the administrative body below, or upon application of any interested party, it must set a hearing, permit the introduction of additional evidence, and "make such investigation concerning the appeal as it considers proper." *Id.* The statute does not set forth a standard of review.

{¶ 23} Appellants argue for a very deferential standard of review for R.C. 5717.011 appeals by again looking to appeals from a municipal taxing authority to a court of common pleas pursuant to R.C. Chapter 2506. Although a court of common pleas may hold a hearing in an R.C. Chapter 2506 appeal, its review must be confined to the transcript of the administrative proceeding unless the appellant satisfies one of the conditions contained in R.C. 2506.03. In addition, R.C. 2506.04 sets forth the standard of review that the common pleas court must apply in deciding the appeal. R.C. 2506.04 provides:

If an appeal is taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code, *the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.* Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party on questions of law as provided in the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code.

(Emphasis added.)

{¶ 24} However, because R.C. 2506.03 and 2506.04 contain significant provisions not in R.C. 5717.011, appellants' reliance on these statutes, and case law involving R.C. Chapter 2506 appeals, is misplaced. As previously noted, R.C. 5717.011 contains no provision that limits the BTA's review to the record developed in the administrative proceedings below when a hearing is requested. There is no provision in R.C. 5717.011(C) that suggests the BTA must give any deference to a board of review decision. The BTA's authority is not limited by an express standard of review. Moreover, deference to a board of review decision is illogical when the BTA hears evidence not presented to the board of

review in conducting its own adjudication of the appeal.¹ It is not this court's role to second-guess the state legislature's policy reasons for establishing two different appeal mechanisms for board of review decisions. We note that the appeal provided pursuant to R.C. 2506.01 is expressly in addition to any other remedy or appeal provided by law. R.C. 2506.01(B). Because the BTA did not err when it permitted the MacDonalds to introduce additional evidence at the hearing and when it considered that evidence in reaching its decision, we overrule appellants' second assignment of error.

{¶ 25} Having overruled appellants' two assignments of error, we affirm the order of the BTA.

Order affirmed.

O'GRADY, J., concurs.

TYACKS, J., concurs in part and dissents in part.

TYACK, J., concurring in part and dissenting in part.

{¶ 26} I respectfully concur in part and dissent in part.

{¶ 27} Most of the facts in this case are not in dispute. William E. MacDonald, III ("MacDonald"), was a resident of the city of Shaker Heights until December 27, 2006. MacDonald had been employed by National City Corporation for 38 years until his retirement on December 31, 2006. MacDonald was vice-chairman and qualified for benefits under the company's Non-Contributory Retirement Plan and Supplemental Executive Retirement Plan ("SERP"). MacDonald elected to receive SERP benefits beginning in 2007 in the form of a joint and survivor annuity that will cease upon the death of MacDonald and his wife. The value of MacDonald's SERP benefit, that had not been previously been reported, was included in Box 5 of his 2006 Form W-2 [REDACTED] totaled \$14,566,611. Mr. and Mrs. MacDonald filed their 2006 city income tax return with Shaker Heights, calculating their tax liability on the amount reported in Box 18 of

¹ For these same reasons, we respectfully find the dissent's reliance upon *AT&T Communications of Ohio, Inc. v. Lynch*, 132 Ohio St.3d 92, 2012-Ohio-1975 and *Tetlack v. Bratenahl*, 92 Ohio St.3d 46 (2001) to be misplaced. Both cases involved R.C. Chapter 2506 appeals. In addition, we did not hold that appellants had the burden of proof at the hearing before the BTA. Rather, we held that the BTA did not act unreasonably or unlawfully in finding that the MacDonalds satisfied their burden in establishing that the SERP benefit was a pension.

MacDonald's W-2 [REDACTED] which totaled \$5,459,597.84. It is not disputed that the SERP is a nonqualified deferred compensation plan.

{¶ 28} The Regional Income Tax Agency ("RITA"), acting as Shaker Heights' tax administrator, issued a notice to MacDonald that his municipal tax liability would be calculated based on Box 5 of his W-2 [REDACTED]. MacDonald appealed to the Shaker Heights Income Tax Board of Review ("Shaker Heights Board") which is a municipal board of appeal ("MBOA"), arguing that the SERP was a pension and was exempt from municipal taxation.

{¶ 29} The Shaker Heights Board concluded that the amount in Box 5 that was attributable to MacDonald's SERP was not a pension and had not been exempted by Shaker Heights' Code of Ordinances 111.0901 and therefore is taxable as it is found in Box 5 of MacDonald's W-2 [REDACTED]. MacDonalds appealed to the BTA, which reversed and found that the SERP payments [REDACTED] constitute a pension and are not subject to taxation. Appellants, Shaker Heights et al., then timely appealed to this court.

{¶ 30} Courts reviewing a BTA decision must consider whether the decision was "reasonable and lawful." *Cousino Constr. Co. v. Wilkins*, 108 Ohio St.3d 90, 2006-Ohio-162, ¶ 10. An appellate court will reverse a BTA decision that is based upon an incorrect legal conclusion. *Gahanna-Jefferson Local School Dist. Bd. of Edn. v. Zaino*, 93 Ohio St.3d 231 (2001). But "[t]he BTA is responsible for determining factual issues and, if the record contains reliable and probative support for these BTA determinations," this court will affirm them. *Am. Natl. Can Co. v. Tracy*, 72 Ohio St.3d 150, 153 (1995).

The Board of Tax Appeals did not follow the proper standard of review

{¶ 31} Appellants' second assignment of error asserts that the BTA improperly conducted a de novo review of the Shaker Heights Board's decision and improperly allowed the introduction of new evidence that could have been presented to the MBOA. I agree in part. The BTA did not employ the correct standard of review because the MBOA's findings are presumptively valid absent a demonstration that those findings are clearly unreasonable or unlawful. However, there is no statutory prohibition to the BTA allowing additional evidence.

{¶ 32} An appellate court's scope of review on issues of law is plenary, including the issue of whether the court or agency below applied the proper standard of review. *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, ¶ 43.

{¶ 33} Appeals from a MBOA may be made to the county's court of common pleas or the BTA, and are governed by R.C. 5717.011:

Upon the filing of a notice of appeal with the board of tax appeals, the municipal board of appeal shall certify to the board of tax appeals a transcript of the record of the proceedings before it, together with all evidence considered by it in connection therewith. * * * The board may order the appeal to be heard upon the record and the evidence certified to it by the administrator, but upon the application of any interested party the board shall order the hearing of additional evidence, and the board may make such investigation concerning the appeal as it considers proper.

{¶ 34} R.C. 5717.011(C). There is no guidance in the statute as to the standard of review. Nor has the Supreme Court of Ohio articulated the standard of review by which the BTA is to measure appeals from a MBOA. This is mostly due to the recent enactment of R.C. 718.11 in 2003, beginning to apply for the 2004 tax year, which required the creation of a MBOA in all municipal corporations that impose an income tax. R.C. 718.11.

{¶ 35} By examining two similar tax appeal procedures to the one at bar, I believe we can determine the potential standard of review in this case. The first standard is for an appeal from the Ohio Tax Commissioner to the BTA in which "the tax commissioner's findings 'are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful.' Consequently, the taxpayer carries the burden 'to show the manner and extent of the error in the Tax Commissioner's final determination.'" *Global Knowledge Training, L.L.C. v. Levin*, 127 Ohio St.3d 34, 2010-Ohio-4411, ¶ 12, quoting *Stds. Testing Laboratories, Inc. v. Zaino*, 100 Ohio St.3d 240, 2003-Ohio-5804, ¶ 30. The second is for an appeal from a municipal board of review to a court of common pleas, which is authorized by R.C. 2506.01, and "the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." R.C. 2506.04.

{¶ 36} Analyzing two cases from the Supreme Court, *Tetlak v. Bratenahl*, 92 Ohio St.3d 46, 2001-Ohio-129, and *AT&T Communications of Ohio, Inc. v. Lynch*, 132 Ohio St.3d 92, 2012-Ohio-1975, I believe we are able to determine that appeals from a municipality board of review to the BTA is most analogous to appeals from the Tax Commissioner. In *Tetlak*, taxpayer Joseph Tetlak challenged the taxable status the distributive share of his S corporation that he argued for the purposes of municipal taxation was intangible income and therefore exempt. See *Tetlak* generally. Tetlak initially filed a protest which was denied by the tax administrator of the Village of Bratenahl who stated that the distributions was income from an unincorporated business entity and therefore taxable by municipalities. *Id.*

{¶ 37} Tetlak appealed to the Bratenahl Board of Review which upheld the tax administrator's denial of Tetlak's protest. *Id.* Tetlak then filed an administrative appeal pursuant to R.C. 2506.01 in the common pleas court. The trial court found that the municipality may tax the distributions but the "determination must be supported by 'the preponderance of substantial, reliable, and probative evidence on the whole record.'" R.C. 2506.04. Finding that the [tax administrator] did not make such determination, the court reversed the decision of the board of review." *Id.* at 47. The Eighth District Court of Appeals affirmed the decision and the case went before the Supreme Court. *Id.*

{¶ 38} The Supreme Court expresses, in reversing the judgment, that deference is to be given to a municipality when reviewing an income tax determination:

The taxpayer, not the village, has the burden of proof on the nature of the income at issue. It is well settled that "when an assessment is contested, the taxpayer has the burden * * * to show in what manner and to what extent * * * the commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect." *Maxxim Med., Inc. v. Tracy* (1999), 87 Ohio St.3d 337, 339, 720 N.E.2d 911, 913, quoting *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215, 5 OBR 455, 457, 450 N.E.2d 687, 688. Furthermore, the "Tax Commissioner's findings are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful." *Id.*, 87 Ohio St.3d at 339-340, 720 N.E.2d at 913-914.

This reasoning is applicable at the municipal level.

Tetlak at 51-52.

{¶ 39} From this, I would conclude that the decisions of a MBOA are to be treated with the same deference as those of the Tax Commissioner when appealed. The Supreme Court twice uses the standards for the Tax Commissioner and specifically states that this "reasoning is applicable at the municipal level" equating the deference given to the Tax Commissioner and the hurdles required to overcome it as applicable to the Bratenahl tax administrator or the Bratenahl Board of Review. *Id.* The case at bar is analogous to the *Tetlak*; both cases examine the taxable status of a type of income by a municipality, the Bratenahl Board of Review and the Shaker Heights Board in both cases concluded that the income was taxable, both of the boards' decisions were overturned upon appeal. The difference being the municipalities' boards' decision in *Tetlak* was appealed to a common pleas court as opposed to the BTA. *Tetlak* emphasizes that the taxpayer must overcome the tax assessor's findings by showing that they are faulty or incorrect and that they are presumed valid absent a showing of them being clearly unreasonable or unlawful. *Id.*

{¶ 40} *AT&T Communications* affirms that, while appeals from a MBOA to a common pleas court under R.C. 2506.01 resemble de novo proceedings, they are not de novo. *AT&T Communications* at ¶ 13. In *AT&T Communications*, a refund of the city of Cleveland's income tax was denied by the tax administrator. *See AT&T Communications* generally. *AT&T* appealed to the Cleveland Board of Income Tax Review which affirmed the refusal of the refund and *AT&T* filed an appeal pursuant to R.C. 2506.01. *Id.* Similar to *Tetlak*, *AT&T Communications* is a municipal income tax dispute in which after the MBOA affirms that administrator's findings the taxpayer appeals to the court of common pleas.

{¶ 41} The Supreme Court affirmed that the courts of common pleas exercise appellate jurisdiction: "[W]hile an appeal under R.C. 2506.01 resembles a de novo proceeding, it is not de novo. There are limits to a court of common pleas review of the administrative body's decision. For example, in weighing evidence, the court may not 'blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise.' " *AT&T Communications* at ¶ 13, quoting *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202 (1979). We find that the BTA may not conduct a de novo review of a MBOA's findings nor may they substitute their own judgment. It is the MBOA not the BTA that has the expertise in the municipalities own

taxing ordinances. There must be deference given to a MBOA's findings. The standards that must be employed and the dispositions that must be reached are more limited than relief that could be awarded pursuant to a trial, therefore the administrative appeal is more akin to an appeal than a trial. *See AT&T Communications* at 14.

{¶ 42} Examining *Tetlak* and *AT&T Communications*, I would find that in a MBOA's decision appealed pursuant to R.C. 5717.011 to the BTA, the taxpayer, not the village, has the burden of proof on the nature of the income at issue. *Tetlak* at 51. When an assessment of a tax administrator is contested, the taxpayer has the burden to show in what manner and to what extent the findings and assessments were faulty and incorrect. *Id.* Furthermore, an appeal pursuant to R.C. 5717.011(C) is not a de novo proceeding, it is more akin to an appeal than a trial, there may not be a substitution of judgment, and the MBOA's findings are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful. *See Tetlak* at 51-52; *AT&T Communications* at ¶ 13-14.

{¶ 43} Shaker Heights' second assignment of error also argues that MacDonald was precluded from introducing new evidence to the BTA that could have been introduced to the MBOA. There is no statutory basis for this argument nor any case law that suggests the BTA should be restricted in this way. The BTA is in fact required upon the application of any interested party to "order the hearing of additional evidence, and the board may make such investigation concerning the appeal as it considers proper." R.C. 5717.011(C). While a court of common pleas in an R.C. 2506.01 appeal may consider evidence outside the administrative record, that authority is limited. There is no statutory equivalent in R.C. 5717.011. *See AT&T Communications* at ¶ 13. We find the BTA is able to hear evidence in a MBOA appeal that could have been presented to the MBOA. Generally, however, it would not be in a taxpayer's interest to purposely withhold evidence from a MBOA as the MBOA's findings should be presumptively valid absent a demonstration they are clearly unreasonable or unlawful.

The BTA did not address the MBOA's findings or presume them as valid

{¶ 44} Examining the BTA's decision and the Shaker Heights Board's decision, I would find that the proper standard of review was not employed by the BTA which conducted a hearing with no deference to factual findings, or interpretation of Shaker Heights' city code by the Shaker Heights Board. The Shaker Heights Board's findings are

required to be shown to be clearly unreasonable for the BTA to draw a different conclusion. This includes the reading of Shaker Heights' Code of Ordinances 111.0901 which originally found MacDonald's SERP not to be a pension and exempt from the municipal income tax.

{¶ 45} Though the BTA cites *Tetlak* in its decision, it does not accord any deference to Shaker Heights Income Tax Board of Review's findings of fact that MacDonald's SERP is not a pension. At no point does the BTA address the reasonableness of the Shaker Heights Board's findings let alone address the question whether MacDonald has demonstrated that those findings are clearly unreasonable. Instead, the BTA acted as if it were writing on a clean slate.

{¶ 46} The Shaker Heights Board concluded that the amount reported on MacDonald's W-2 [REDACTED] attributable to his SERP was not a pension but rather an amount that had not been previously reported, "and that was, at the time of its reporting, known, fixed and not subject to forfeiture to the benefit of Appellant. It was not a pension as that term is commonly used, which is a payment of retirement benefits after retirement." Shaker Heights Board's decision, at 10. The factual determinations about the SERP lead the Shaker Heights Board to conclude that it was not a pension:

[MacDonald] had the contractual right to SERP benefits if and when he completed his time and other requirements set out in the [National City] SERP program. Thus, with each month of service to [National City], [MacDonald], by his employee services, was "paying" for his contractual right to get those SERP benefits following his retirement.

This "deferred" compensation continued to accrue in [MacDonald]'s favor until the end of 2006 when, in fact, its present value, shown in Box 5 of his W-2 [REDACTED] actually recognized as due and owing, though as yet unpaid, thus, is income subject to the City's income tax.

[MacDonald] chose to use that "income" to purchase a join life annuity. But [MacDonald] had the option to take the sum in cash, emphasizing that it was deferred compensation to which [MacDonald] was now entitled.

Shaker Heights Board's decision, at 11.

{¶ 47} These are some of the factual and legal conclusions of the Shaker Heights Board that must be presumed valid unless demonstrated that they are clearly unreasonable or unlawful.

{¶ 48} The BTA did not really address the conclusions of the Shaker Heights Board. Instead, the BTA stated that while the SERP "falls within the ambit of a nonqualified deferred compensation plan, we do not find such designation necessarily mandates its exclusion from the commonly accepted definition of pension." BTA's decision, at 10. The BTA then simply made the determination that the SERP was a pension. This ignored the Shaker Heights Board's conclusion that the SERP is a deferred compensation that could be used by MacDonald as proof that the SERP was not a pension.

{¶ 49} The BTA then concluded that "we need look no further than the terms of National City's SERP to discern its purpose, i.e., 'to provide for the payment of certain pension, disability and survivor benefits in addition to benefits which may be payable under other plans.' " BTA decision, at 11. This fails to address the conclusions and arguments made by Shaker Heights Board. Again, I find that the BTA did not presume Shaker Heights Income Tax Board of Review's findings as valid and did not show what demonstrates those findings to be clearly unreasonable or unlawful.

{¶ 50} The second assignment of error should be affirmed in part and overruled in part. Since the majority of this panel does not do so, to that extent, I respectfully dissent in part.

.....

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Feb 27 12:17 PM-13AP000071

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

William E. MacDonald, III, et al.,	:	
	:	
Appellants-Appellees,	:	
	:	No. 13AP-71
v.	:	(BTA No. 2008-K-1883)
	:	
City of Shaker Heights Income Tax	:	(REGULAR CALENDAR)
Board of Review et al.,	:	
	:	
Appellees-Appellants.	:	
	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on February 27, 2014, appellants' assignments of error are overruled, and it is the judgment and order of this court that the order of the Ohio Board of Tax Appeals is affirmed. Costs assessed against appellants.

KLATT and O'GRADY, JJ.
TYACK, J., concurs in part.

/S/JUDGE_____

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Feb 27 4:11 PM-13AP000071

Tenth District Court of Appeals

Date: 02-27-2014
Case Title: WILLIAM E MACDONALD III -VS- CITY OF SHAKER HEIGHTS
Case Number: 13AP000071
Type: JEJ - JUDGMENT ENTRY

So Ordered

A handwritten signature in cursive script, "William A. Klatt", is written over a circular, textured seal. The seal appears to be an official emblem or stamp, though its details are not clearly legible.

/s/ Judge William A. Klatt

Electronically signed on 2014-Feb-27 page 2 of 2