

IN THE SUPREME COURT OF OHIO

ORIGINAL

HUNTER T. HILLENMEYER)	
)	CASE NO. 14-0235
Appellant,)	
v.)	
)	On Appeal from the Ohio Board of Tax
CITY OF CLEVELAND BOARD OF)	Appeals
REVIEW and NASSIM LYNCH,)	
CLEVELAND TAX ADMINISTRATOR)	Board of Tax Appeals Case No. 2009-3688
)	
Appellees.)	

MERIT BRIEF OF APPELLANT HUNTER T. HILLENMEYER

Stephen W. Kidder
 (Counsel of Record)
 PHV No. 3032-2014
 HEMENWAY & BARNES LLP
 60 State Street
 Boston, MA 02109
 Telephone: 617.227.7940
 Facsimile: 617.227.0781
 skidder@hembar.com

Barbara A. Langhenry (0038838)
 Linda L. Bickerstaff (0052101)
 (Counsel of Record)
 City of Cleveland Department of Law
 205 West St. Clair Avenue
 Cleveland, OH 44113
 Telephone: 216.664.4406
 Facsimile: 216.420.8299
 lbickerstaff@city.cleveland.oh.us

Richard C. Farrin (0022850)
 ZAINO HALL & FARRIN LLC
 41 S. High Street, Suite 3600
 Columbus, OH 43215
 Telephone: 614.326.1120
 Facsimile: 614.754.6368
 rfarrin@zhftaxlaw.com

COUNSEL FOR APPELLEES
 CITY OF CLEVELAND BOARD OF
 REVIEW and NASSIM LYNCH,
 CLEVELAND TAX
 ADMINISTRATOR

COUNSEL FOR APPELLANT
 HUNTER T. HILLENMEYER

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STATEMENT OF FACTS

This case concerns the validity of the City of Cleveland's method of allocating the income of nonresident professional athletes for tax purposes. Among all the jurisdictions that are home to Clubs from the major professional sports leagues – the National Football League, Major League Baseball, the National Basketball Association, and the National Hockey League – Cleveland is the only jurisdiction that taxes athletes' income based on the proportion of games that the athlete's team plays in the jurisdiction to the total number of games the team plays during the year (the "games-played method"). All other jurisdictions that impose an income tax allocate athletes' income based on the proportion of days that the athlete performs service in the jurisdiction to the total number of days on which the athlete performs services for his employer during the year (the "duty days method").

A. Ohio's Statutory Framework Governing Municipal Income Taxes

The Ohio Constitution grants municipalities the right to exercise all powers of local self-government. Ohio Constitution, Article XVIII, Sections 3 and 7. Municipalities have the power to adopt and enforce local regulations, including the power of taxation, so long as such regulations do not conflict with Ohio general law or constitutional provisions. *See id.; Thompson v. City of Cincinnati*, 2 Ohio St.2d 292, 294, 208 N.E.2d 747 (1965). The Ohio General Assembly is authorized by the Constitution to place restrictions on the taxing authority enjoyed by municipalities, *see* Ohio Constitution, Article XIII, Section 6, Article XVIII, Section 13, and has done so in several explicit statutory provisions.

Ohio law permits municipalities to impose a uniform income tax on wages earned by residents and wages earned by nonresidents for services performed within the municipality. *See* R.C. 718.03(B) and 718.01(H)(10); *Angell v. City of Toledo*, 153 Ohio St. 179, 185, 91 N.E.2d 250 (1950). The Ohio Revised Code, however, explicitly prohibits municipalities from imposing

an income tax on “[e]mployee compensation that is not ‘qualifying wages’ as defined in section 718.03 of the Revised Code.” R.C. 718.01(H)(10). Under Section 718.03 of the Revised Code, “[q]ualifying wages’ means wages, as defined in section 3121(a) of the Internal Revenue Code,” with certain adjustments. R.C. 718.03(A)(2). Under the Internal Revenue Code, “the term ‘wages’ means all remuneration for employment.” 26 U.S.C. 3121(a). “Employment” is defined in the Internal Revenue Code as “any service, of whatever nature, performed . . . by an employee for the person employing him.” 26 U.S.C. 3121(b). Ohio law thus authorizes municipalities to tax employee wages, but requires that employee wages be treated as having been earned for all services performed by an employee for his or her employer.

The Revised Code also prohibits municipalities from taxing the income paid to a nonresident “for personal services performed by the individual in the municipal corporation on twelve or fewer days in a calendar year.” R.C. 718.011. Individuals who spend limited time in an Ohio municipality – such as an attorney who travels to Ohio for a one-day hearing – are thus statutorily exempt from municipal income taxes. *See id.* That exemption, however, explicitly does not apply to a nonresident individual who “is a professional entertainer or professional athlete, the promoter of a professional entertainment or sports event, or an employee of such a promoter.” R.C. 718.011(B). As a result, a professional athlete who performs services in an Ohio municipality on a single day during the tax year becomes subject to the municipality’s income tax, while other professionals and employees do not.

With respect to state income taxes, Ohio employs the duty day method of allocating professional athlete’s income. *See* Ohio Dep’t of Taxation, *Ohio’s State Tax Report*, No. 80 (2006) at 1, *available at* http://www.tax.ohio.gov/portals/0/tax_analysis/tax_data_series/ostr_summer_06.pdf (accessed May 9, 2014) (“Ohio currently levies income tax on the pay of

professional athletes and team staff based on employer withholdings for the ‘duty days’ that the teams are active in the state.”). Ohio’s current procedures “trace their history back to the 1991 Board of Tax Appeals (BTA) case *Hume v. Limbach*.” *Id.* at 2. The Ohio Department of Taxation has explained that *Hume* “was an important case for us – it defined the way we tax nonresident athletes.” *Id.* at 3. (“You have to look at all the days they’re performing during the year, meaning all their duty days in Ohio as well as other places. This is a common approach in other states in taxation of athletes.”).

B. Cleveland’s Method Of Allocating Professional Athlete’s Income On The Basis Of Games Played

The City of Cleveland imposes a 2% tax on all income allocable to Cleveland. *See* Cleveland Codified Ordinances 191.0501. With respect to nonresidents, the Cleveland Codified Ordinances provide that Cleveland’s income tax is imposed “[o]n all qualifying wages, earned and/or received . . . by nonresidents of the City for work done or services performed or rendered within the City or attributable to the City; on all net profits earned and/or received by a nonresident from the operation or conduct of any business or profession within the City; and on all other taxable income earned and/or received by a nonresident derived from or attributable to sources, events or transactions within the City.” Cleveland Codified Ordinances 191.0501(b)(1). The Cleveland Ordinance does not specify, however, how the income of a nonresident athlete who performs service partly within Cleveland and partly outside Cleveland should be allocated.

Administrative regulations promulgated by the Central Collection Agency (“CCA”) – part of the Division of Taxation of Cleveland’s Department of Finance – provide that, in the case of nonresident employees, the City’s income tax is imposed “on all salaries, wages, commissions and other compensation earned and received . . . for work done or services rendered or performed within said taxing community.” CCA Article 3:02(A). Article 3:00 of the CCA

regulations governs the imposition of the City's tax, and it does not contain any allocation provision for nonresident employees. Nor does any provision of Article 3:00 specifically address compensation paid to professional athletes.

The only CCA regulation that addresses compensation paid to professional athletes is contained in Article 8:02, which is the withholding regulation. In general, that regulation requires employers to withhold from nonresident employees who perform work both within and outside of Cleveland based on the number of working days spent within and outside of the City. With respect to professional athletes, however, the regulation requires their compensation to be allocated based on the number of games played in Cleveland, rather than the number of days on which the athlete performs services for his employer in Cleveland. Specifically, Cleveland's regulation provides:

In the case of employees who are non-resident professional athletes, the deduction and withholding of personal service compensation shall attach to the entire amount of compensation earned for games that occur in the taxing community. In the case of a non-resident athlete not paid specifically for the game played in a taxing community, the following apportionment formula must be used:

The compensation earned and subject to tax is the total income earned during the taxable year, including incentive payments, signing bonuses, reporting bonuses, incentive bonuses, roster bonuses and other extras, multiplied by a fraction, the numerator of which is the number of exhibition, regular season, and post-season games the athlete played (or was available to play for his team, as for example, with substitutes), or was excused from playing because of injury or illness, in the taxing community during the taxable year, and the denominator of which is the total number of exhibition, regular season, and post-season games which the athlete was obligated to play under contract or otherwise during the taxable year, including games in which the athlete was excused from playing because of injury or illness.

CCA Article 8:02(E)(6). Thus, under Cleveland's regulation, a visiting football player who travels to Cleveland for 2 days during a 160-day season for his team to play the Cleveland Browns will not have 1/80 (1.25%) of his income allocated to Cleveland for tax purposes.

Instead, because he played 1 out of 20 games (including preseason games) in Cleveland, 1/20 (5%) of his income will be allocated to Cleveland.

C. Cleveland's Taxation of Hunter Hillenmeyer

Appellant Hunter T. Hillenmeyer is a former professional football player. During the tax years in question (2004 through 2006) Hillenmeyer played linebacker in the National Football League ("NFL" or the "League") for the Chicago Bears. During each of those years Hillenmeyer played a game in the City of Cleveland and was subjected to Cleveland's income tax.

1. Services performed by Hillenmeyer for the Chicago Bears

Like all NFL players, Hillenmeyer's employment with the Chicago Bears was governed by the terms of the Standard NFL Player Contract ("Standard Player Contract"). (Supp. 55 (Hillenmeyer's 2006 Contract), 94 (Hillenmeyer's 2003--2005 Contract).)¹ All players enter into the Standard Player Contract with the Club that employs them. (Supp. 9.) A player may be subject to additional provisions that apply to him individually, and those provisions will be set forth in an addendum to the Standard Player Contract. (*Id.*) The Standard Player Contract sets forth the services that players are required to perform for the NFL Clubs in return for the compensation set forth in the contract. Paragraph 2 of the Standard Player Contract, entitled "EMPLOYMENT AND SERVICES," provides in part:

Player will report promptly for and participate fully in Club's official mandatory mini-camp(s), official preseason training camp, all Club meetings and practice sessions, and all pre-season, regular season, and post-season football games scheduled for or by Club. If invited, Player will practice for and play in any all-star football game sponsored by the League.

(Supp. 55.) Under paragraph 4 of the Standard Player Contract, players are also required to "participate upon request in reasonable activities to promote the Club and the League." (*Id.*)

¹ Unless otherwise noted, the relevant terms of Hillenmeyer's 2006 contract and his 2003--2005 contract are identical.

Hillenmeyer's contract thus required him, in addition to playing in games, to participate in mini-camp(s), preseason training camp, team meetings, practice sessions, and promotional activities. (*See id.*)

Paragraph 5 of the Standard Player Contract, entitled "COMPENSATION" provides that "[f]or performance of Player's services and all other promises of Player, Club will pay Player a yearly salary." (Supp. 55–56.) Paragraph 5 thus makes clear that Hillenmeyer's "yearly salary" was paid in consideration for all of the services Hillenmeyer was required to perform for the Chicago Bears under Paragraph 2 of the Standard Player Contract. (*See id.*) Paragraph 5 also states that the Club will make certain per diem payments to a player for travel and lodging expenses incurred in connection with preseason camps, and preseason, regular season, and post-season games. (*Id.*) Unlike the player's salary, however, those per diem payments are intended only to compensate the player for expenses arising from preseason or regular season travel; they are not intended to compensate him for of the services he performs for the Club while receiving the per diem. (*See id.*)

The Standard Player Contract also governs the timing of the payment of a player's yearly salary. Paragraph 6 provides that a player, such as Hillenmeyer, "will be paid 100% of his yearly salary under this contract in equal weekly or bi-weekly installments over the course of the applicable regular season period." (Supp. 56.) Unlike Paragraph 2, Paragraph 6 does not specify the services that players are required to perform in exchange for their yearly salary. Instead, it simply calls for a biweekly or weekly payment schedule, which includes payment during the Club's "bye week" in which it does not play in a game.

Approximately 40% of NFL player compensation is paid in a form other than yearly salary, such as roster bonuses and signing bonuses. (Supp. 11, Tr. 78.) Such compensation is

not required to be paid in accordance with the schedule for “yearly salary” set forth in Paragraph 6 of the Standard Player Contract. (*Id.*) Hillenmeyer’s 2006 contract, for example, entitled him to a \$4.5 million roster bonus for being a member of the Chicago Bears’ roster on July 10, 2006. (Supp. 64.) That roster bonus was payable in four installments in 2006 and 2007. (*Id.*) Hillenmeyer was entitled to the roster bonus regardless of whether he played in any games during the 2006 season or performed any other services for the Bears. (Supp. 14–15, Tr. 85–86.)

At the hearing of this matter before the City of Cleveland Municipal Board of Review (“Board of Review”), Thomas DePaso, Associate General Counsel to the NFL Players Association, testified extensively regarding the services that NFL players are required to perform. In addition to explaining the requirements of the Standard Player Contract, DePaso testified that the NFL Collective Bargaining Agreement (“CBA”) between the League and the Players Association allows players only four days off per month beginning with the first preseason game and continuing through the end of the Club’s season. (Supp. 6–7, Tr. 39–40; Supp. 44 (CBA).) As a result, during the 6-week preseason, 17-week season, and post-season for teams that advance that far, players typically are entitled to a total of twenty-one days off. (Supp. 6–7, Tr. 39–40.) During all remaining days during the preseason, regular season, and post-season, players are required to perform services for their employer. DePaso also testified that, under the CBA, players can be fined for failing to participate in contractually required services, including mandatory mini-camp(s) and preseason training camp, team meetings, and practices sessions. (Supp. 17–19, Tr. 95–97.)

Hillenmeyer also submitted evidence to the Board of Review in the form of an affidavit from Cliff M. Stein, the Chicago Bears’ Senior Director of Football Administration and General

Counsel. (Supp. 69.) Stein stated unequivocally in his affidavit that “[u]nder the terms of Hillenmeyer’s NFL Player Contract, he has been required since joining the Bears to provide services to his employer from the beginning of the pre-season through the end of the post-season, including mandatory mini-camps, official preseason training camp, meetings, practice sessions, and all pre-season, regular season, and post-season games.” (*Id.*) Stein’s affidavit also states that “[t]he compensation Hillenmeyer receives from the Bears is paid for all of these services and not only for games played.” (*Id.*)

2. Cleveland’s allocation of Hillenmeyer’s income under the games-played method

During each season from 2004 through 2006, Hillenmeyer traveled to Cleveland with the Chicago Bears to play in a football game against the Cleveland Browns. In both 2004 and 2006, the Bears played an exhibition preseason game in Cleveland. (Supp. 71.) In 2005, the Bears played a regular season game in Cleveland. During each season from 2004 through 2006, Hillenmeyer spent two days in Cleveland performing services for the Chicago Bears – one day traveling to Cleveland the day before the game, and one day participating in the game and traveling home. (Supp. 93.)

Hillenmeyer performed services for the Chicago Bears on a total of 157 days in 2004, 165 days in 2005, and 168 days in 2006. (Supp. 93.) The duty days method would therefore have allocated to Cleveland 1.27% of Hillenmeyer’s income in 2004, 1.21% of his income in 2005, and 1.19% of his income in 2006. Cleveland, however, allocated Hillenmeyer’s income using the games-played method rather than the duty days method. As a result, although Hillenmeyer only performed services in Cleveland on 2 days during 2004 and 2006, Cleveland imposed its income tax on 5% of Hillenmeyer’s income during each of those years because he played 1 of 20 games in Cleveland. In 2005, Cleveland imposed its income tax on 4.76% of

Hillenmeyer's income because he played 1 of 21 games in Cleveland (the Chicago Bears having played in five preseason games in 2005).

By using the games-played method Cleveland allocated to itself 393% of the 2004 and 2006 income that would have been allocated to Cleveland had it applied the duty days method to Hillenmeyer. For 2004, Cleveland allocated to itself 420% of Hillenmeyer's income that would have been allocated to Cleveland under the duty days method. Thus, during the relevant tax years, Cleveland allocated to itself, on average, over 400% of the income that would have been allocable to Cleveland had it applied the duty days method to Hillenmeyer instead of the games-played method.

The discrepancy that results from allocating income under the games-played method is reflected in the below chart, which compares the percentage of Hillenmeyer's income allocated to Cleveland under the games-played method to the percentage of his income allocated to the State of Ohio under the duty days method:

Tax Year	Ohio Calculation Based on Duty Days	Income Allocated to Ohio (Duty Days)	Cleveland Calculation Based on Games-Played	Income Allocated to Cleveland (Games Played)	Disparity Between Duty Days Allocation and Games Played Allocation
2006	2 duty days in Ohio ÷ 168 total duty days	1.19%	1 Cleveland game ÷ 20 total games	5.00%	Cleveland allocates to itself 420% of what Ohio allocates to itself at the state level for the exact same services.
2005	2 duty days in Ohio ÷ 165 total duty days	1.21%	1 Cleveland game ÷ 21 total games	4.76%	Cleveland allocates to itself 393% of what Ohio allocates to itself at the state level for the exact same services.

2004	2 duty days in Ohio ÷ 157 total duty days	1.27%	1 Cleveland game ÷ 20 total games	5.00%	Cleveland allocates to itself 393% of what Ohio allocates to itself at the state level for the exact same services.
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D. Administrative Proceedings Below

On December 19, 2007, Hillenmeyer filed a timely application for a refund of income taxes paid to Cleveland for the tax years 2004 through 2006. (Supp. 118–121.) In his application for a refund, Hillenmeyer argued that Cleveland’s method of allocating the income of professional athletes on the basis of games played is illegal, erroneous, and unconstitutional. (Supp. 119.) Hillenmeyer also argued that the exclusion of professional athletes from R.C. 718.011, which prohibits municipalities from taxing the income of nonresidents who perform services in the municipality on twelve or fewer days during the tax year, violates the Equal Protection Clause. (Supp. 120.) Accordingly, by severing that offending exclusion from the statute, Hillenmeyer argued that he is entitled to a refund of the entire amount of tax paid. *Id.*

The Cleveland Tax Administrator denied Hillenmeyer’s request for a refund in a final administrative ruling dated February 19, 2009. (Appx. 26.) The Tax Administrator asserted that Cleveland’s method of allocating Hillenmeyer’s income was authorized by City law – namely CCA Article 8:02(E)(6). (Appx. 31.) The Tax Administrator also asserted repeatedly that the games-played method is valid because “a player’s contract salary [is tied] to one thing – games played.” (Appx. 37; *see also* Appx. 32, 38.) With respect to Hillenmeyer’s constitutional challenges, the Tax Administrator asserted that they could not be administratively determined and, in any event, that the games-played method was not unconstitutional. (Appx. 43–48.)

Hillenmeyer appealed the denial of his refund application to the City of Cleveland Municipal Board of Review (the “Board of Review”), which affirmed the Tax Administrator’s decision. The Board of Review found, among other things, that “[t]he undisputed facts show that the Taxpayer performed services for his employer . . . for the 6-week preseason and the 17-week regular season, including attending meetings and practice sessions . . . on non-game days, for which Taxpayer was paid weekly a contractually agreed upon amount that is referred to as ‘Paragraph 5 compensation’. . . . Taxpayer was also paid a \$2.5 million roster bonus that is separate and distinct from the Paragraph 5 compensation, and was based solely on being on the Chicago Bears’ roster on July 10, 2006.”² (Appx. 17.) The Board of Review nevertheless affirmed the Tax Administrator’s decision upon concluding that the games-played method is reasonable because certain “facts support a reasonable interpretation that the Taxpayer was employed to play games.” (Appx. 20.) The Board of Review also found this Court’s decision in *Hume v. Limbach*, 61 Ohio St.3d 387, 575 N.E.2d 150 (1991), “to be inapposite factually.” (Appx. 23.)

Hillenmeyer appealed the Board of Review’s decision to the Ohio Board of Tax Appeals. In the decision below, dated January 14, 2014, the Board of Tax Appeals affirmed the decisions of the Board of Review and the Tax Administrator denying Hillenmeyer’s request for a refund. (Appx. 7–14.) The Board of Tax Appeals acknowledged at the outset that, although it was authorized to accept evidence on constitutional points, it was making no finding on Hillenmeyer’s constitutional challenges because it believed it had no jurisdiction to decide the constitutional claims. (Appx. 12.) With respect to Hillenmeyer’s non-constitutional arguments, the Board of Tax Appeals found that the “Cleveland ordinances under consideration do not

² The Tax Administrator did not cross-appeal from the Board of Review’s factual finding that Hillenmeyer was compensated for performing non-game services for his employer.

operate in contravention of any state statute regarding municipal income taxes or Ohio case precedent.” (*Id.*) (footnotes omitted).) That finding indicates that the Board of Tax Appeals was under the mistaken understanding that the games-played method was required by the City Ordinance, rather than the CCA regulations. Apparently, that is why the Board of Tax Appeals failed to address Hillenmeyer’s argument that the games-played method in the CCA regulations was contrary to the Cleveland Ordinance. The Board of Tax Appeals also found this Court’s decision in *Hume* to be of “little utility” because it understood *Hume* to stand only for the proposition that income can in some circumstances be allocated to another jurisdiction, but to not prescribe any particular method by which such allocation must be done. (Appx. 12 fn. 9.)

Hillenmeyer filed a timely Notice of Appeal from the Board of Tax Appeals’ decision. (Appx. 1.)

ARGUMENT

A decision of the Board of Tax Appeals must be reversed or vacated if it is “unreasonable or unlawful.” R.C. 5717.04. In determining whether the Board of Tax Appeals decision is unreasonable or unlawful, this Court reviews questions of law de novo. *Columbus City School Dist. Bd. of Educ. v. Testa*, 130 Ohio St.3d 344, 2011-Ohio-5534, 958 N.E.2d 557, ¶ 12. The Board of Tax Appeals’ decision below rests on the validity of Cleveland’s administrative regulation requiring the income of professional athletes to be allocated using the games-played method, and therefore presents a question of law subject to de novo review.

Cleveland’s use of the games-played method is invalid because it is contrary to Ohio law. Cleveland’s justification for utilizing the games-played method – that professional athletes are paid only to play games – is at odds with the undisputed record evidence and the definition of “qualifying wages” mandated by R.C. 718.03. The very same argument the City of Cleveland

advances now was rejected by this Court in *Hume v. Limbach*, 61 Ohio St.3d 387, 575 N.E.2d 150 (1991).

Cleveland's application of the games-played method to Hillenmeyer is also unconstitutional because it violates the Due Process Clause and the Commerce Clause of the United States Constitution. Use of the games-played method unfairly attributes to Cleveland income that was earned by Hillenmeyer in other jurisdictions and taxes activity that has no connection to Cleveland. As applied to Hillenmeyer, the games-played method results in Cleveland allocating to itself 400% of the income that would be allocated to Cleveland if the duty days method were applied to Hillenmeyer.

Finally, R.C. 718.011(B) is unconstitutional insofar as it singles out professional athletes, including Hillenmeyer, for less advantageous tax treatment than similarly situated taxpayers in violation of the Ohio Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Appellant's Proposition of Law No. 1:

Cleveland's method of allocating professional athlete's income on the basis of games played is invalid because it is contrary to Ohio law. The games-played method is contrary to R.C. 718.01(H) and 718.03, which together require municipalities to treat all services performed by an employee for an employer as services for which the employee receives compensation, it is contrary to this Court's decision in *Hume v. Limbach*, and it is contrary to Cleveland Codified Ordinances 191.0501(b)(1), which allows Cleveland to tax only income derived from work done or services performed within Cleveland or attributable to Cleveland.

Cleveland's administrative regulations provide that the income of professional athletes shall be allocated based on the percentage of games that the athlete plays in Cleveland, rather than the percentage of working days on which he performs services in Cleveland. CCA Article 8:02(E)(6). The regulations thus purport to allow the Cleveland Tax Administrator to treat

professional athletes as if they were compensated only for playing games, but not for any other services they perform for their employer.

An administrative rule that is contrary to a statutory provision is invalid. *Ransom & Randolph Co. v. Evatt*, 142 Ohio St. 398, 407–408, 52 N.E.2d 738 (1944). Accordingly, if the games-played method, and its treatment of athletes as if they were compensated only for playing in games, is contrary to the Ohio Revised Code or the Cleveland Codified Ordinances, it is invalid. This Court must construe the provisions of the Revised Code and Cleveland Ordinances strictly, and resolve all doubts in favor of the taxpayer. *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 34; *Bowsher v. Euclid Income Tax Bd. of Review*, 99 Ohio St.3d 330, 2003-Ohio-3886, 792 N.E.2d 181, ¶ 14. Moreover, those provisions “must be construed, if fairly possible, so as to avoid not only the conclusion that [they are] unconstitutional, but also grave doubts upon that score.” *In re Judicial Campaign Complaint Against Stormer*, 137 Ohio St.3d 449, 2013-Ohio-4584, 1 N.E.3d 317, ¶ 20 (internal quotation marks omitted).

Cleveland’s use of the games-played method is contrary to the Revised Code and the Cleveland Ordinance and therefore must be invalidated. This Court has squarely rejected the contention that a taxing authority can unilaterally decide what services an athlete is and is not compensated for irrespective of contrary provisions in the athlete’s contract. *Hume*, 61 Ohio St.3d 387. Moreover, by construing the Revised Code and Cleveland Ordinance to prohibit Cleveland’s use of the games-played method, this Court will avoid the grave constitutional questions that would otherwise arise.

A. Cleveland's Use Of The Games-Played Method Is Contrary To The Ohio Revised Code, Under Which All Services Performed By An Employee For An Employer Are Services For Which The Employee Is Deemed To Be Receiving Compensation

Cleveland's use of the games-played method treats professional athletes as if they are paid only to play in games. The Cleveland Tax Administrator has repeatedly asserted the position, both in its decision on Hillenmeyer's refund application and in its briefing below, that professional athletes are paid only for playing in games. (*See, e.g.*, Appx. 32 ("The 'games-played' method . . . correctly recognizes that activities other than actual games played are all ancillary to what the athlete is hired to do – play games."); Appx. 37 ("[T]he games-played method properly apportions player salaries since the plain language of both [the CBA and the Standard Player Contract] ties a player's contract salary to one thing – games played."); Appx. 38 ("players are paid to play games").) That assertion, however, is contrary to the Revised Code and the undisputed record evidence.

The Revised Code prohibits municipalities from imposing an income tax on "[e]mployee compensation that is not 'qualifying wages' as defined in section 718.03 of the Revised Code." R.C. 718.01(H)(10). Under Section 718.03 of the Revised Code, "[q]ualifying wages' means wages, as defined in section 3121(a) of the Internal Revenue Code," with certain adjustments. R.C. 718.03(A)(2). Under the Internal Revenue Code, "the term 'wages' means all remuneration for employment." 26 U.S.C. 3121(a). "Employment," in turn, is defined in the Internal Revenue Code as "any service, of whatever nature, performed . . . by an employee for the person employing him." 26 U.S.C. 3121(b). Ohio law thus requires that employee wages be treated as having been earned for *all* services performed by an employee for his or her employer.

Here, the undisputed record evidence presented to the Board of Review and the Board of Tax Appeals established that Hillenmeyer performed services for the Chicago Bears other than

playing in football games. Hillenmeyer's contract, like that of all NFL players, explicitly required him to "participate fully in Club's official mandatory mini-camp(s), official preseason training camp, [and] all Club meetings and practice sessions." (Supp. 55.) It also provided that Hillenmeyer would be paid an annual salary for the performance of all "services and all other promises of Player," not just for participation in games. (*Id.*; see also Supp. 69 (stating that Hillenmeyer was required to participate in "mandatory mini-camps, official preseason training camp, meetings, practice sessions, and all pre-season, regular season, and post-season games" and that "[t]he compensation Hillenmeyer receives from the Bears is paid for all of these services and not only for games played").) In fact, in 2006, the vast majority of Hillenmeyer's compensation was in the form of a roster bonus earned for simply being a member of the Chicago Bears roster on July 20, 2006, and was thus unrelated entirely to his participation in games. (Supp. 64.)

In sum, the Revised Code requires that employee wages be deemed compensation for all services the employee performs for his employer. Because Hillenmeyer performed services for the Chicago Bears other than playing games (and was compensated for those services), Cleveland's attempt to treat Hillenmeyer and other professional athletes as being paid only to play in games is contrary to the Revised Code. To the extent CCA Article 8:02(E)(6) purports to require such treatment, it is invalid.

B. Cleveland's Use Of The Games-Played Method Is Contrary To This Court's Decision In *Hume v. Limbach*

Cleveland's attempt to treat Hillenmeyer and other professional athletes as being paid only for playing in games, despite contractual language demonstrating that Hillenmeyer was also paid for additional services, is not only contrary to the Revised Code, but the very same approach was squarely rejected by this Court in *Hume v. Limbach*, 61 Ohio St.3d at 389.

In *Hume* this Court reviewed the Ohio Tax Commissioner's determination that Thomas Hume, a baseball player for the Cincinnati Reds, was paid only for the regular season and not for spring training camp and preseason exhibition games. *Id.* Hume's contract, much like Hillenmeyer's, provided that Hume was required to perform services for the Reds in addition to playing in games, including participation in "the Club's training season [and] the Club's exhibition games." *Id.* at 387. Hume's contract also provided, much like Hillenmeyer's, that Hume would be paid an annual salary for "performance of the Player's services and promises hereunder." *Id.* Like Hillenmeyer, Hume received a per diem for certain expenses incurred in connection with performing required services for the Reds during the preseason. *Id.* at 388. And like Hillenmeyer's contract, Hume's contract provided a payment schedule that resulted in him receiving his compensation only during the regular season. *Id.* at 387.

In *Hume*, the Tax Commissioner determined that, notwithstanding the provisions in Hume's contract requiring him to provide services for the Reds during the preseason, Hume was paid only for the regular season because he received compensation only during the regular season. *Id.* at 389. This Court rejected that conclusion. *Id.* Observing that Hume's contract required him to participate in spring training and exhibition games, this Court held that Hume "was compensated for the training season and exhibition games, despite receiving payment only during the playing season." *Id.*

Hume establishes that where a professional athlete's contract specifies the services he is required to perform in return for compensation, a tax administrator is not free to disregard those contract provisions and to treat the player, for tax purposes, as being compensated for only a subset of the services he in fact performs for his employer. *See id.* Yet that is precisely what the Cleveland Tax Administrator is attempting to do here. Just as the Tax Commissioner in *Hume*

was attempting to treat a player, for tax purposes, as having been compensated for only a subset of the services he actually performed (i.e., the regular season but not spring training), so too is the Cleveland Tax Administrator attempting to treat Hillenmeyer, for tax purposes, as though he were compensated for only a subset of the services he actually performed for the Chicago Bears (i.e., playing in games but not participating in mini-camp(s), training camps, practices, and team meetings). That attempt should be rejected again by this Court, just as it was in *Hume*.

C. Cleveland's Use Of The Games Played Method Is Contrary To The Cleveland Codified Ordinances, Which Authorize Cleveland To Tax Only Income Derived From Services Performed Within The City Of Cleveland

In addition to violating the Revised Code and this Court's decision in *Hume*, Cleveland's use of the games-played method is contrary to the Cleveland Codified Ordinances. Section 191.0501 of the Cleveland Codified Ordinances provides in relevant part that Cleveland's income tax is imposed "[o]n all qualifying wages, earned and/or received . . . by nonresidents of the City for work done or services performed or rendered within the City or attributable to the City." Cleveland Codified Ordinances 191.0501(b)(1). The Ordinance thus taxes income derived from services performed by an employee within Cleveland, but not income derived from services performed elsewhere. *See id.*

By applying the games-played method to Hillenmeyer, Cleveland is taxing more than the income earned by Hillenmeyer for services performed within Cleveland. The games-played method treats professional athletes as if they were paid only to play in games. As demonstrated above, however, Hillenmeyer performed a number of non-game services for the Chicago Bears for which he received compensation, including participating in mini-camp(s), preseason training camp, team meetings, and practice sessions. (Supp. 55.) All of those non-game services were performed outside of Cleveland. But by using the games-played method, Cleveland allocates to itself a substantial portion of the income Hillenmeyer receives for performing those services.

That Cleveland is taxing income earned for activities performed outside Cleveland is most evident from the fact that application of the games-played method resulted in Cleveland allocating to itself 400% of the income that would have been allocated to Cleveland if the duty days method were applied to Hillenmeyer.

In sum, like the Revised Code, the language of the Cleveland City Ordinances is incompatible with Cleveland's method of taxing professional athletes' income on the basis of games played.

D. Other Jurisdictions That Have Considered The Question Have Uniformly Rejected The Games-Played Method In Favor Of The Duty Days Method

Outside of Cleveland, the games-played method of allocating professional athletes' income has been uniformly rejected by courts and administrative tax boards that have considered the issue. As a result, if this Court were to affirm the decision of the Board of Tax Appeals in this case, Ohio would stand alone in judicially endorsing the games-played method as a reasonable method of allocating income.

As a matter of federal law, the U.S. Court of Appeals for the Second Circuit has held that the income of professional hockey players must be allocated between the United States and Canada on the basis of the number of duty days on which a player performs services for which he is compensated. *Stemkowski v. Comm'r*, 690 F.2d 40, 44–45 (2d Cir. 1982). In *Stemkowski*, the Second Circuit concluded that the National Hockey League Standard Player's Contract compensates hockey players for preseason training camp and the playoffs, in addition to the regular season. *Id.* at 45 (holding that Tax Court's contrary determination was clearly erroneous). As a result, the Second Circuit held that the Commissioner of Revenue was required to include preseason training camp and the playoffs in the number of duty days used in allocating players' income. *Id.* at 44–45.

A number of state courts and administrative boards have rejected the games-played method of allocating income in favor of the duty days method. California, for example, has “rejected the argument that professional athletes are paid only for playing in their respective games” because, in fact, “[t]hey are also paid for practicing and traveling and are generally fined if they do not appear at practice sessions.” *In re Carroll*, Cal. Bd. Equalization No. 85A-684-SW, 1987 WL 50144, at *2 (Apr. 7, 1987) (rejecting games-played method of allocation in favor of duty days where regulation, much like Cleveland Codified Ordinances, provided that income “attributable to services rendered in this state” would be allocated to California); *see also Newman v. Franchise Tax Bd.*, 208 Cal.App.3d 972, 978–979 (1989) (requiring duty days method to be applied to actor Paul Newman, and citing *In re Carroll* with approval). New York has similarly concluded that “allocation by games played is itself not fair and equitable,” and has noted the particular unfairness that results from allocating the income of NFL players on the basis of games played. *In re Bickett*, N.Y. Div. Tax App. No. 813160, 1996 WL 54179, at *2–3 (1996) (observing that for a “typical” football player, “[t]he use of the games played method as opposed to the duty days method yields an allocation percentage which is 560.07% higher”). In *Bickett*, the New York Division of Tax Appeals observed that the state “is not taxing tickets (or the receipts of the team)” but is instead “taxing a player’s income, and the efforts required to earn that income certainly include practice on practice days as required by the contract.” *Id.* at *3.

In sum, there is unanimity of authority outside of Ohio holding that the games-played method of allocating professional athlete’s income is not fair and reasonable because it assumes, contrary to fact, that the only service for which professional athletes are compensated is playing in games. Reversal of the Board of Tax Appeals decision would be consistent with that authority

and with this Court's decision in *Hume*, and would avoid Ohio becoming the only jurisdiction to judicially endorse allocating professional athlete's income on the basis of games played.

Concluding that the games-played method is contrary to Ohio law would also allow the Court to avoid the serious constitutional questions that, as discussed below, would otherwise arise.

Appellant's Proposition of Law No. 2:

Cleveland's allocation of Hillenmeyer's income on the basis of games played violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it unfairly apportions income and because it taxes activity with no connection to Cleveland.

Cleveland's authority to tax individuals is subject to limitations imposed by the United States Constitution, including the Due Process Clause of the Fourteenth Amendment. *Thompson v. City of Cincinnati*, 2 Ohio St.2d 292, 294, 297, 208 N.E.2d 747 (1965). For a local tax on a nonresident to be valid under the Due Process Clause, the following requirements must be satisfied: (1) there must be a minimum connection between the taxpayer and the taxing jurisdiction, *Quill Corp. v. North Dakota*, 504 U.S. 298, 306, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), (2) there must be a minimum connection between the activity subject to tax and the taxing jurisdiction, *see Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 778, 112 S.Ct. 2251, 119 L.Ed.2d 533 (1992); *Shaffer v. Carter*, 252 U.S. 37, 57, 40 S.Ct. 221, 64 L.Ed. 445 (1920), and (3) the income attributed to the taxing municipality must be fairly apportioned to the taxpayer's activities in the municipality, *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983) (noting that fair apportionment is required by both the Due Process Clause and the Commerce Clause).

Cleveland's application of the games-played method of allocation to Hillenmeyer violates the Due Process Clause because it unfairly apportions income and because it taxes activity with no connection to Cleveland.

A. Cleveland's Use Of The Games-Played Method Violates The Due Process Clause Because It Unfairly Apportions Income

The “central purpose behind” the fair “apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction.” *Goldberg v. Sweet*, 488 U.S. 252, 260–261, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989) (citing *Container Corp.*, 463 U.S. at 169). In determining whether a particular formula fairly apportions income, the Supreme Court has required that the formula satisfy two distinct tests: “internal consistency” and “external consistency.” *Container Corp.*, 463 U.S. at 169. Internal consistency considers whether an apportionment formula, if used by every jurisdiction, would result in multiple taxation. See *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995); *Container Corp.*, 463 U.S. at 169. The games-played method of allocation concededly is not internally inconsistent, because it would not result in multiple taxation if employed by every jurisdiction. In fact, however, Cleveland is the *only jurisdiction* that is home to a major professional sports Club and that allocates the income of professional athletes on the basis of games played. See, e.g., Jerome R. Hellerstein & Walter H. Hellerstein, *State Taxation* ¶ 20.05[4][d] (3d Ed.2013) (“In the past, a few states employed a ‘games played’ formula, but no state appears to do so today.”).

External consistency considers whether a “tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing” jurisdiction. *Jefferson Lines*, 514 U.S. at 185; *Goldberg*, 488 U.S. at 262. Under the Due Process Clause, the Supreme Court will strike down the application of an apportionment formula if “the income attributed to the State is in fact out of all appropriate proportions to the business transacted in that State or has led to a grossly distorted result.” *Container Corp.*, 463 U.S. at 169 (citation, ellipsis, and internal quotation marks omitted). Unlike the internal consistency test, which considers the hypothetical existence

of an identical tax in all other jurisdictions, under the external consistency test, “the threat of real multiple taxation (though not by literally identical statutes) may indicate a State’s impermissible overreaching.” *Jefferson Lines*, 514 U.S. at 185; *Goldberg*, 488 U.S. at 262–264 (considering “risk of multiple taxation” from non-identical taxes as part of external consistency analysis). Finally, to be externally consistent under the Due Process Clause, an “apportionment formula must actually reflect a reasonable sense of how income is generated.” *Container Corp.*, 463 U.S. at 169.

Cleveland’s application of the games-played method to Hillenmeyer is not externally consistent because it attributes to Cleveland income that is out of all proportion to the services actually performed by Hillenmeyer in Cleveland, it creates a real risk of multiple taxation, and it does not accurately reflect how Hillenmeyer’s income is generated.

1. Games-played allocates income “out of all proportion” with services performed and leads to a “grossly distorted result”

Application of the games-played method to Hillenmeyer has resulted in income being attributed to Cleveland that “is in fact out of all appropriate proportions to the business transacted” by Hillenmeyer in Cleveland, and it “has led to a grossly distorted result.” *See Container Corp.*, 463 U.S. at 169 (internal quotation marks omitted). In the context of apportioning employee wages, it is well-recognized that income is earned in the jurisdiction where an employee performs services for his or her employer. *See, e.g., Hellerstein & Hellerstein, State Taxation* ¶ 20.05[3][b][i] (“[T]he general rule for determining the ‘source’ of personal service income is the jurisdiction where the services are performed.”); *see also Shaffer*, 252 U.S. at 57 (“As to nonresidents, the jurisdiction [of a taxing state] extends only to their property owned within the state and their business, trade, or profession carried on therein”); *Thompson*, 2 Ohio St.2d 292, paragraph one of the syllabus (“A municipal corporation may levy

a tax on the wages resulting from work and labor performed within its boundaries by a nonresident of that municipal corporation.”). Determining the source of employee income for purposes of apportionment is therefore straightforward. Unlike determining the source of corporate income, it does not implicate “the complications and uncertainties in allocating the income of multi-state businesses to the several States.” *See Allied-Signal*, 504 U.S. at 778.

Here, Hillenmeyer performed services for his employer on between 157 to 165 days during the relevant tax years. He only performed services in Cleveland on two days during each of those years. Again, under *Hume*, it is established that Hillenmeyer earned his compensation for all of his services rendered to his Club, from pre-season training to practice days and team meetings. *See* 61 Ohio St.3d at 389. Cleveland has the right to apportion to itself only the income Hillenmeyer earned for services rendered in Cleveland. Yet by taxing 1/20 of Hillenmeyer’s income under the games-played method, Cleveland is instead unfairly apportioning to itself income that was clearly earned in other jurisdictions.

Even in the corporate income tax context, where the Supreme Court has recognized the difficulty of adopting a formula that allocates income in precise accordance with its source, the Court has still observed that “[s]ome methods of formula apportionment are particularly problematic because they focus on only a small part of the spectrum of activities by which value is generated.” *Container Corp.*, 463 U.S. at 182. The games-played method plainly fits that description. Moreover, where a formula results in a significantly greater percentage of a taxpayer’s income being apportioned to the taxing jurisdiction than is actually generated in the taxing jurisdiction, the Supreme Court has not hesitated to strike down the formula under the Due Process Clause.

In *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 51 S.Ct. 385, 75 L.Ed. 879 (1931), for example, the Supreme Court held that North Carolina's method of apportioning corporate income based entirely on ownership of tangible property in the state violated the Due Process Clause. *Id.* 135–136. The formula at issue in *Hans Rees'* resulted in between 66% and 85% of the taxpayer's income being attributed to North Carolina, whereas the evidence demonstrated that during the relevant years no more than 21.7% of the taxpayer's income had its source in North Carolina. *Id.* at 128, 134. That disparity led the court to conclude that North Carolina was attributing to itself “a percentage of income out of all appropriate proportion to the business transacted by the [taxpayer] in that state” and thus “the taxes as laid were beyond the state's authority.” *Id.* at 135–136 (citing *Shaffer*, 552 U.S. at 52, 53, 57); see also *Container Corp.*, 463 U.S. at 184 (noting that “the more than 250% difference . . . led us to strike down the state tax in *Hans' Rees' Sons, Inc.*”). Similarly, in *Norfolk & W. Ry. Co. v. Mo. State Tax Comm'n*, 390 U.S. 317, 326, 88 S.Ct. 995, 19 L.Ed.2d 1201 (1968), the Supreme Court struck down a property tax allocation formula that assessed the taxpaying railroad company's rolling stock at nearly twice the value supported by evidence, which the Court concluded “led to a grossly distorted result.” *Id.*; see also *Phil. Eagles Football Club v. City of Phil.*, 573 Pa. 189, 227–228, 823 A.2d 108 (2003) (striking down an unapportioned business privileged tax that “actually *doubled* the Football Club's tax assessment on . . . media receipts” and thus was “plainly ‘out of all proportion’ to the Football Club's business activities in Philadelphia”).

Cleveland's application of the games-played method to Hillenmeyer has led to a grossly distorted result. Cleveland allocated to itself *approximately 400%* of the income that would have been allocable to Cleveland had it applied the duty days method to Hillenmeyer. Under the duty

days method, between 1.19% and 1.27% of Hillenmeyer's income would have been allocated to Cleveland during the relevant tax years. By using the games-played method instead, Cleveland allocated to itself between 4.76% and 5% of Hillenmeyer's income. The magnitude of that discrepancy demonstrates that the games-played method, at least as applied to Hillenmeyer, results in an allocation that is "out of all appropriate proportion to the business transacted by" Hillenmeyer in Cleveland, *see Hans Rees' Sons*, 283 U.S. at 135, and has "led to a grossly distorted result," *see Norfolk & W. Ry.*, 390 U.S. at 326.³

The discrepancy in allocation that results from use of the games-played formula far exceeds the percentages that the Supreme Court has found to be within the "margin of error," even in the complex corporate income tax context. *See Container Corp.*, 463 U.S. at 184. As noted, taxing jurisdictions have typically been afforded greater leeway in fashioning an apportionment formula in the corporate tax context, unlike the employee wage context, "[b]ecause of the complications and uncertainties in allocating the income of multi-state businesses to the several States." *Allied-Signal*, 504 U.S. at 778. But even in the corporate context where apportionment formulas are afforded greater leeway, the 400% discrepancy present here would not pass constitutional muster. *See Hans Rees' Sons*, 283 U.S. at 135; *cf. Container Corp.*, 463 U.S. at 184 (observing that a percentage increase of 14% was "a far cry from the more than 250% difference which led us to strike down the state tax in *Hans Rees'*

³ The magnitude of that discrepancy also demonstrates that the games-played method and duty days method cannot both be reasonable. *See Bickett*, 1996 WL 54179, at *2-3 ("Petitioner argues cogently in this case that the radically different results from the two methods of allocation [i.e., duty days and games-played] . . . means certainly that one of them is wrong."). As demonstrated above, the duty days method appropriately takes into consideration the fact that NFL players are paid to participate in mini-camp(s), preseason training camp, team meetings, and practices, *see* (Supp. 55-56.), whereas the games-played method assumes, contrary to fact, that players are paid only to play in games. As between the two, the duty days method plainly adheres more closely to the actual sources of Hillenmeyer's income.

Sons, Inc.”); *Moorman Mfg. Co. v. G.D. Bair*, 437 U.S. 267, 271; 98 S.Ct. 2340, 57 L.Ed.2d 197 (1978), fn. 4 (greatest disparity between two formulas during relevant years was an increase of approximately 55%). Because Cleveland’s allocation of Hillenmeyer’s income using the games-played method is out of all proportion with the services he performed in Cleveland and has led to a grossly distorted result, the games-played method fails the external consistency test and is invalid under the Due Process Clause.

2. Games-played creates a real risk of multiple taxation

The risk of multiple taxation by other jurisdictions that do not utilize an identical apportionment formula is relevant in determining whether an apportionment formula results in a tax that is not externally consistent. *See Jefferson Lines*, 514 U.S. at 185; *Goldberg*, 488 U.S. at 262–264. Here, Cleveland’s use of the games-played method creates a real risk of multiple taxation because no other NFL jurisdiction utilizes that method of allocation. In fact, every other NFL (and major sport) jurisdiction that imposes an income tax now uses the duty days method of allocating professional athletes’ income, in recognition of the fact that professional athletes are paid for all of the services they perform for their employer. As a result, Cleveland’s use of the games-played method results in multiple taxation. Whereas Cleveland allocated to itself 5% of Hillenmeyer’s income for playing a game in Cleveland, jurisdictions that utilize a duty days approach would have allocated less than 2% of Hillenmeyer’s income to Cleveland. The remaining 98% would have been allocated to the other jurisdictions in which Hillenmeyer performed services. Professional athletes like Hillenmeyer are thus subject to multiple taxation as a result of Cleveland’s games-played method of taxation because more than 100% of their income is allocated to various jurisdictions for tax purposes. “[T]he threat of real multiple

taxation (though not by literally identical statutes)” is indicative of Cleveland’s “impermissible overreaching.” See *Jefferson Lines*, 514 U.S. at 185.

3. Games-played does not accurately reflect how income is generated

To be externally consistent under the Due Process Clause, an “apportionment formula must actually reflect a reasonable sense of how income is generated.” *Container Corp.*, 463 U.S. at 169. The games-played method does not reflect a reasonable sense of how professional athletes’ income, including Hillenmeyer’s income, is generated. The games-played method rests on the false premise that professional athletes earn income exclusively from playing in games. But even if games were the exclusive source of professional sports Clubs’ revenue,⁴ Cleveland’s tax is being imposed not on the Clubs but *on the employee-athletes’ wages*. See *Bickett*, 1996 WL 54179, at *3 (“[I]n this case the Division is not taxing tickets (or the receipts of the team). It is taxing a player’s income . . .”). As the evidence demonstrates, Hillenmeyer’s wages were earned not only for playing in games, but also for participating in a host of other required activities, including mini-camp(s), preseason training camp, team meetings, and practices. (Supp. 55–56.) In fact, the single largest source of Hillenmeyer’s income during the relevant tax years – a \$4.5 million roster bonus – was completely independent of his participation in any games. (Supp. 64.) By allocating income based on the assumption that players are paid only to play in games, the games-played method does not “actually reflect a reasonable sense of how income is generated.” *Container Corp.*, 463 U.S. at 169.

In sum, because the games-played method unfairly apportioned Hillenmeyer’s income to Cleveland, it is invalid under the Due Process Clause as applied to Hillenmeyer.

⁴ Game receipts and broadcast income from games, though undoubtedly a significant portion of professional sports Clubs’ revenue, are not their sole source of revenue. Clubs also derive revenue from merchandise sales, licensing, and other sources.

B. Cleveland's Use Of The Games-Played Method Violates The Due Process Clause By Taxing Activity That Has No Connection To Cleveland

The Supreme Court has long recognized that inherent in the Due Process Clause is the fundamental “principle that a State may not tax value earned outside its borders.” *Allied Signal*, 504 U.S. at 777; *Container Corp.*, 463 U.S. at 164; *Shaffer*, 252 U.S. at 57 (“As to nonresidents, the jurisdiction [of a taxing state] extends only to their property owned within the state and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources.”). Cleveland’s application of the games-played method to Hillenmeyer resulted in Cleveland taxing value beyond its borders because the games-played method allocated to Cleveland income earned by Hillenmeyer for services performed elsewhere. *See Allied-Signal*, 504 U.S. at 778.

During the relevant tax years, Hillenmeyer’s income was generated by providing a multitude of services to his employer, the Chicago Bears, including participating in mini-camp(s), preseason training camp, team meetings, practices, and games. (Supp. 55–56.) Hillenmeyer performed those services, on average, over the course of 163 working days during the Bears’ season. (*See* Supp. 93.) In each of the relevant tax years he spent only two days performing services for the Bears in Cleveland. (*Id.*) As a result, no more than 1.27% of Hillenmeyer’s income generating activities occurred in Cleveland. Yet Cleveland allocated between 4.76% and 5% of Hillenmeyer’s income to Cleveland for tax purposes. Because no more than 1.27% of Hillenmeyer’s income producing activities occurred in Cleveland, but Cleveland imposed its tax on up to 5% of Hillenmeyer’s income, Cleveland plainly imposed its tax on activities that occurred outside of Cleveland in violation of the Due Process Clause. *See Allied Signal*, 504 U.S. at 777; *Shaffer*, 252 U.S. at 57.

Appellant's Proposition of Law No. 3:

Cleveland's allocation of Hillenmeyer's income on the basis of games played violates the Commerce Clause of the United States Constitution because it unfairly apportions income, it discriminates against interstate commerce, and it results in a tax burden that is not fairly related to the services provided by Cleveland.

In addition to the Due Process Clause, the Commerce Clause of the United States Constitution imposes constraints on the authority of states and municipalities to tax income derived from interstate activities. *See Jefferson Lines*, 514 U.S. at 179; *Blangers v. Idaho*, 763 P.2d 1052, 1055 (Idaho 1988) (holding that personal income tax assessed against nonresident employees violated Commerce Clause). Although the Commerce Clause, by its terms, empowers Congress to regulate commerce among the several states, *see* U.S. Constitution, Article I, Section 8, cl. 3, the Supreme Court has “sensed a negative implication in the provision since the early days” of the Republic, and has recognized that “what has come to be called the dormant Commerce Clause” restrains the states from adopting regulatory measures, including tax measures, ““designed to benefit in-state economic interests by burdening out-of-state competitors.”” *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–338, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–274, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988)). In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), the Supreme Court adopted a four-part test for determining whether a local tax violates the Commerce Clause. The Court will sustain a tax in the face of a Commerce Clause challenge only if “the tax [1] is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.” *Id.*; *see Goldberg*, 488 U.S. at 259–260 (observing that “[s]ince the *Complete Auto* decision we have applied its four-pronged test on numerous occasions” and collecting cases).

Cleveland’s application of the games-played method of allocation to Hillenmeyer violates the Commerce Clause of the U.S. Constitution because (1) it unfairly apportions to Cleveland income derived from services performed elsewhere, (2) it discriminates against interstate commerce, and (3) it results in a tax burden that is not fairly related to the services provided by Cleveland.

A. Cleveland’s Games-Played Method Unfairly Apportions Income To Cleveland

Like the Due Process Clause, the Commerce Clause demands that income be fairly apportioned to the taxing jurisdiction. *See Container Corp.*, 463 U.S. at 169.⁵ As demonstrated above with respect to the Due Process Clause, *see supra* pp. 22–28, Cleveland’s application of the games-played method to Hillenmeyer unfairly apportions income to Cleveland. The games-played method attributes to Cleveland income that is out of all proportion to the services actually performed by Hillenmeyer in Cleveland, it creates a real risk of multiple taxation, and it does not accurately reflect how Hillenmeyer’s income is generated. *See supra* pp. 22–28, and authority cited. As a result, it violates the Commerce Clause in addition to the Due Process Clause.

B. Cleveland’s Games-Played Method Discriminates Against Interstate Commerce

At its core, the negative or dormant aspect of the Commerce Clause is intended to prevent states and municipalities from discriminating against interstate commerce by favoring local interests over out-of-state interests. *See Am. Trucking Ass’ns, Inc. v. Scheiner*, 483 U.S. 266, 286, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987) (“[A] state tax that favors in-state business over out-

⁵ The Supreme Court has acknowledged that some elements of the Due Process Clause and Commerce Clause inquiries – in particular the nexus requirement – though overlapping, are not equivalent. *Quill Corp.*, 504 U.S. at 312. Specifically, the Court has held that a taxpayer’s “minimum contact” with a taxing jurisdiction that may be sufficient to satisfy the Due Process Clause may not be sufficient to satisfy the Commerce Clause’s “substantial nexus” requirement. *Id.* at 313. But the Court never suggested that an allocation formula that unfairly apportions income under Due Process Clause could be found to fairly apportion income under Commerce Clause.

of-state business for no other reason than the location of its business is prohibited by the Commerce Clause.”). Discrimination against out-state-interests need not be intentional or appear on the face of a statute or regulation in order to implicate the Commerce Clause. *See id.*; *Best & Co. v. Maxwell*, 311 U.S. 454, 455, 61 S.Ct. 334, 85 L.Ed. 275 (1940) (“The commerce clause forbids discrimination, whether forthright or ingenious.”). Local laws that are merely discriminatory “in practical effect” or have a “forbidden impact on interstate commerce” similarly violate the Commerce Clause. *See Am. Trucking Ass’ns.*, 483 U.S. at 286 (flat tax imposed on all trucks operating in Pennsylvania violated Commerce Clause because it had impermissible effect of discriminating against out-of-state truckers); *Complete Auto*, 430 U.S. at 288 (focus of Commerce Clause inquiry is “whether the tax produces a forbidden effect”).

Cleveland’s use of the games-played method of allocation violates the Commerce Clause because it has a discriminatory effect on members of visiting professional sports Clubs who travel to Cleveland to compete. Members of non-Cleveland teams, such as Hillenmeyer, by definition practice and perform other non-game services for their team outside the City of Cleveland. Because those athletes are compensated for those non-game services – as Hillenmeyer was, (*see* Supp. 55–56 (providing that he was required to participate in “official mandatory mini-camp(s), official preseason training camp, [and] all Club meetings and practice sessions” and that his salary was paid in exchange for all of those services)) – they are subject to taxation in the jurisdiction in which those activities occur. Yet, because Cleveland treats all player compensation as being paid for playing in games, athletes on clubs visiting Cleveland face the risk of multiple taxation. Members of Cleveland’s professional sports Clubs are also subject to Cleveland’s games-played method of allocation. Cleveland’s Clubs, however, can avoid or mitigate the risk of multiple taxation by practicing and conducting other non-game activities

within the City of Cleveland. Non-Cleveland Clubs do not have that option. As a result, the effect of Cleveland's use of the games-played method of allocation is to discriminate against interstate commerce by subjecting players on out-of-state visiting Clubs to a threat of multiple taxation that in-state Cleveland Clubs can avoid.⁶

C. Cleveland's Games-Played Method Results In A Tax Burden That Is Not Fairly Related To the Services Provided By Cleveland

The fourth prong of the *Complete Auto* test requires that local taxes be "fairly related to the services provided by the State." *Complete Auto*, 430 U.S. at 279. "When the measure of a tax bears no relationship to the taxpayers' presence or activities in a State, a court may properly conclude under the fourth prong of the *Complete Auto Transit* test that the State is imposing an undue burden on interstate commerce." *Am. Trucking Ass'n*s., 483 U.S. at 291 (internal quotation marks omitted). Whereas the first prong of the *Complete Auto* test requires that a taxpayer "have a substantial nexus with the State before *any* tax may be levied on it," the "fourth prong of the *Complete Auto Transit* test imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the [taxpayer's] contact." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981).

⁶ The Cleveland Browns in fact practice outside the City of Cleveland in Berea, Ohio. Members of the Browns are thus theoretically exposed to a risk of multiple taxation. In fact, however, the City of Cleveland has entered into an agreement with the City of Berea whereby "Berea receives 100 percent of both the administrative staff's income tax collection and the tax on [player] bonuses. The players' base wages are split 50/50 between Berea and Cleveland[.] See Joanne Berger DuMond, *Cleveland Browns Sale: Where Does Berea Fit In?*, Cleveland.com (Aug. 2, 2012), http://www.cleveland.com/berea/index.ssf/2012/08/cleveland_browns_sale_where_do.html (accessed May 8, 2014); see also *Ohio State Assoc. of United Assoc. of Journeymen & Apprentices v. Johnson Controls, Inc.*, 123 Ohio App.3d 190, 196, 703 N.E.2d 861 (1997) (court may take judicial notice of fact reported in media).

Cleveland's agreement to allow Berea, where the Browns practice, to tax 50% of Browns players' wages is completely contrary to its position asserted throughout this litigation that players are paid only to play in games. And Cleveland's decision to exclude members of the Browns from the games-played method that it applies to members of all out-of-state Clubs is further evidence of impermissible discrimination against out-of-state business.

Cleveland's allocation of Hillenmeyer's income on the basis of games played is not reasonably related to Hillenmeyer's contact with Cleveland. To be sure, Cleveland's allocation is tied to the number of games Hillenmeyer played in Cleveland. But the undisputed evidence established Hillenmeyer's income was not tied exclusively to games. Rather, Hillenmeyer's income was tied to all services he provided to the Bears, including participation in "official mandatory mini-camp(s), official preseason training camp, all Club meetings and practice sessions." (Supp. 55.) And Hillenmeyer's \$4.5 million roster bonus was tied only to his status as a member of the Bears as of July 10, 2006. (Supp. 64.) Cleveland's decision to allocate Hillenmeyer's income exclusively on the basis of one subset of services he performed for the Bears (playing in games) is as arbitrary as if Cleveland were to tax Hillenmeyer based solely on the proportion of team meetings he participated in in Cleveland to the total number of Bears team meetings. Because the "measure" of Cleveland's income tax (i.e., games played) is not "reasonably related to the extent" of Hillenmeyer's contact with Cleveland, it fails the fourth prong of the *Complete Auto* test and is invalid under the Commerce Clause. *See Commonwealth Edison*, 453 U.S. at 626.

Appellant's Proposition of Law No. 4:

R.C. 718.011(B) violates the Ohio Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it singles out professional athletes for less advantageous tax treatment than similarly situated taxpayers without any permissible justification.

Hillenmeyer is entitled to a refund not only because the games-played method used by Cleveland is contrary to Ohio law and unconstitutional as applied to him, but also because Cleveland's authority to tax Hillenmeyer derives from a statute that unconstitutionally singles out professional athletes for less favorable tax treatment than similarly situated taxpayers in violation of Article I, Section 2 of the Ohio Constitution, and the Equal Protection Clause of the

Fourteenth Amendment to the United States Constitution. Under R.C. 718.011, municipalities are prohibited from taxing the income of nonresidents who perform services in the municipality on twelve or fewer days during the tax year. R.C. 718.011. Professional athletes and entertainers, however, are inexplicably excluded from that prohibition. R.C. 718.011 (“[A] municipal corporation shall not tax the compensation paid to a nonresident individual for personal services performed by the individual in the municipal corporation on twelve or fewer days in a calendar year unless . . . [t]he individual is a professional entertainer or professional athlete, the promoter of a professional entertainment or sports event, or an employee of such a promoter, all as may be reasonably defined by the municipal corporation.”). Thus, the City of Cleveland was allowed to impose its income tax on Hillenmeyer – who performed services in Cleveland on only two days during each of the relevant tax years – solely because of Hillenmeyer’s status as a professional athlete.

“[T]he requirement of equal protection prescribed by Section 2, Article I of the Ohio Constitution, and the Fourteenth Amendment to the United States Constitution prevents discrimination as between persons subject to taxation. . . . To be valid, taxation and other statutes must operate equally upon all persons of the same class; no discrimination or favoritism among them is permitted.” *Youngstown Sheet & Tube Co. v. City of Youngstown*, 91 Ohio App. 431, 435, 108 N.E.2d 571 (1951); *see also Gen. Elec. Co. v. DeCourcy*, 60 Ohio St.2d 68, 71, 397 N.E.2d 397 (1979) (quoting *Youngstown* with approval). The Ohio Constitution provides that “Government is instituted for [the people’s] equal protection and benefit.” Ohio Constitution, Article I, Section 2. “Equal protection means the protection of equal laws.” *Youngstown*, 91 Ohio App. at 435. Accordingly, Ohio courts have held that “[a] classification must rest upon some difference which bears a reasonable and just relation to the act in respect to

which the classification is proposed and may not be made arbitrarily and without any such reasonable or just basis.” *Id.* at 436. “Specifically, a classification for taxation, to be valid, must be a classification of the subject of taxation – property – and not a classification of taxpayers.” *Id.* (holding unconstitutional a law subjecting corporations to a higher income tax rate than natural persons).

“The equal protection clause” of the Fourteenth Amendment likewise “protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.” *Allegheny Pittsburgh Coal Co. v. County Comm’n of Webster County*, 488 U.S. 336, 345, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989) (internal quotation marks omitted). To withstand scrutiny under the Equal Protection Clause, classifications among taxpayers in state tax laws must “rationally further a legitimate state interest.” *See MCI Telecomms. Corp. v. Limbach*, 68 Ohio St.3d 195, 199, 625 N.E.2d 597 (1994); *see also Allegheny*, 488 U.S. at 344 (a classification can be “neither capricious nor arbitrary” and must “rest[] upon some reasonable consideration of difference or policy”).

Ohio’s decision to single out nonresident professional athletes for less advantageous tax treatment than similarly situated taxpayers is not rationally related to any legitimate state interest, and is therefore invalid under the Ohio Constitution and the Equal Protection Clause of the Fourteenth Amendment. Notably, neither the Tax Administrator, the Municipal Board of Review, nor the Ohio Board of Tax Appeals provided any justification for R.C. 718.011(B)’s differentiation of professional athletes and entertainers from all other nonresidents who perform services in Ohio for a limited number of days during the tax year. (*See, e.g.*, Appx. 45–46 (arguing that an equal protection challenge should fail “so long as the tax is rationally related to a legitimate governmental interest,” but failing to identify any legitimate interest for R.C.

718.011(B)); Appx. 22 (noting R.C. 718.011(B)'s exclusion of professional athletes but not addressing Equal Protection claim); Appx. 12 (not addressing Equal Protection claim).)

Ohio has identified no additional burdens that result from nonresident professional athletes performing services in the state, and no additional benefits accruing to such athletes, compared to similarly situated taxpayers. Although the public services required for major athletic events might conceivably justify some differential tax treatment, it does not follow that such differential tax should be imposed on employees of a professional sports team who have no choice or discretion as to where their team will play. Moreover, R.C. 718.011(B) does not single out only major professional athletic events, but instead applies to all income earned by any professional athlete for whatever services rendered. Thus, if Hillenmeyer had traveled to Ohio for a single day to participate in a mandatory photo-shoot for the Chicago Bears, (*see* Supp. 55 (requiring Hillenmeyer to participate in promotional events)), R.C. 718.011 would allow the municipality where that activity occurred to tax Hillenmeyer's income. Yet a nonresident photographer who similarly traveled to the same municipality to participate in the same photo-shoot would not be subject to the municipality's income tax. Such differentiation between two similarly situated taxpayers bears no rational relationship to any legitimate state interest and is therefore unconstitutional. *See Youngstown*, 91 Ohio App. at 436 ("a classification for taxation, to be valid, must be a classification of the subject of taxation . . . and not a classification of taxpayers").

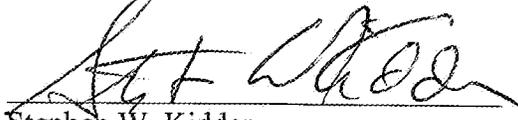
In sum, because R.C. 718.011(B) singles out professional athletes for less advantageous tax treatment than similarly situated taxpayers, it is invalid under Article I, Section 2 of the Ohio Constitution, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, Appellant Hunter T. Hillenmeyer requests that this Court reverse the decision of the Ohio Board of Tax Appeals and order that the City of Cleveland grant Hillenmeyer's request for a refund of income taxes paid to Cleveland for the tax years 2004 through 2006.

Dated: May 14, 2014

Respectfully submitted,



Stephen W. Kidder
(Counsel of Record)
PHV No. 3032-2014
HEMENWAY & BARNES LLP
60 State Street
Boston, MA 02109
Telephone: 617.227.7940
Facsimile: 617.227.0781
skidder@hembar.com

Richard C. Farrin (0022850)
ZAINO HALL & FARRIN LLC
41 S. High Street, Suite 3600
Columbus, OH 43215
Telephone: 614.326.1120
Facsimile: 614.754.6368
rfarrin@zhftaxlaw.com

COUNSEL FOR APPELLANT
HUNTER T. HILLENMEYER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of Appellant Hunter T. Hillenmeyer was served on Linda L. Bickerstaff, Assistant Director of Law, City of Cleveland Department of Law, 205 West St. Clair Avenue, Cleveland, Ohio 41133, Counsel of Record for Appellees, by regular U.S. Mail, postage prepaid, on this 14th day of May, 2014.


Richard C. Farrin (0022850)

IN THE SUPREME COURT OF OHIO

HUNTER T. HILLENMEYER)
)
 Appellant,) CASE NO. 14-0235
)
 v.)
)
 CITY OF CLEVELAND BOARD OF)
 REVIEW and NASSIM LYNCH,) On Appeal from the Ohio Board of Tax
 CLEVELAND TAX ADMINISTRATOR) Appeals
)
 Appellees.) Board of Tax Appeals Case No. 2009-3688
)

NOTICE OF APPEAL OF APPELLANT HUNTER T. HILLENMEYER

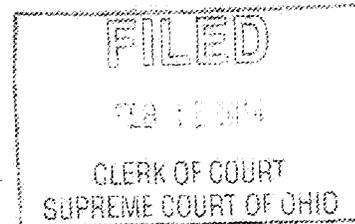
Stephen W. Kidder (Counsel of Record)
PHV No. 3032-2014
HEMENWAY & BARNES LLP
60 State Street
Boston, MA 02109
Telephone: 617.227.7940
Facsimile: 617.227.0781
skidder@hcmbar.com

Barbara A. Langhenry (0038838)
Linda L. Bickerstaff (0052101)
City of Cleveland Department of Law
205 West St. Clair Avenue
Cleveland, OH 44113
Telephone: 216.664.4406
Facsimile: 216.420.8299
lbickerstaff@city.cleveland.oh.us

Richard C. Farrin (0022850)
ZAINO HALL & FARRIN LLC
41 S. High Street, Suite 3600
Columbus, OH 43215
Telephone: 614.326.1120
Facsimile: 614.754.6368
rfarrin@zhftaxlaw.com

COUNSEL FOR APPELLEES
CITY OF CLEVELAND BOARD OF
REVIEW and NASSIM LYNCH,
CLEVELAND TAX ADMINISTRATOR

COUNSEL FOR APPELLANT
HUNTER T. HILLENMEYER



Appellant Hunter T. Hillenmeyer hereby gives notice of his appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio from a Decision and Order ("Decision") of the Ohio Board of Tax Appeals (the "BTA") in the case of *Hunter T. Hillenmeyer v. City of Cleveland Board of Review et al.*, BTA No. 2009-3688, entered upon the BTA's journal of proceedings on January 14, 2014. A true and accurate copy of the Decision being appealed is attached hereto and incorporated herein by reference.

The errors in the Decision of which the Appellant complains are:

1. The BTA acted unreasonably and unlawfully by determining that the City of Cleveland's method of allocating Appellant's income on the basis of games played, rather than on the basis of total days worked, does not violate the provisions of the Ohio Revised Code and the provisions of the Cleveland City Ordinance, despite the fact that such allocation on the basis of games played resulted in Cleveland imposing its tax on Appellant's income that was not earned for work done or services performed in Cleveland.
2. The BTA acted unreasonably and unlawfully by failing to address Appellant's argument that the City of Cleveland's regulation providing a games-played allocation method, CCA Art. 8:02(E)(6), is contrary to the Cleveland City Ordinance, Clev. Ord. §191.0501(b)(1), and is therefore invalid.
3. The BTA acted unreasonably and unlawfully by failing to hold that the City of Cleveland's regulation providing a games-played allocation method, CCA Art. 8:02(E)(6), is contrary to the Cleveland City Ordinance, Clev. Ord. §191.0501(b)(1), and is therefore invalid.
4. The BTA erred to the extent that it found that the Cleveland City Ordinance contained the games-played allocation method for professional athletes. Clev. Ord. §191.0501(b)(1)

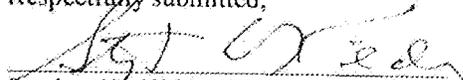
subjects to Cleveland's income tax wages earned or received by nonresidents "for work done or services performed or rendered within the City or attributable to the City." The ordinance does not specify any allocation method for wages earned by professional athletes. The games-played allocation method for wages of professional athletes is contained only in the City's regulations, CCA Art. 8:02(E)(6).

5. The BTA acted unreasonably and unlawfully by determining that the Ohio Supreme Court's decision in *Hume v. Limbach*, 61 Ohio St. 3d 387, 575 N.E.2d 150 (1991), did not prohibit the use of the games-played method of allocation despite the fact that the Court in *Hume* specifically concluded that, where a professional athlete's contract compensated him for all his services from preseason training through the regular season and the playoffs, the taxing authority was required to allocate the taxpayer's income based on all of the services he rendered.
6. The BTA acted unreasonably and unlawfully by affirming the decision of the City of Cleveland Board of Review, which had affirmed the Cleveland Tax Administrator's use of a games-played method for allocating Appellant's income, because allocating Appellant's income on the basis of games played results in the unfair apportionment to Cleveland of income earned by Appellant for services performed elsewhere, in violation of the Commerce Clause and the Due Process Clause of the United States Constitution.
7. The BTA acted unreasonably and unlawfully by failing to consider Appellant's argument that the City of Cleveland's position that Appellant is paid only to play in games is fundamentally inconsistent with the City of Cleveland allocating to itself a portion of Appellant's roster bonus, which was not paid for playing in games.

8. The BTA acted unreasonably and unlawfully by failing to hold that the City of Cleveland's position that Appellant is paid only to play in games is fundamentally inconsistent with the City of Cleveland allocating to itself a portion of Appellant's roster bonus, which was not paid for playing in games.
9. The BTA acted unreasonably and unlawfully by affirming the decision of the City of Cleveland Board of Review, because Appellant and other professional athletes are specifically singled out and excluded from the protection afforded by R.C. 718.011, which prohibits the collection of municipal income taxes from nonresident individuals who perform personal services within the municipality on twelve or fewer days during a calendar year, in violation of the Equal Protection Clauses of the United States Constitution and the Ohio Constitution.
10. The BTA acted unreasonably and unlawfully by refusing to decide whether Cleveland's method of allocating Appellant's income on the basis of games played, rather than on the basis of total days worked, constitutes a fair or reasonable method of apportionment.

Dated: 2/10/14

Respectfully submitted,


Stephen W. Kidder (Counsel of Record)
PHV No. 3032-2014
HEMENWAY & BARNES LLP
60 State Street
Boston, MA 02109
Telephone: 617.227.7940
Facsimile: 617.227.0781
skidder@hembar.com

Richard C. Farrin (0022850)
ZAINO HALL & FARRIN LLC
41 S. High Street, Suite 3600
Columbus, OH 43215
Telephone: 614.326.1120
Facsimile: 614.754.6368

rfarrin@zhftaxlaw.com

COUNSEL FOR APPELLANT
HUNTER T. HILLENMEYER

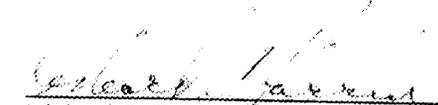
CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Appeal was sent by certified mail, return receipt requested, to counsel for all parties to the proceedings before the Ohio Board of Tax

Appeals on this 27th day of February, 2014.

Barbara A. Langhenry (0038838)
Linda L. Bickerstaff (0052101)
City of Cleveland Department of Law
205 West St. Clair Avenue
Cleveland, OH 44113

COUNSEL FOR APPELLEES
CITY OF CLEVELAND BOARD
OF REVIEW and NASSIM LYNCH,
CLEVELAND TAX ADMINISTRATOR


Richard C. Farrin (0022850)

OHIO BOARD OF TAX APPEALS

Hunter T. Hillenmeyer,)	CASE NO. 2009-3688
)	
Appellant,)	(MUNICIPAL INCOME TAX)
)	
vs.)	DECISION AND ORDER
)	
City of Cleveland Board of Review)	
and Nassim Lynch, Cleveland Tax)	
Administrator,)	
)	
Appellees.)	

APPEARANCES:

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

Hemenway & Barnes LLP
Stephen W. Kidder
60 State Street
Boston, Massachusetts 02109

For the Appellees - Barbara A. Langhenry
City of Cleveland Director of Law
Linda L. Bickerstaff
Assistant Director of Law
205 West St. Clair Avenue
Cleveland, Ohio 44113

Entered **JAN 14 2014**

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above-named appellant from a decision of the City of Cleveland Board of Review, i.e., municipal board of appeal

("MBOA").¹ Therein, the MBOA denied appellant's appeal of the city of Cleveland Tax Administrator's ("administrator") denial of his request for refund of income tax paid to the city of Cleveland for tax years 2004 through 2006; specifically, the MBOA concluded that the administrator properly allocated appellant's income as a professional athlete to the city of Cleveland using the games-played method.² All parties to the appeal waived the opportunity to appear before this board and thus, this matter was submitted to the Board of Tax Appeals upon the notice of appeal, the transcript certified to this board by the MBOA ("S.T., Vols. I-VI"), and the parties' legal briefs.

The notice of appeal sets forth appellant's specifications of error, in pertinent part, as follows:

"1. The Board of Review erroneously concluded that the City of Cleveland's use of games played formula to allocate the income of Appellant was permissible under the Ohio Revised Code and the Cleveland Income Tax Ordinance despite the fact that Appellant demonstrated clearly at the hearing before the Board of Review that Cleveland's use of a games played formula resulted in Cleveland imposing a tax on income that is not earned for work done or services performed in Cleveland, in violation of both the Ohio Revised Code and the City Ordinance.

"2. The Board of Review erroneously concluded that the City of Cleveland's games played method of allocating Appellant's income was reasonable despite the fact that Appellant demonstrated clearly at the hearing before the

¹ R.C. 718.11 requires the legislative authority of each municipal corporation that imposes a tax on income to maintain a board to hear appeals. R.C. 5717.011 refers to this body as a "municipal board of appeal." Therefore, although the city of Cleveland's board identifies itself as the "City of Cleveland Board of Review," for purposes of consistency, we shall refer to Cleveland's board as the municipal board of appeal, i.e., "MBOA."

² The "games-played" method apportions income to a jurisdiction based upon the number of games played in a particular jurisdiction as compared to the total number of games played.

Board of Review that Cleveland's method of allocating Appellant's income results in Cleveland unfairly apportioning to Cleveland income earned by Appellant for services performed elsewhere, in violation of the Commerce Clause and Due Process Clause of the United States Constitution.

"3. The Board of Review erroneously concluded that the Ohio Supreme Court's decision in Hume v. Limbach (1991), 61 Ohio St.3d 387, did not prohibit the use of a games played formula to allocate Appellant's income despite the fact that the Court in Hume specifically concluded that when a professional athlete's contract compensated him for all his services from preseason training through the regular season and the play-offs, the taxing authorities were required to allocate his income earned for services rendered based on all services he rendered, despite the fact that his contract compensation was only paid during the regular season.

"5. The Board of Review erroneously concluded that the facts supported the conclusion that Appellant was employed 'to play games' despite the fact that Appellant demonstrated clearly at the Hearing before the Board of Review that Appellant's contract required him to:

'report promptly for and participate fully in Club's official mandatory mini-camp(s), official preseason training camps, all Club meetings and practice sessions, and all pre-season, regular season and post-season football games scheduled for or by Club.'

"6. The Board of Review erroneously concluded that Cleveland's allocation of Appellant's roster bonus, which the Board concluded was paid based solely on Appellant's being on the roster of the Club, on the games played formula was reasonable despite the fact that inclusion of such bonus in income allocated to Cleveland is wholly inconsistent with Cleveland's rationale that the games played formula is appropriate because Appellant was paid to play games. Because the roster bonus was not paid for playing in games, or in fact for performing any services, allocating the roster bonus to Cleveland based on games played results in the City taxing qualifying wages that are not earned for work done or

services performed within the City, in violation of both the Ohio Revised Code and the City Ordinance, and the Due Process clauses of the United States and Ohio Constitutions.

“***

“8. Although the Board of Review does not have jurisdiction to determine the constitutional validity of a statute, to protect his ability to raise the issue, Appellant asserts that the exclusion of professional athletes from the protection afforded by R.C. 718.011 for individuals who perform services in the municipal corporation on twelve or fewer days in a calendar year violates the Equal Protection clauses of the United States and Ohio Constitutions because the exclusion results in certain individuals (professional athletes and entertainers) within the class of nonresident individuals being treated differently than other individuals in the same class.”

During the years in question, appellant was a nonresident professional football player for the Chicago Bears. In each of the years in question, appellant, as part of the Chicago Bears organization, traveled to Cleveland to play a game, either as part of the exhibition season or the regular season.³ As a result of those games, in each year, appellant was in Cleveland for two days. For each of the years in question, appellant filed a city of Cleveland tax return with the Central Collection Agency⁴ (“CCA”) and now seeks a refund for the “difference in city tax withheld by his

³ In 2004 and in 2006, the Chicago Bears traveled to Cleveland to play in one exhibition game; in 2005, the Bears traveled to Cleveland to play in one regular season game.

⁴ “The Central Collection Agency is an entity created by Cleveland Codified Ordinance (“C.O.”) 191.2311 that collects and distributes income taxes for its member communities. In accordance with C.O. 191.2303, the Agency is governed by a set of Rules and Regulations approved by the boards of income tax review of each member community. The Rules and Regulations along with the income tax ordinances govern income tax matters within the various member communities. The city of Cleveland is a member community of the Agency whose board of review adopted and incorporated the Agency’s Rules and Regulations into its Income Tax Ordinance.” Appellees’ Initial Brief at 2.

employer and remitted to the City under the City's games-played apportionment method⁵ and the duty-days method.⁶" Cleveland Brief at 2.

Appellant's tax liability was determined pursuant to CCA Article 8:02(E)(6), which provides, in pertinent part:

"E. In the case of employees who are non-residents of the taxing community, the amount to be deducted is the current rate of tax on the compensation paid or earned and deferred with respect to personal services rendered in said taxing community.

"Where a non-resident receives compensation for personal services, rendered or performed partly within and partly outside a taxing community, the withholding employer shall withhold, report and pay the tax on that portion of the compensation which is earned within said taxing community in accordance with the following rules of apportionment:

"6.*** In the case of employees who are non-resident professional athletes, the deduction and withholding of personal service compensation shall attach to the entire amount of compensation earned for games that occur in the taxing community."

The article continues, setting forth the apportionment formula⁷ that "must be used" for a "non-resident athlete not paid specifically for the game played in a taxing community," e.g., appellant.

⁵ See Footnote #2.

⁶ The "duty-days" method allocates income to a particular jurisdiction based upon the number of days in which services are performed in the jurisdiction as compared to all days in which services are performed in any jurisdiction.

⁷ "The compensation earned and subject to tax is the total income earned during the taxable year, including incentive payments, signing bonuses, reporting bonuses, incentive bonuses, roster bonuses and other extras, multiplied by a fraction, the numerator of which is the number of exhibition, regular season, and post-season games the athlete played (or was available to play for his team, as for example, with substitutes), or was excused from playing because of injury or illness, in the taxing

At the outset of our review herein, we acknowledge appellant's constitutional claims, but make no finding in relation thereto. Although the Ohio Supreme Court has authorized this board to accept evidence on constitutional points, it has clearly stated that we have no jurisdiction to decide constitutional claims. *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229; *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 198.

Further, we find that the Cleveland ordinances under consideration do not operate in contravention of any state statute regarding municipal income taxes⁸ or Ohio case precedent.⁹ As such, Cleveland's method for apportionment of non-resident athletes' income "is a valid exercise of the city's municipal power to tax." *Gesler v. City of Worthington Income Tax Bd. of Appeals*, Slip Opinion No. 2013-Ohio-4986, ¶22.

Finally, the Board of Tax Appeals has no express or implied equity jurisdiction and therefore cannot render a determination whether the Cleveland ordinances constitute a fair or reasonable method by which to apportion appellant's

community during the taxable year, and the denominator of which is the total number of exhibition, regular season, and post-season games which the athlete was obligated to play under contract or otherwise during the taxable year, including games in which the athlete was excused from playing because of injury or illness."

⁸ See R.C. 718.01(H)(8) and R.C. 718.011 which provide that a municipal corporation shall not tax "a nonresident individual for personal services performed by the individual on twelve or fewer days in a calendar year unless *** [t]he individual is a professional *** athlete."

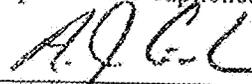
⁹ The parties have argued the applicability of the court's holding in *Hume v. Limbach* (1991), 61 Ohio St.3d 387, which concerns the allocation of compensation of a non-resident professional athlete for purposes of imposition of state individual income tax. Specifically, the athlete was compensated in Ohio for services performed outside of Ohio and the court held that such athlete could "allocate out of state the income for services performed in Florida." The court did not, however, indicate the method by which such allocation should be made. Thus, we find little utility in the court's holding in *Hume* to our analysis herein; in the instant appeal, there is no dispute that appellant's income must be allocated between the city of Cleveland and other locales where the appellant "performed services;" the dispute arises regarding the allocation method to be utilized.

income for the subject years. *Columbus Southern Lumber Co. v. Peck* (1953), 159 Ohio St. 564. As a creature of statute, we have only the jurisdiction, power, and duties expressly given by the General Assembly. *Steward v. Evatt* (1944), 143 Ohio St. 547. See, also, *HealthSouth Corp. v. Levin*, 121 Ohio St.3d 282, 2009- Ohio-584, ¶ 24; *Gen. Motors Corp. v. Limbach* (1993), 67 Ohio St.3d 90, 93. Accordingly, we are limited in the instant determination to whether, based upon the specific provisions of the city of Cleveland ordinances, the Cleveland Tax Administrator acted properly in denying appellant's claim for refund of income taxes for the time period in question, specifically, tax years 2004-2006.

“When cases are appealed from a municipal board of review to the BTA, the burden of proof is on the appellant to establish a right to the relief requested. Cf. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121.” *Marion v. Marion Bd. of Rev.* (Aug. 10, 2007), BTA No. 2005-T-1464, unreported, at 3. As the appellees have aptly pointed out, the “[t]axpayer does not complain that the Tax Administrator applied or even interpreted Cleveland's games-played method wrong. His only complaint is that he prefers another method.” Appellees' Initial Brief at 10. The Cleveland Tax Administrator has accurately determined appellant's tax liability for the years in question, using the games-played method set forth in CCA Article 8:02(E)(6). We make no finding regarding the propriety of the allocation methodology set forth in the city ordinance, as such determination is outside of this board's jurisdiction. Accordingly, the decision of the MBOA, affirming the actions of

the Administrator, is hereby affirmed.

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



A.J. Groeber, Board Secretary

PROOF OF FILING

I hereby certify that a copy of the foregoing notice of appeal was filed with the Ohio Board of Tax Appeals on this 12th day of February, 2014.

Richard C. Farrin
Richard C. Farrin (0022850)

CITY OF CLEVELAND
BOARD OF REVIEW

In re: Hunter T. Hillenmeyer

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Case No. 09-001

DECISION

Scope of Appeal

Taxpayer, Hunter T. Hillenmeyer, appeals from a February 29, 2009 Ruling of the Tax Administrator denying the Taxpayer's request for refund for the years 2004 - 2006 based on the application of Article 8:02(E) of the Tax Administrator's Rules and Regulations allocating income of professional athletes to the City of Cleveland ("the City") based on a fraction, with the numerator being the number of games played in the City and the denominator being the number of games played everywhere. The case was heard before the Board of Review of the City on July 2, 2009.

Question Presented

Whether the Tax Administrator is permitted to allocate the Taxpayer's income as a professional athlete to the City of Cleveland based on a fraction, with the numerator being the number of games played in the City and the denominator being the number of games played everywhere. For the reasons stated below, this Board finds the Tax Administrator is permitted to allocate income of professional athletes based on game days and **AFFIRMS** the Tax Administrator's denial of Taxpayer's refund request.

Facts

During the years at issue, the Taxpayer was employed as a professional football player for the Chicago Bears. The facts surrounding his employment were, for the most part, presented to the Board through Mr. Thomas DePaso, the General Counsel to the National Football League Players Association, who testified concerning the terms of the Standard

E

Player Contract, marked Taxpayer's Exhibit B, and through an unsworn affidavit of the Taxpayer, marked Taxpayer's Exhibit I. The undisputed facts show that the Taxpayer performed services for his employer during the offseason during minicamps, for which the Taxpayer was paid per diem; during pre-season training camps beginning 15 days before the first preseason game, for which the Taxpayer was paid per diem; and for the 6-week preseason and the 17-week regular season, including attending meetings and practice sessions during on non-game days, for which Taxpayer was paid weekly a contractually agreed upon amount that is referred to as "Paragraph 5 compensation" because that is the section of the Standard Player Contract referring to these payments. Taxpayer was also paid a \$2.5 million roster bonus that is separate and distinct from the Paragraph 5 compensation, and was based solely on being on the Chicago Bears' roster on July 10, 2006. The Taxpayer performed services in two games each year in the City during the period at issue.

The Tax Administrator Can Allocate Income of Professional Athletes By Any Permissible Method.

Under Section 191.2303 of the Codified Ordinances of the City, the Tax Administrator:

is hereby empowered, subject to the approval of the Board of Review, to adopt and promulgate and to enforce and interpret rules and regulations relating to any matter or thing pertaining to the collection of taxes and the administration and enforcement of the provisions of this chapter [191].

On August 5, 1991, the Tax Administrator submitted proposed rules and regulations addressing allocation of income of professional athletes and entertainers performing in the City. Pursuant to Section 191.2303 of the Codified Ordinances, on August 7, 1991, the Board of Review approved Article 13:02, Part E, of the Tax Commissioner's Rules and Regulations, apportioning income of professional athletes to the City on the basis of games played in the City. At the time Part E was approved, some jurisdictions apportioned income of professional athletes based on games played in a jurisdiction compared with game days played everywhere, while

other jurisdictions apportioned income of professional athletes based on duty days performed in a jurisdiction compared with duty days performed everywhere. On the date Part E was adopted, other jurisdictions apportioning income of professional athletes on the basis of games played in the jurisdiction included: New Jersey (see State Tax News, Jan./Feb. 1984), Massachusetts (see former Reg. 62.5A.1), New York (see former New York Tax Law Section 632(c)), and other jurisdictions followed, such as Oregon and Pennsylvania. Each of those jurisdictions presumably found the games-played method of allocating income of professional athletes to be reasonable.

Taxpayer asserts that at the present time the City is the sole jurisdiction allocating income of professional sports players based on the number of games played in the jurisdiction. See Taxpayer's Exhibit H, Affidavit of Jeffrey L. White. This Board takes notice of Section 361.24(b) of the Laws of the City of Columbus, published electronically as required by Ohio Revised Code Section 718.07, clearly allocating income of professional sports players to the City of Columbus on the games-played method. On the basis of the clear words of Laws of the City of Columbus, as published by the City of Columbus, this Board finds that the City is not the sole jurisdiction allocating income of professional sports players based on the number of games played in the jurisdiction. The Board also finds that the allocation methods employed by other taxing jurisdictions are not relevant in this case.

Taxpayer is essentially asking this Board to find that the Tax Administrator acted either unreasonably or unlawfully in following the Tax Administrator's Rules and Regulations, as approved by this Board. The Tax Administrator has been specifically empowered to adopt and promulgate Rules and Regulations pertaining to the collection, administration and enforcement of the City income tax. We find the Tax Administrator's powers and duties with respect to the Rules and Regulations to be analogous to the powers and duties of the Secretary of the U.S. Treasury with respect to Treasury Regulations. In Chevron U.S.A. v. Natural Resources Defense Counsel, Inc. (1984), 467 U.S. 837, the United States Supreme Court found that where the legislature has not directly spoken on the issue, then the reviewing body must ask whether the regulation is based on a permissible construction of the statute; and if it is, then the

reviewing body must defer to the administrative agency's construction. Under the Chevron analysis, Part E. of Article 13.02 must be upheld by this Board if it is a permissible construction of Chapter 191 of the Codified Ordinances of the City. For the reasons that follow, we believe Part E. of Article 13.02 is a permissible construction of Chapter 191 of the Codified Ordinances because it is a permissible method of allocating income of a professional athlete under the statutory laws of the State of Ohio and under legal precedent applicable to this Board.

The Tax Administrator's Method of Allocating Income of Professional Athletes is Permissible Because it is Reasonable, Is Permitted by State Law, and Is Not Prohibited by Case Law.

A. The Tax Administrator's Method of Allocating Income Of Professional Athletes is Reasonable.

The Tax Administrator's Ruling in this case makes clear that in his view, the Taxpayer is paid to play games, quoting a District of Columbia employment case for the view that "the principal service for which a player is hired by the Redskins is to play regularly scheduled games and earn money for the team...Just as an actor's rehearsals are ancillary to his performance on the stage, so a professional athlete's practice is merely preparatory to the game." Ruling, at page 8. The Taxpayer has made clear that he believes that allocation of his income should be made under the duty-day method, which method is followed by more jurisdictions.

The Supreme Court has found that in the social and economic fields, state regulation should not be struck down as "unwise, improvident, or out of harmony with a particular school of thought." Williamson v. Lee Optical of Oklahoma, Inc. (1955), 348 U.S. 483, 488. This Board is not at liberty to strike down a regulation simply because the allocation of income is not made with mathematical nicety or because in practice it results in some inequality. Lindsey v. Natural Carbonic Gas Co. (1911), 220 U.S. 61, 78. A statutory or regulatory scheme "will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland (1961), 366 U.S. 420, 426.

Insofar as the Taxpayer complains of lack of coordination among the various taxing authorities, it is well-settled that as a matter of municipal income taxation in Ohio, "[n]o municipal corporation is deprived of its power to levy a tax on income by reason of any action taken by another municipal corporation." Thompson v. City of Cincinnati (1965), 2 Ohio St.2d 292 (Syll. 2 by the Court).

This Board finds that allocation of income of professional athletes under the game-day method to be reasonable because it is more precise. Games take place in only one location; whereas, duty days may involve performing services in more than one place on the same day. For instance, travel days may be allocated to more than one jurisdiction, giving rise to greater than 100 percent of the duty days being taxed. See, e.g., Transcript P. 22, describing a practice in Chicago in the morning, followed by a flight to Cleveland and a game in Cleveland the same day. In order to equitably apply the duty-day method under such circumstances, there would need to be some agreement between Cleveland and Chicago concerning a practice/travel/game day; if not, the player would be taxed for more than 100 percent of the duty days. Taxpayer's representative has stated that teams themselves decide where to allocate a duty day, notwithstanding the ordinances of the individual cities. See, Transcript Pp. 61-62. This Board finds that the Tax Administrator acted reasonably in utilizing an allocation method that avoids the need for coordination among each municipality levying income tax on professional athletes and, lacking coordination, avoids having the athletes' employers decide where to source the income themselves on travel days.

This Board finds other facts presented in this case support the reasonableness of utilizing the games-played method for allocating income of professional athletes. The Standard Player Contract makes clear that the athletes are paid separately for preseason practice duties. Furthermore, in the case of discipline, suspension, or unexcused absence of a player, if the player misses a game, the player is not paid for the entire week, notwithstanding that the player might have attended team meetings and practices throughout the week. See, Transcript P. 69. We believe these facts support a reasonable interpretation that the Taxpayer was employed to play games, and that it is reasonable to allocate the Taxpayer's income to the City based on the games played in the City.

This Board also finds that the Tax Administrator's allocation of the roster bonus on the games-played basis is reasonable as well. Revised Code Section 718.03 permits municipal corporations in Ohio to tax employee compensation only to the extent the compensation constitutes wages for Federal Insurance Contribution Act ("FICA") purposes. Codified Ord. 191.031501 defines the term "qualifying wages" as wages defined under FICA. The City levies tax on qualifying wages pursuant to Codified Ord. 191.0501. In Rev. Rul. 2004-109, the Internal Revenue Service ruled that signing bonuses paid to an employee constitute wages for purposes of FICA. Specifically, the Service analyzed taxation of the signing bonus as follows:

The individual does not provide clear, separate, and adequate consideration for the payment that is not dependent upon the employer-employee relationship and its component terms and conditions. Thus, the signing bonus is part of the compensation the Baseball Club pays as remuneration for employment, making it wages regardless of the fact that the contract provides that the bonus is not contingent on the performance of future services.

We find the roster bonus substantially similar to the signing bonus ruled upon by the Service to be wages for FICA purposes insofar as both types of bonuses are paid to the employee regardless of whether the employee participates in games for the team and both types of bonuses are clearly paid solely as a result of the employer-employee relationship. We, therefore, find that the Tax Administrator acted reasonably in including the roster bonus and qualifying wages and allocating the roster bonus income under the games-played method, together with the Taxpayer's other qualifying wages.

B. Allocation of Income Based on Game Days is Permitted Under Ohio Law.

Article XIII, Section 6 of the Ohio Constitution grants the Ohio General Assembly the power to provide, by general laws, for the

organization of cities and incorporated villages, and Article XVIII, Section 13 of the Ohio Constitution gives the General Assembly the authority to restrict municipalities' power to tax. The General Assembly, through Revised Code Chapter 718, has issued a detailed set of rules governing municipal taxation in the State of Ohio.

In 2000, the General Assembly enacted Revised Code Section 718.011, forbidding municipalities from taxing compensation paid to nonresidents for personal services performed in the municipality on 12 or fewer days. Later that year, the General Assembly amended Revised Code Section 718.011 to permit taxation of professional athletes, among other individuals, without regard to the general rule that an individual must perform services in the jurisdiction for greater than 12 days. The General Assembly was clearly aware that professional athletes were subject to municipal income tax; however, the General Assembly did not mandate that professional athletes should be taxed based on games played in the jurisdiction or duty days in the jurisdiction. At the time Section 718.011 was amended to exclude professional athletes from the general rule, the City had been taxing athletes based on games played in the City for over nine years.

On June 26, 2003, Am. Sub. H.B. 95 was signed into law. H.B. 95 contained a general theme of uniformity in municipal taxation. Specifically, H.B. 95 enacted provisions creating the following uniform approaches to taxation: 1) a uniform definition of taxable income for net profits tax returns; 2) a uniform withholding/employee compensation tax base; 3) elimination of withholding safe harbors to achieve uniformity; 4) uniform due dates for returns; 5) uniform rule for extending due dates for returns; 6) uniform methods for appeals; and 7) uniform rules relating to the Ohio Business Gateway. The extensive enactment of uniform rules did not include any requirement of uniformity in allocating income of professional athletes playing games in a municipality. It should also be noted that at the time of passage of H.B. 95, the City had been allocating income of professional athletes based on games played in the City for close to 12 years.

Based on the legislative history of Revised Code Chapter 718 set forth above, this Board finds that the General Assembly at no time issued

any law forbidding the allocation of income of athletes based on games played in the jurisdiction; rather, the General Assembly expressly chose on more than one occasion to leave the method of allocation open. Both the City and Columbus have lawfully adopted the games-played method of allocation.

C. Allocation of Income Based on Game Days Is Not Prohibited by any Court Having Jurisdiction Over the City.

The Taxpayer's argument sets forth a number of cases purporting to dictate that the City adopt an allocation of income based on duty days. We find each of the cases either distinguishable or not of precedential value to this Board. We find Hume v. Limbach (1991), 61 Ohio St. 3d 387, the Only Ohio case cited by Taxpayer, to be inapposite factually. In the Hume case, the Court found as a fact that the plaintiff only received compensation during the playing season, and that Mr. Hume reported to training season without receiving any other payment because his employer did not have enough money to pay him until then. Under these facts, where the plaintiff received no compensation whatsoever for training, the Court found that Mr. Hume's regular playing season compensation included preseason training; the Court, thus, required that duty days, including preseason training days and exhibition games, be used in apportioning income for purposes of computing a non-resident tax credit. Unlike Hume, in the case before this Board, the facts show that the Taxpayer received separate compensation for all preseason training (Transcript, P. 42, stating that a per diem is payable on each week of the preseason), so it is not logical (as it was in Hume) to conclude that the regular season Paragraph 5 compensation extends to the training period before the season. Not only are the basic facts found by the Hume Court different from the facts of the case before us, but in addition, we find nothing in Hume that leads to the conclusion mandating any particular method of apportioning municipal income tax.

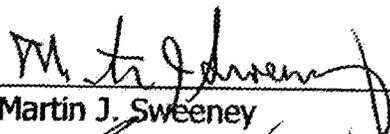
Stemkowski v. Commissioner (2nd Cir. 1982), 690 F.2d 40, is inapposite because it addresses deducting ordinary and necessary business expenses from apportioned income for between the United States and Canada. Although Stemkowski and other cases cited by the Taxpayer

endorse combining the preseason and regular season for various purposes, none of those cases deal with municipal taxation of income, none of the cases have precedential authority before this Board, and none of the cases prohibit a municipality from utilizing any permissible or reasonable method of allocating income.

Conclusion

We find that the Tax Administrator acted permissibly in allocating the Taxpayer's income as a professional athlete to the City of Cleveland based upon the games-played method. It is a reasonable interpretation of the Standard Player Contract to find that the Taxpayer was paid to play games during the period following preseason practice for which the Taxpayer received separate payments. It is also reasonable to choose an allocation method that avoids the problem of coordination with other jurisdictions. We also find that General Assembly specifically intended to leave open the income allocation method to be used for professional athletes and that no court having jurisdiction over this Board has rejected the games-played method of allocating income in a case involving municipal income tax. For all of these reasons, this Board affirms the Tax Administrator's denial of Taxpayer's request for refund for Tax Years 2004 – 2006.


Debra D. Rosman


Martin J. Sweeney


Barry Withers

CERTIFICATE OF SERVICE

A copy of the foregoing Decision was mailed by regular U.S. mail, postage prepaid, this 29th day of September, 2009 to the following:

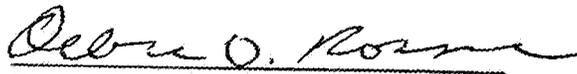
Stephen W. Kidder, Esq.
Hemenway & Barnes LLP
60 State Street
Boston, MA 02129

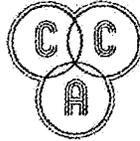
and

Richard C. Farrin, Esq.
McDonald Hopkins LLC
41 South High Street, Suite 3550
Columbus, OH 43215
Attorneys for Taxpayer

and

Linda L. Bickerstaff, Esq.
Assistant Director of Law
205 St. Clair Avenue
Cleveland, OH 44114
Attorney for the Tax Administrator


Debra D. Rosman



CENTRAL COLLECTION AGENCY

DIVISION OF TAXATION

205 W. Saint Clair Ave.
Cleveland, OH 44113-1503

www.ccatax.ci.cleveland.oh.us

Telephone (216) 664-2070

Toll Free (in Ohio) 1-800-223-6317

Fax (216) 420-8299

February 19, 2009



Thomas M. Zaino, Esq.
Richard C. Farrin, Esq.
McDonald Hopkins Co., LPA
41 South High Street
Suite 3650
Columbus, Ohio 43215

Re: Hunter T. Hillenmeyer
Taxpayer Id. No. [REDACTED]
Taxable Years 2004-2006

Dear Mr. Zaino and Mr. Farrin:

In response to your request on behalf of the referenced Taxpayer, this Final Administrative Ruling is hereby issued denying Taxpayer's appeal of the Tax Auditor decisions in all respects for the relevant tax years.

This Ruling is based solely upon and limited to the tax matters outlined in the Notice of Appeal dated August 22, 2008 and is released to you in accordance with the executed Power-of-Attorney on file with this office.

No opinion is expressed nor may an opinion be implied or otherwise construed to have been issued concerning tax matters not raised in the Notice of Appeal and not disclosed on the Taxpayer's filed returns or in previous correspondence submitted for the relevant tax years. To the extent that omitted facts exist which would alter, change or otherwise modify the conclusions reached in this Ruling, no opinion is expressed nor may an opinion be implied or otherwise construed to exist with respect to those omitted facts or the impact of those omitted facts upon this Ruling.

ISSUES PRESENTED

The basis of Taxpayer's appeal concerns denial of requests for refunds filed for TY2004-2006.

MEMBERS

Aida	Bradner	Cleveland	Geneva on the Lake	Linsdale	Middlefield	North Randall	Paulding	Seville	Waynesfield
Alger	Ernstsmahl	Creston	Grand Rapids	Madison	Munroe Falls	Northon	Peninsula	South Russell	Wiloughby Hills
Andover	Burton	Coldersville	Grand River	Medina	Northfield	Village of Oakwood	Perry	Timberlake	
Antwerp	Cairo	Elida	Highland Hills	Mentor on the Lake	North Babylon	Orwell	Rocky River	Wadsworth	
Barberton	Chardon	Gates Mills	Liberty Center	Metamora	North Perry	Painesville	Russells Point	Warrensville Hts	

Thomas M. Zaino, Esq.
Richard C. Farrin, Esq.
February 19, 2009
Page 2

During all relevant times, Taxpayer was a non-resident professional athlete, a member of the Chicago Bears football team, who played games for his team in Cleveland. In accordance with the City's Ordinance, Taxpayer's employer (the Chicago Bears) withheld and remitted city tax on the gross amount of qualifying wages earned for services performed within the City.

Under the City's Ordinance and the Central Collection Agency's Rules and Regulations, the games-played apportionment method is used to apportion a non-resident professional athlete's player salary attributable to services performed within the City.

For each year at issue, Taxpayer filed city tax returns. On December 19, 2007, Taxpayer filed a request for refund for each of the relevant years seeking a refund of the difference between the tax paid under the games-played method and tax that would be owed under a duty-days method of apportionment.

Since both the City's Ordinance and the Agency's Rules and Regulations require use of the games-played apportionment method, Taxpayer was notified by three separate letters dated January 22, 2008 (one for each of the relevant years) that his employer correctly withheld city tax and that the requests for refunds were denied.

Thereafter, by letter dated August 22, 2008, you requested a Final Administrative Ruling seeking review of the Tax Auditor's decisions denying the refund requests (the "Notice of Appeal").

In the Notice of Appeal you claim that the games-played method of apportionment is "illegal, erroneous [] and unconstitutional." You argue that "the apportionment of [Taxpayer's] compensation for services performed in Cleveland should be based on [the] duty days[]" method of apportionment.

You also contend that Revised Code Section 718.011 "unconstitutionally discriminates against [Taxpayer] in violation of the Equal Protection Clauses of the United States and Ohio Constitutions" since it authorizes Cleveland (and every other Ohio municipality) to tax compensation paid to non-resident professional athletes for personal services performed within the municipality on 12 or fewer days in a calendar year.

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With regard to state law, you essentially claim that non-resident professional athletes should not be taxed at all since but for the exception carved out for them under Section 718.011, they would not be taxed since nonresident professional athletes generally do not perform services in municipal taxing jurisdictions more than 12 days during a calendar year.

And finally, you question the sufficiency and effect of the January 22, 2008 denial notices by claiming that the decisions (i) were form letters; (ii) fail to state why the requests for refunds were denied; (iii) are not final since they were not issued by the Tax Administrator; (iv) are not final since they do not state they were "intended as final decisions"; (v) and failed to advise Taxpayer of his right to appeal or the manner in which an appeal of the decisions could be taken.

DECISION

A. Complaints About Tax Auditor Decisions Are Red-Herring.

While you readily acknowledge that the refund requests were denied and readily acknowledge that Taxpayer received notice of the denials, the Notice of Appeal questions the sufficiency of the decisions denying the refund claims and strongly suggest that those decisions were insufficient since (among other things) no final administrative ruling was issued.

In accordance with CCA's Rules and Regulations,¹ final administrative rulings are issued only upon taxpayer request² and, in accordance with the City's Ordinance and state law, are a jurisdictional requirement necessary to invoke the jurisdiction of the Board of Review.³ Any suggestion that decisions of the audit department are invalid unless final administrative rulings are issued is simply wrong. Moreover, even if such were true, but it is not, at no time prior to August 22, 2008 did the Taxpayer request a final administrative ruling.

¹ Cleveland's Ordinance provides for the adoption of rules and regulations relating to "any matter or thing pertaining to the collection of taxes." (C.O. §191.2303.) These rules and regulations along with the Ordinance govern all matters relating to tax collection within the City.

² Article 13:03(B).

³ C.O. §191.2503; R.C. §718.11.

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Tax auditor decisions cannot be challenged directly with the Board. That fact however does not mean that decisions are not effective and final when issued. Absolutely nothing in state law, the City's Ordinance or the Rules and Regulations suggest that tax auditor decisions otherwise denying refund claims are not final *unless* tax administrator rulings are issued or unless reviewed by the Board of Review. In fact the opposite is true. The Rules and Regulations authorize tax auditors to both audit returns and render decisions on those returns.

CCA Art. 13:06(A) states, in part, that the Tax "Administrator or any authorized employee is authorized to examine the books, papers, records and [f]ederal [i]ncome [t]ax returns of ... any person ... for purposes of verifying the accuracy of any return made, or, to ... ascertain the tax due under the ordinance." Likewise, Art. 13:07(A) authorizes the Tax Administrator, or any person acting in his capacity, to conduct oral examinations under oath of persons having knowledge of tax returns or tax due under the ordinance.

Clearly then, tax auditors are authorized to both audit tax returns and issue decisions relating to those returns.

As to the Agency's use of "form letters" to advise Taxpayer that the requests for refunds were denied, use of "form letters" does not alter the fact that the requests were denied. The Agency (and the City) consistently use "form letters" to communicate with taxpayers (and residents) for a number of valid reasons, such as to promote consistency in communication. Your complaint about the use of form letters clearly has absolutely no merit.

You also suggest that because the word "final" does not appear in the denial notices, that omission somehow renders the decisions something other than final. The notices speak for themselves. They state "denied". Webster's Dictionary defines "denied" as (among other things) "to give a negative answer to"; "to refuse to grant."⁴ "Denied" simply means "denied."

⁴ Webster's New Collegiate Dictionary (1981), p. 301.

And with regard to how Taxpayer could appeal the January 22, 2008 decisions, you complain that the notices did not state Taxpayer had the right to appeal or how the appeal should be taken. The Agency's Rules and Regulations advise taxpayers how to appeal tax auditor decisions that they may not like and how to request rulings from the Tax Administrator.

CCA Art. 13:03(B) states, in part, that "[a]ny taxpayer or employer desiring a special ruling on any matter pertaining to the ordinance or these rules and regulations should submit to the Administrator in writing all the facts involved and the ruling sought."

In so doing, the Rules do not impose any specific timeframe, such as 30 days, within which to challenge denied refund claims. In this regard, the Rules are as taxpayer-friendly as possible. Here, when Taxpayer requested a Final Administrative Ruling *eight months after* the refund requests were denied, a ruling was issued.

Finally, you claim that the notices failed to explain or otherwise state why the refund claims were denied. Like your other complaints regarding the notices, this complaint has absolutely no merit.

Ignoring the reasons given (notice of which you freely acknowledge), does not eliminate those reasons.

Taxpayer received three separate notices, one for each of the tax years at issue. Each notice stated that since Taxpayer's employer correctly withheld city tax, the request for refund is denied.

So despite your arguments to the contrary, the January 22, 2008 decisions were effective and valid when issued and all of the denial notices were sufficient.

Most important, however, is that you have not explained, shown or otherwise indicated how Taxpayer has been prejudiced by the purported insufficiency of the January 22, 2008 denial notices. Your argument in this regard appears to be nothing more than a red-herring.

B. City Law Authorizes The Games-Played Method.

As you know, for city tax purposes, state law defines taxable wages in terms of "qualifying wages."⁵

As you also know, under Cleveland's Ordinance, the city tax is imposed on all qualifying wages earned and/or received by non-residents for work done or services performed within the City or attributable to the City.⁶

For purposes of collecting the tax, the Ordinance imposes a "withholding requirement" on employers (like the Chicago Bears) within or doing business within the City. It provides that in accordance with the Rules and Regulations, employers within and doing business within the City shall deduct at the time of payment of such qualifying wages, the amount of tax imposed by the Ordinance.⁷

CCA Article 8:02(E) states that in the case of employees who are non-residents and whose qualifying wages are earned from sources within and without the City, such wages are apportioned to the City in accordance with rules set forth in that Article.⁸

CCA Article 8:02(E)(6) specifically deals with "professional athletes." It provides, in pertinent part, that "[i]n the case of employees who are non-resident professional athletes, the deduction and withholding of personal service compensation shall attach to the entire amount of compensation earned for games that occur in the taxing community[.]"

Under this method, total compensation is multiplied by a ratio, the numerator of which is the number of games played in the taxing jurisdiction; the denominator of which is the total number of games.

City law clearly only authorizes the games-played apportionment method.

⁵ R.C. §718.03.

⁶ C.O. §191.0501(b)(1).

⁷ C.O. §191.1302(a).

⁸ CCA Article 8:02.

C. The Games-Played Method Is A Valid Allocation.

There are two commonly used methods to apportion a non-resident professional athlete's income for purposes of determining income earned within and without a taxing jurisdiction, the "duty-days" and "games-played" apportionment methods.

Under the duty-days method, "duty days" generally include all days during the year that the athlete either prepares for or participates in competition.⁹ Each duty day is assigned to the jurisdiction where service is performed on that particular day. Tax liability is determined by multiplying total compensation by a ratio, the numerator of which is the number of duty days allocated to the taxing jurisdiction; the denominator of which is the total number of duty days.

The "games-played" method apportions income based on the ratio of games played in a particular jurisdiction to the total number of games played. Pre-season and post-season games are usually included in total games. Under this method, total compensation is again multiplied by a ratio, the numerator of which is the number of games played in the taxing jurisdiction; the denominator of which is the total number of games.

You seem to essentially argue that the games-played method is unfair since it fails to consider time spent on non-game activities like pre-season training, mini-camps, practices, meetings, etc.

The "games-played" method however correctly recognizes that activities other than actual games played are all ancillary to what the athlete is hired to do—play games.

Although *Pro-Football, Inc. v. District of Columbia Dep't of Employment Servs.*,¹⁰ is not a tax case, recognizes the fact that players are paid to play the games. The issue in that case was whether Washington, D.C.'s workers compensation act covered players of the NFL Washington Redskins where the majority of the players time was spent at their practice facility in Virginia and not

⁹ "Duty-days" is not consistently defined by all jurisdictions using the duty-days method.
¹⁰ 588 A.2d 275.

D.C. where the games were played. The appeals court found that the D.C. act was applicable explaining as follows:

the principal service for which a player is hired by the Redskins is to play regularly scheduled games and earn money for the team. In the final analysis, professional athletes are entertainers. Just as an actor's rehearsals are ancillary to his performance on the stage, so a professional athlete's practice is merely preparatory to the game.

Much like professional entertainers, professional athletes including professional football players are paid to perform before others.

Despite Taxpayer's contentions to the contrary, the games-played apportionment method is valid.

D. Ohio Law Views Athletes And Entertainers Similarly.

Ohio law clearly views professional athletes similar to professional entertainers. This is shown by the fact that state law allows municipalities to tax both non-resident professional entertainers and non-resident professional athletes in situations where other non-residents cannot be taxed.

As you know, municipalities are generally prohibited from taxing compensation paid to non-residents working in the city on 12 or fewer days in a calendar year. This is known as the "occasional entrant rule" and is set forth in Revised Code Section 718.011. The rule, however, does not apply to either professional entertainers or professional athletes. Section 718.011 provides, in pertinent part, that;

... a municipal corporation shall not tax the compensation paid to a nonresident individual for personal services performed by the individual in the municipal corporation on twelve or fewer days in a

calendar year unless ... [t]he individual is a professional entertainer or professional athlete[.]

So clearly then, Cleveland's use of the games-played method does not violate state law.¹¹

E. Players Paid Separately For Pre-Season And Off-Season.

According to the Collective Bargaining Agreement ("CBA") between the NFL and its Players Association,¹² players are paid separately for pre-season training camps, mini-camps and off-season workouts.

Article XXXV deals with "off-season workouts," it states:

Section 3. Payment: Each player shall receive at least the following amounts per day for any workouts or classroom instruction in which he participates pursuant to a Club's voluntary off-season workout program, provided the player fulfills the Club's reasonable off-season workout requirements: \$110 for the 2006 League Year; \$120 for the 2007-08 League Years; \$130 for the 2009-2010 League Years and the 2011 League Year if it is an Uncapped Year; and \$145 for the 2011 League Year if it is a Capped Year and the 2012 League Year. Players who (1) are under contract or tender to an NFL Club; and (2) have been officially allocated by that Club to the NFL Europe League who participate in a Club's off-season workout program may also receive expenses for travel, board, and lodging subject to the terms and

¹¹ Even proposed federal legislation dealing with how states and political subdivisions can tax nonresidents carves out an exception for professional athletes. See Mobile Workforce State Income Tax Fairness and Simplification Act of 2007 (H.R. 3359)

¹² See "Collective Bargaining Agreement Between The NFL Management Council and NFL Players Association" dated March 8, 2006, available online at www.nflpa.org/CBA/CBA_complete.aspx.

conditions set forth in Article XXIV, Section 7(e)(iv)(3).¹³

Article XXXVI addresses "minicamps," it states:

Section 3. Expenses:

(a) Any veteran player who attends a minicamp will receive meal allowances in accordance with Article XXXIX (Meal Allowance), Section 1 of this Agreement, plus all travel expenses to and from the camp, plus "per diem" payments at the rate provided in Article XXXVII (Salaries), Section 4 of this Agreement. In addition, the Club will provide housing for players coming from out-of-town.

(b) If a rookie player (defined as in Article XXXVIII, Section 1) signed a Player Contract with any Club for the prior League Year, he shall receive, for each day that he attends minicamp, the following compensation, but no other compensation: (i) the prorated portion of the weekly "per diem" specified for the current League Year (as set forth in Article XXXVII, Section 3); (ii) the meal allowance specified for the current League Year (as set forth in Article XXXIX, Section 1); and (iii) all travel expenses to and from the camp, plus housing (for players coming from out-of-town).¹⁴

Article XXXVII of the CBA deals with "pre-season training camps" and states:

Section 3. Rookie Per Diem: A rookie player will receive "per diem" payments at the rate of \$775 per week in the 2006 League Year, \$800 per week in the

¹³ NFL CBA at 111.

¹⁴ NFL CBA at 114.

2007-08 League Years, \$825 per week in the 2009-10 League Years and the 2011 League Year if it is an Uncapped Year, and \$850 per week in the 2011 League Year if it is a Capped Year and the 2012 League Year, commencing with the first day of preseason training camp and ending one week prior to the Club's first regular season game.

Section 4. Veteran Per Diem: A veteran player will receive "per diem" payments at the rate of \$1,000 per week in the 2006-07 League Years, \$1,225 per week in the 2008-10 League Years and the 2011 League Year if it is an Uncapped Year, and \$1,375 per week in the 2011 League Year if it is a Capped Year and 2012 League Year, commencing with the first day of pre-season training camp and ending one week prior to the Club's first regular season game, and an additional \$200 per week during the pre-season, commencing with the Club's first pre-season game (exclusive of the Canton Hall of Fame Game and any International Game) and ending one week prior to the Club's first regular season game.¹⁵

As set forth above, players receive per diem payments, meal allowances, travel expenses to and from camps plus housing for off-season workout requirements; mini-camps; pre-season training camps, etc.

Since players are paid before the regular season for such activities, they would not be paid again for the same services during the regular season. This clearly supports the games-played method over the duty-days method with regard to such activities.

¹⁵ NFL CBA at 115.

F. Player Contracts Also Support Games-Played Method.

And both the CBA and Player Contract actually support the fact that the games-played method properly apportions player salaries since the plain language of both ties a player's contract salary to one thing—games played. Both the CBA and Player Contract provide that a player's contract salary shall be paid either weekly or bi-weekly during the regular season.

Article XXXVIII of the CBA states, in pertinent part:

Section 10. Payment: Unless agreed upon otherwise between the Club and the player, each player will be paid at the rate of 100% of his salary in equal weekly or bi-weekly installments over the course of the regular season commencing with the first regular season game. ...¹⁶

Likewise the Player Contract states:

Section 6. Payment. Unless this contract or any collective bargaining agreement in existence during the term of this contract specifically provides otherwise, Player will be paid 100% of his yearly salary under this contract in equal weekly or biweekly installments over the course of the applicable regular season period, commencing with the first regular season game played by Club in each season. Unless this contract specifically provides otherwise, if this contract is executed or Player is activated after the beginning of the regular season, the yearly salary payable to Player will be reduced proportionately and Player will be paid the weekly or biweekly portions of his yearly salary becoming due and payable after he is activated. Unless this contract specifically provides otherwise, if this contract is terminated after the beginning of the regular season, the yearly salary

¹⁶ NFL CBA at 117.

payable to Player will be reduced proportionately and Player will be paid the weekly or bi[]weekly portions of his yearly salary having become due and payable up to the time of termination.¹⁷

If a contract is signed after the regular season begins or if a player is activated after the regular season begins, salary is proportionately reduced to the number of games remaining. And if a player contract is terminated after the regular season begins, salary is proportionately reduced by the number of games remaining in the regular season.¹⁸

So it seems clear that under both the Player Contract and CBA, players are paid to play games.¹⁹

G. Other Jurisdictions Use The Games-Played Method.

You claim that "Cleveland is the only municipality in the country that continues to tax nonresident athletes on a 'games played' basis. Municipalities and states that previously taxed on a 'games played' basis, such as the State of New York or the City of Detroit, have changed their method of taxation to a 'duty days' basis."

That claim is wrong. Pittsburgh, for example, uses a games-played method as well.

¹⁷ NFL CBA at 164, Appendix C.

¹⁸ Likewise, it is common knowledge that suspensions are almost always done on a game-basis; and fines for certain conduct (like "helmet-to-helmet" contact) often result in loss of game checks too.

¹⁹ Other provisions in the CBA illustrate this fact as well. For example, Article XXXIV deals with "salary." Section 7(b)(i) discusses signing bonuses and provides that signing bonuses shall be prorated (allocated) over the term of the Player Contract on a straight-line basis, not to exceed six years. (NFL CBA at 62.) Likewise Article XIV, Section 9 concerns salary forfeitures. It provides that while no signing bonus forfeitures are permitted, the players and Club may agree (among other things) to forfeit the proportionate amount of a player's signing bonus allocation for each game missed (1/17th for each regular season week missed) if the player voluntarily retires or otherwise withholds services. (NFL CBA at 26.)

Pittsburgh imposes a three percent facility usage fee on each non-resident who uses any of its publicly funded facilities to engage in an athletic event or otherwise render a performance for which remuneration is received. "Publicly funded facilities" include (among other things) Heinz Field, where the Pittsburgh Steelers play; PNC Park, where the Pittsburgh Pirates (baseball) play; and Mellon Arena, where the Pittsburgh Penguins (hockey) play.

Pittsburgh's Regulations sets forth how the fee is computed. Section 203, "Computation of Usage Fee" explains as follows:

a. ALLOCATION OF WAGES FOR PROFESSIONAL SPORTS TEAMS' PLAYERS

Any player on a professional sports team, who is not a Pittsburgh resident, who engages in an athletic event that is held in a publicly funded facility within the City of Pittsburgh, and for which they are compensated, shall be subject to the usage fee. These include players on the professional, or major league level. Those on the practice squad or the minor league level will be categorized as "other employees" of a professional sports team. The compensation attributable to Pittsburgh is determined by using the ratio of *games in Pittsburgh to the total games played by the team while the player is on the roster. Exhibition games, pre-season games, regular season, and post-season games are to be included.* The calculation to determine the amount of the usage fee due for players, commonly known as the "duty day" method, shall be:

Gross Wages x (Total duty days in Pittsburgh/Total duty days) x .03.²⁰

²⁰ Emphasis added. Available online at http://www.city.pittsburgh.pa.us/finance/assets/forms/2006/2006_UF-1_sports_facil_usage_regs.pdf.

So even though the Pittsburgh Regulation uses the term "duty-days," it is clear that "duty-days" is defined in terms of games-played.

In addition to the City of Pittsburgh, Maine, for example, uses the games-played method as well. With regard to apportioning personal services income, Maine's Regulations state as follows:

4. Professional Athletes.

A. Exhibition and regular season games.

Nonresident professional athletes must include in income the entire amount of compensation received for games played in Maine. In the case of a nonresident athlete not paid specifically for the game played in Maine, the following apportionment formula must be used: The income earned and subject to the Maine income tax is the total compensation earned during the taxable year, including incentive payments, bonuses, and extras, but excluding signing bonuses and league playoff money. Total compensation is multiplied by a fraction, the numerator of which is number of exhibition and regular season games the athlete played (or was available to play for the athlete's team, as, for example, with substitutes) in Maine during the taxable year, and the denominator of which is the total number of exhibition and regular season games that the athlete was obligated to play under contract or otherwise during the taxable year, including games in which the athlete was excused from playing because of injury or illness.

B. Playoff games. For playoff games played in Maine, the amount of league playoff money earned by the professional athlete for playing or being available to play in such games is also income subject to apportionment under the following formula:

League playoff money earned and subject to the Maine income tax is the total league playoff compensation earned during the taxable year multiplied by a fraction, the numerator of which is the number of playoff games the athlete played or was available to play in Maine during the taxable year, and the denominator of which is the total number of playoff games which the athlete's team played during the taxable year, including playoff games in which the athlete was excused from playing because of injury or illness.²¹

...

So despite your claim, the games-played method is used by other jurisdictions.

And that other municipalities *may* use a "duty-days" method is completely irrelevant.

H. Cleveland Is Taxing Income Apportioned To It.

According to Hemenway & Barnes, "Cleveland is unconstitutionally apportioning income to Cleveland that is earned for services outside the City."²² This argument is flawed however because it suggests that using a pre-apportionment tax base to determine tax liability is the same as direct taxation of such income.

A case that illustrates this point is *Shell Oil Co. v. Iowa Department of Revenue*.²³

In that case, taxpayer sold oil and chemical products in the State of Iowa.²⁴ These products included crude oil that had been extracted from certain

²¹ 36 MRSA §5211(17); Rule No. 806 (18-125 CMR 06) "Nonresident Individual Income Tax." Available online at <http://www.maine.gov/revenue/rules/pdf/rule806.pdf>.

²² The Notice of Appeal incorporates a letter from Hemenway & Barnes dated August 9, 2007 that had previously been given to the City.

²³ 488 U.S. 19 (1988).

²⁴ *Id* at 22.

submerged lands known as the Outer Continental Shelf (OCS) that were governed by the federal Outer Continental Shelf Lands Act (OCSLA).²⁵ The Act was created, in part, because Congress wanted to "prevent [] the [different] states from asserting on the basis of territorial claims, jurisdiction to assess direct taxes on the OCS."²⁶ Consequently, the OCSLA contained a provision providing that "State taxation laws shall not apply to the outer Continental Shelf."²⁷

Iowa had a sales-based apportionment formula that it used to determine the income tax imposed on a unitary business like taxpayer that conducted business in Iowa as well as other states.²⁸ The "income tax [would be] determined by a single-factor apportionment formula based on sales."²⁹ "Under [the] formula, Iowa [taxed] the share of a corporation's overall net income that [was] reasonably attributable to the trade or business within the state."³⁰

For four years, taxpayer filed Iowa tax returns in which it adjusted the Iowa formula to exclude a figure that purportedly reflected "income earned" from the OCS.³¹ Iowa rejected taxpayer's modification and found a tax deficiency. Taxpayer challenged the determination claiming that "inclusion of the OCS-derived income in the tax base of Iowa's apportionment formula violated the OCSLA."³²

Both the Iowa Supreme Court and the U.S. Supreme Court would find that such inclusion of the "OCS-derived income" was proper. As the U.S. Supreme Court would explain:

[Taxpayer's] argument hinges on the mistaken premise that including OCS-derived income in the preapportionment tax base is tantamount to the direct taxation of OCS production. But income that is

²⁵ *Id.* at 21-22.

²⁶ *Id.* at 29-30.

²⁷ See *id.* at 24.

²⁸ *Id.* at 22.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 23.

³² *Id.*

included in the preapportionment tax base is not, by virtue of that inclusion, taxed by the State. Only the fraction of total income that the apportionment formula determines (by multiplying the income tax base by the apportionment fraction) to be attributable to Iowa's taxing jurisdiction is taxed by Iowa. As our Commerce Clause analysis of apportionment formulas has made clear, the inclusion of income in the preapportioned tax base of a state apportionment formula does not amount to extraterritorial taxation. This Court has repeatedly emphasized that the function of the apportionment formula is to determine the portion of a unitary business income that can be fairly attributed to in-state activities.³³

Hemenway & Barnes' argument is similar to the one that was rejected in the *Shell* case.

As stated in *Shell*, including income within the pre-apportionment tax base is not tantamount to direct taxation of such income. The clear function of the games played apportionment method is to determine the portion of income that can be fairly attributed to the players' Cleveland activities.

I. Constitutional Challenges Cannot Be Administrative Determined.

In the Notice of Appeal, you have not claimed that the Agency improperly interpreted or applied any provision in the Ordinance or the Rules and Regulations but rather, you claim that the Agency's Rules and Regulations and state law are unconstitutional.

You are challenging the Rules and Regulations because they mandate use of the games-played method; and you are challenging state law (R.C. §718.011) because it permits municipalities to tax nonresident professional athletes different from other nonresidents.

³³ *Id.* at 30-31 (citations omitted).

Clearly you are making facial constitutional challenges to both the Rules and Regulations and state law which cannot be administratively determined.

Further, state law limits the jurisdiction of a local board of review to reviewing decisions or rulings by the tax administrator.

Section 718.11 of the Revised Code provides, that "[a]ny person who is aggrieved *by a decision by the tax administrator ...* may appeal the decision to the board."³⁴ The statute also provides that "[t]he board may affirm, reverse or modify *the tax administrator's decision or any part of that decision.*"³⁵

Likewise, Section 191.2503 of the City's Codified Ordinances provides, "[a]ny person dissatisfied with *any ruling or decision of the Administrator ...* may appeal therefrom to the Board of Review."³⁶ That Section also limits the jurisdiction of the Board by providing that "[t]he Board shall, on hearing, have jurisdiction to affirm, reverse or modify *any such ruling or decision.*"³⁷

Since clearly Taxpayer is not claiming that the Agency acted improper as to how it interpreted or applied either its Rules or state law, no justiciable claim will be raised with the Board upon appeal, if an appeal is taken.

Taxpayer probably should have proceeded with an action in the common pleas court under either Revised Code Chapter 2721, "Declaratory Judgments" or Chapter 2723 "Enjoining and Recovering Illegal Taxes and Assessments".

Since Taxpayer failed to initiate actions under either of those Statutes, it seems clear that you are merely attempting to accomplish with the Cleveland Board of Review that which you were required to pursue with the common pleas court.

The relief Taxpayer seeks would clearly not be properly before the Board.

³⁴ Emphasis added.

³⁵ Id. (emphasis added).

³⁶ Emphasis added.

³⁷ Id. (emphasis added).

J. The Games-Played Method Is Not Unconstitutional.

You also state that the Hemenway & Barnes letter "set[s] forth [your] position that the current method by which the City of Cleveland taxes professional athletes is unconstitutional."

Among other things that letter states that the games-played method "violates the fair apportionment requirements" of the Due Process and Commerce Clauses of the U.S. Constitution. It also claims that the games-played method "subjects the players to apportionment practices that are discriminatory and in contravention of the Equal Protection Clause."

While the purpose of this Ruling is not to determine whether the games-played method is constitutional, some points are warranted.

Not once has the United States Supreme Court held an apportionment formula unconstitutional on its face.³⁸ It is also clear that no single apportionment formula is required by the U.S. Constitution.³⁹

There is no question that a municipality may impose a tax on income accruing to non-residents from work conducted within its borders.⁴⁰ Obviously, any income tax system must have rules for determining the amount of net income to be taxed. In this regard, a municipality has wide discretion in devising a formula to fairly allocate a taxpayer's intrastate income.⁴¹ This is so since developing an apportionment formula is essentially a legislative task.⁴²

No valid equal protection claim has been raised. To satisfy equal protection all that is required is a plausible policy reason for a challenged classification. It has long been settled that "[a]bsolute equality is impracticable

³⁸ *American Trucking Assn v. Scheiner*, 483 U.S. 266, 285 (1987); *Armao, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984); *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983).

³⁹ *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989) (citations omitted).

⁴⁰ *Shaffer v. Carter*, 252 U.S. 37, 52 (1920).

⁴¹ See *Allied-Signal, Inc. v. Director, Div of Taxation*, 504 U.S. 768, 769 (1992).

⁴² *Goldberg v. Sweet*, 488 U.S. 252, 261.

in taxation, and is not required by the equal protection clause.⁴³ Using a rational basis test, so long as the tax is rationally related to a legitimate governmental interest, an equal protection challenge should fail. As one commentator noted "[i]f a nonresident professional athlete challenges an income allocation system under the Equal Protection Clause, the state tax will certainly stand pursuant to the rational relation test."⁴⁴

Due process looks to the connection that must exist between the taxpayer and municipality before the municipality has authority to impose its tax.⁴⁵

All it requires is some minimal connection between the governmental entity and the person, property or transaction it seeks to tax.⁴⁶ With due process, the question is whether the non-resident professional athlete availed himself of the protections and benefits given by the municipality.

Since the non-resident athlete plays games in Cleveland, those games could not occur but for the benefits and protections given by the City's resources including police, fire, roads, its economic market etc. It would therefore appear that a due process violation would be difficult to show.

The Commerce Clause limits a municipality's authority to tax if such tax unduly burdens interstate commerce. A taxing statute does not violate the Commerce Clause if it (i) is applied to an activity with a substantial nexus within the municipality; (ii) is fairly apportioned; (iii) does not discriminate against interstate commerce; and (iv) is fairly related to the services provided by the municipality.⁴⁷

⁴³ *Maxwell v. Bugbee*, 250 U.S. 525, 543 (1919).

⁴⁴ Kevin Koresky, *Tax Considerations for U.S. Athletes Performing in Multinational Team Sport Leagues or "You Mean I Don't Get All of My Contract Money?!"* 8 Sports Law. J. 101, 114, (2001) [hereinafter, Koresky, *Tax Considerations for U.S. Athletes*].

⁴⁵ *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 465 (1959).

⁴⁶ *Wisconsin v. J.C. Penny Co.*, 311 U.S. 435, 444 (1940); *Quill Corporation v. North Dakota*, 504 U.S. 298, 305-307 (1992).

⁴⁷ *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 279 (1977).

Here, the substantial nexus requirement is satisfied since the income-producing activity (games played) occurs within Cleveland.

With regard to fair apportionment, a tax is "fairly apportioned" if its purpose is to tax only its fair share of an interstate transaction.⁴⁸ Courts determine if a tax is fairly apportioned by looking at whether it is "internally consistent" and "externally consistent."

"Internal consistency" looks at the narrow issue of whether the tax (if applied by all other states) would affect or place an undue burden on interstate commerce.⁴⁹ The test is not whether there is *any* overlap of taxation but rather, whether there is an impermissible burden on interstate commerce caused by the overlap.⁵⁰ A tax is fairly apportioned if it reaches only those non-resident athletes who have contacts within the City.⁵¹ Since Cleveland's tax is so applied, it is internally consistent.⁵²

"External consistency" looks at whether the city tax only taxes that portion of interstate revenues that reasonably reflect an activity within the city.⁵³ This test appears to be more applicable to a multistate business than to the activities of an individual. Nevertheless, the games-played method obviously intends to comply with this requirement.

With respect to whether the tax discriminates against interstate commerce, the test is whether it places a greater burden on non-residents than

⁴⁸ *Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 169 (1983).

⁴⁹ *Id.*

⁵⁰ *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267, 276-278 (1978).

⁵¹ *Armco*, 457 U.S. at 645 (if the internal consistency of one state is compared with different taxes imposed by others, the validity of state taxes would turn solely on "the shifting complexities of the tax code of 49 other States.")

⁵² And while the August 9, 2007 letter did not raise the issue of possible multiple taxation, the limited possibility of multiple taxation is not sufficient to invalidate Cleveland's tax. Moreover, the incidence of multiple taxation is generally alleviated where a taxing jurisdiction allows tax credits for taxes paid in other jurisdictions. *Tyler Pipe Indus., Inc. v. Washington Dept of Revenue*, 483 U.S. 232, 245-253 (1987) ("[m]any States provide tax credits that alleviate or eliminate potential multiple taxation.")

⁵³ *Oklahoma Tax Comm'r v. Jefferson Lines*, 514 U.S. 175, 185 (1995).

residents.⁵⁴ As a general matter, unless Cleveland's tax is discriminatory on its face and not designed to promote a legitimate governmental interest, it should be upheld on discriminatory grounds. If a tax is fairly apportioned, it has also been traditionally found not to discriminate.⁵⁵

Insofar as whether Cleveland's tax is fairly related to the services it provides, the question is whether the City has given anything for which it can ask something in return.⁵⁶ In other words, whether the tax is reasonably related to the services Cleveland provides so as to justify the tax. The answer to that question is yes since non-resident athletes, in particular benefit from police, fire, roads, etc., because the games are held in Cleveland. Likewise, residents are required to pay for such services as well, even when they are not used.

Since Cleveland's tax is in proportion to the non-resident professional athlete's activities in Cleveland and their enjoyment of the opportunities and services Cleveland provides in connection with those activities, the city tax is reasonable and fairly related.

As noted, no court has ever held the games-played apportionment method to be unconstitutional. And the few legal scholars that have examined this issue have opined that any constitutional challenge would likely be unsuccessful.⁵⁷

K. The State Tax Treatment Is Completely Irrelevant.

Hemenway & Barnes' August 9, 2007 letter sets forth a comparison between the State of Ohio and Cleveland as to their tax treatment of a

⁵⁴ *Id.* at 266; *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 279 (1977)

⁵⁵ *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 624-625 (1981) (quoting *Wisconsin v. J.C. Penney, Co.*, 311 U.S. 435, 444 (1940)); *American Trucking Assn.*, 483 U.S. 266, 277; *Goldberg V. Sweet*, 488 U.S. 25, 255-256 (1989).

⁵⁶ *Wisconsin v. J.C. Penny*, 311 U.S. at 444.

⁵⁷ Paul Barger, *State Taxation of Nonresident Professional Athletes: The Need for Congressional Intervention*, *State Tax Today*, 176-24 (1999) ("state taxes on nonresident professional athletes have consistently survived constitutional challenges and will continue to do so in the future"); Jeffrey L. Krasney, *State Income Taxation of Nonresident Professional Athletes*, 2 *Sports Law J.* 127, 157 (1993) ("[A]ny reasonably apportioned method imposed by the states [including the games-played method] should be capable of surviving constitutional challenges.")

non-resident professional football player suggesting that since more income is apportioned to Cleveland than the State, Cleveland's allocation is wrong. This is comparing apples to oranges.

With respect to income tax liability, Ohio and Cleveland each have their own criteria. For example, how the two taxes are measured is different. The starting point for state tax purposes is adjusted gross income, modified by adjustments; whereas for city tax purposes it is qualifying wages.

Also, Cleveland (as authorized by state law) has enacted a specific rule setting forth a specific allocation method pertaining to non-resident professional athletes. For state tax purposes, allocation and apportionment do not apply in calculating income subject to tax but rather are used to determine Ohio's nonresident tax credit.

So any attempt to compare the two is both misleading and wrong.

L. Cases Cited By Taxpayer Are Clearly Inapposite.

Hume and the other cases cited in the August 9, 2007 letter are clearly inapposite and none of them support the arguments that you suggest.

1. *Hume v. Limbach*.⁵⁸

Hume is an Ohio Supreme Court case that does not deal with either the duty-days or the games-played apportionment methods but rather with the state's non-resident tax credit.

In that case, the Court rejected a ruling by the state Tax Commissioner that a Cincinnati Reds player was not entitled to a non-resident tax credit for time spent in spring training and exhibition games that took place in Florida. The Tax Commissioner maintained that only time spent out of Ohio during the regular season was subject to the tax credit since the Reds paid the player only during the regular season. The Court disagreed and determined that the credit must be calculated based on total time outside Ohio.

⁵⁸ (1991) 61 Ohio St.3d 387, 575 N.E.2d 150.

The *Hume* case is inapposite because it concerns a *non-resident tax credit* (Cleveland does not even offer a non-resident tax credit).

The issue here is how much income is subject to Cleveland's tax based on how Cleveland apportions that income. After the income is apportioned, tax liability is then determined. In *Hume*, tax liability was already determined and the issue was how much of a tax credit taxpayer was entitled to receive to reduce tax liability.⁵⁹

What was discussed in *Hume* and what has been raised here, are as different as night and day. The issue here examines the front-end of determining tax liability namely, what is taxable. *Hume* discussed the back-end of calculating a tax credit to reduce tax liability.

Hume clearly does not prohibit Cleveland, or for that matter, any other Ohio municipality from adopting a games-played method. So the statement in the August 9, 2007 letter that "[t]his Ohio precedent should be equally as binding on the City of Cleveland as it is for the State of Ohio" is just plain wrong.

2. *Stemkowski v. Commissioner*.⁶⁰

In that case, taxpayer was a hockey player in a cross-border hockey league, playing in Canada and the U.S. The case addressed the sourcing of taxpayer's salary for *federal* tax purposes to within and without the U.S. For federal tax purposes, a specific IRS Treasury Regulation⁶¹ exists (much like the City has a specific provision) governing the source of compensation for labor or personal services. Under the Regulation, income is generally apportioned on a time-basis, similar to the duty-days allocation. The Court held that since the player's contract compensated him for training camp and the play-offs, in accordance with the Regulation, time spent for those events should be included in the time-basis ratio.

⁵⁹ R.C. §55747.05(A) (setting forth the state's non-resident tax credit).

⁶⁰ 690 F.2d 40 (2nd Cir. 1982).

⁶¹ Treas. Reg. 1.881-4(b).

A specific IRS Treasury Regulation controlled in that case like CCA Art. 8:02(E)(6) controls in this case. Hemenway & Barnes fail to acknowledge that fact.

3. *Appeal of Carroll*.⁶²

Ironically, the professional athlete in Carroll wanted the games-played and not the duty-days apportionment method applied to his situation.

Although the professional basketball player in that case was a member of the home team, Golden State Warriors (located in California), he was a non-resident of California. The player used the games-played method to calculate his state tax liability, resulting in about 50% of his salary being apportioned to California. The state franchise tax board recalculated his tax liability on the basis of total days spent in California including travel days, training camp and practice sessions. The result increased the amount of the player's salary apportioned to California to around 71%. After the taxpayer appealed, the state board of equalization held that the working days formula better determined the amount of California source income and upheld the franchise tax board's 71% assessment.

Crucial to the board of equalization's decision was the fact the franchise tax board had previously issued an audit rule adopting the concept of "duty days" as the basis for apportioning non-resident professional athlete's income. While the franchise tax board in *Carroll* adopted a duty-days apportionment method, Cleveland's Board of Income Tax Review has adopted a games-played method.

If Carroll illustrates anything, it is simply that a duty-days apportionment method does not always result in a lower percentage of income being apportioned.

4. *Newman v. Franchise Tax Bd.*⁶³

This California case involved a professional actor and not a professional athlete. In this case, the popular actor, the late Paul Newman, a non-resident of

⁶² No. 85A-684-SW, 1987 WL 50144 (Cal.St.Bd.Eq., April 7, 1987).

⁶³ 208 Cal.App.3d 972, 256 Cal.Rptr. 503.

California, had an exclusive 11-week contract to film the movie "The Sting" in California. The state franchise tax board would determine that since Newman worked in California for 25 of the 27 days that actual filming of the movie took place, 92.59% (25/27) of this income should be apportioned to California. Newman would, however, convince the court that since the 11-week contract period encompassed 54 days (work days) and he was physically present in California on 30 of those 54 days, the apportionment to California should be 55.56% (30/56).

Crucial to the court's reasoning was that the board had adopted the duty days allocation for professional athletes. The court found that non-resident actors were "in the same class as [such] athletes."⁶⁴

Clearly, the outcome would have been different if the board had adopted a games-played method

5. *In re Bickett*.⁶⁵

This is an administrative decision where the New York Division of Taxation was not permitted to apply the games-played apportionment method to a non-resident professional athlete football player's New York source income. In this case, taxpayer, a professional football player for the Indianapolis Colts calculated his New York tax liability using the duty-days method. Later, after the Division of Taxation recalculated his tax liability using a games-played method, the taxpayer would appeal and win.

The problem in this case was clear. The State of New York had a "working days" apportionment method that was "consistent" with the "duty days" concept.⁶⁶ The Division of Taxation attempted to impose the games-played method without "a shred of evidence or argument that [the duty-days] method [was] not fair and equitable."⁶⁷ Moreover, the Division of Taxation sought to

⁶⁴ See *id.* at 978, 256 Cal.Rptr. at 506.

⁶⁵ DTA No. 813160, 1996 WL 54179 (N.Y.Div.Tax.App., Feb. 1, 1996).

⁶⁶ See *id.*, slip. op. at 2.

⁶⁷ See *id.*

impose the games-played method as a "policy" when New York apparently "authorize[d] allocation only by 'resolution.'"⁶⁸

The administrative decision in *Bickett* was made because there appeared to be an "ad hoc" application of the games-played method by the Division of Taxation in that case. The same is not true here.

M. A Duty-Days Apportionment Is Not Legally Mandated.

Finally, Hemenway & Barnes' letter attempts to claim that the games-played method is contrary to both Ohio law and Cleveland's own Ordinance much like what was stated in the Notice of Appeal but for different reasons.

The August 9, 2007 letter begins this argument by noting that Revised Code Sections 718.01(B) and 718.01(F) limits the power of cities to tax by prohibiting cities from taxing employee compensation that is not "qualifying wages."⁶⁹ The letter also notes that Cleveland's Ordinance only taxes non-residents on all "qualifying wages."

From this point the argument takes a number of different turns. It goes something like this:

Since qualifying wages for purposes of both the Ohio statute and the Ordinance means "wages" as that term is defined in the Internal Revenue Code and since "wages" under the IRC includes "all remuneration for employment" and further since under the IRC "employment" is "any service of whatever nature performed by an employee for the person employing him," therefore "all services rendered by a player are services for which he is receiving compensation" which in turn means that

⁶⁸ See *id.*, slip op. at 3.

⁶⁹ Section 718.01(B) addresses the fact that the municipal income tax must be imposed at a uniform rate; while Section 718.01(F) [since re-numbered to 718.01(H)] identifies those income items that municipalities are prohibited from taxing.

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Richard C. Farrin, Esq.
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Cleveland is required to consider all duty days in apportioning a player's salary.

That argument is not valid. The issue is not about whether the income is "qualifying wages" or how the IRC defines "employment" (which is really irrelevant), but rather how "qualifying wages" are apportioned to Cleveland when the non-resident is a professional athlete that performs services in Cleveland. And despite Hemenway & Barnes' analysis, a duty-days apportionment is not legally mandated or required for the apportionment.

For all of the foregoing reasons, the appeal filed on behalf of the Taxpayer is denied in all respects; the Agency properly denied Taxpayer's refund requests.

Insofar as this letter constitutes a Final Administrative Ruling issued by the Tax Administrator on all issues raised in the August 22, 2008 Notice of Appeal, Taxpayer has the right to appeal this Final Administrative Ruling to the Cleveland Board of Income Tax Review, in accordance with the procedures outlined in the City of Cleveland's Income Tax Ordinance, applicable CCA Rules and Regulations and Section 718.11 of the Revised Code.

Sincerely,



Nassim M. Lynch,
Tax Administrator

cc: Mr. Robert Meaker

U.S. Constitution, Article I, Section 8, cl. 3

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

Fourteenth Amendment to the U.S. Constitution, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Constitution, Article I, Section 2

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

26 U.S.C. 3121

(a) Wages

For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; * * *

* * *

(b) Employment

For purposes of this chapter, the term "employment" means any service, of whatever nature, performed

(A) by an employee for the person employing him, irrespective of the citizenship or residence of either,

(i) within the United States, * * *

* * *

R.C. 718.01 Municipal income tax rates.

* * *

(H) 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;

* * *

R.C. 718.03 Withholding taxes from qualifying wages.

(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:

(a) Deduct the following amounts:

(i) Any amount included in wages if the amount constitutes compensation attributable to a plan or program described in section 125 of the Internal Revenue Code;

(ii) For purposes of division (B) of this section, any amount included in wages if the amount constitutes payment on account of sickness or accident disability.

(b) Add the following amounts:

(i) Any amount not included in wages solely because the employee was employed by the employer prior to April 1, 1986;

(ii) Any amount not included in wages because the amount arises from the sale, exchange, or other disposition of a stock option, the exercise of a stock option, or the sale, exchange, or other disposition of stock purchased under a stock option and the municipal corporation has not, by resolution or ordinance, exempted the amount from withholding and tax. Division (A)(2)(b)(ii) of this section applies only to those amounts constituting ordinary income.

(iii) Any amount not included in wages if the amount is an amount described in section 401(k) or 457 of the Internal Revenue Code. Division (A)(2)(b)(iii) of this section applies only to employee contributions and employee deferrals.

(iv) Any amount that is supplemental unemployment compensation benefits described in section 3402(o)(2) of the Internal Revenue Code and not included in wages.

(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.

(d) Deduct any amount included in wages if the amount arises from the sale, exchange, or other disposition of a stock option, the exercise of a stock option, or the sale, exchange, or other disposition of stock purchased under a stock option and the municipal corporation has, by resolution or ordinance, exempted the amount from withholding and tax.

* * *

R.C. 718.011 Income subject to tax - personal services performed by nonresident on twelve or fewer days.

On and after January 1, 2001, a municipal corporation shall not tax the compensation paid to a nonresident individual for personal services performed by the individual in the municipal corporation on twelve or fewer days in a calendar year unless one of the following applies:

(A) The individual who is an employee of another person; the principal place of business of the individual's employer is located in another municipal corporation in this state that imposes a tax applying to compensation paid to the individual for services performed on those days; and the individual is not liable to that other municipal corporation for tax on the compensation paid for such services.

(B) The individual is a professional entertainer or professional athlete, the promoter of a professional entertainment or sports event, or an employee of such a promoter, all as may be reasonably defined by the municipal corporation.

Cleveland Codified Ordinances 191.0501 Rate and Taxable Income

For the purposes specified in Section 191.0101, on and after January 1, 1967, an annual tax of one-half of one percent (0.5%) per annum shall be imposed upon the hereinafter specified income; provided that on and after July 1, 1968, the rate of tax shall be a total of one percent (1%) per annum; and that on and after March 1, 1979, the rate of such tax shall be a total of one and five-tenths percent (1.5%) per annum; and that on and after January 1, 1981, the rate of tax shall be two percent (2%) per annum. Such tax shall be imposed upon all taxable income as follows:

* * *

(b) (1) On all qualifying wages, earned and/or received on and after January 1, 1967, by nonresidents of the City for work done or services performed or rendered within the City or attributable to the City; on all net profits earned and/or received by a nonresident from the operation or conduct of any business or profession within the City; and on all other taxable income earned and/or received by a nonresident derived from or attributable to sources, events or transactions within the City;

* * *

CCA Article 8:02 Withholding Collection at Source

* * *

- (E) In the case of employees who are non-residents of the taxing community, the amount to be deducted is the current rate of tax on the compensation paid or earned and deferred with respect to personal services rendered in said taxing community and on the entire compensation paid or earned and deferred that is fully allocated to and taxable by the employment city as set forth in Articles 3:01(B) and 3:02(B) of these Rules and Regulations.

Where a non-resident receives compensation for personal services, rendered or performed partly within and partly outside a taxing community, the withholding employer shall withhold, report and pay the tax on that portion of the compensation which is earned within said taxing community in accordance with the following rules of apportionment. The following rules of apportionment shall only apply if the wages are specifically attributable to a place or location worked that is outside the employment city and only if the entire amount of such wages are not allocated to and taxable by the employment city as set forth in Articles 3:01(B) and 3:02(B) of these Rules and Regulations.

* * *

- (6) Professional Athletes. In the case of employees who are non-resident professional athletes, the deduction and withholding of personal service compensation shall attach to the entire amount of compensation earned for games that occur in the taxing community. In the case of a non-resident athlete not paid specifically for the game played in a taxing community, the following apportionment formula must be used:

The compensation earned and subject to tax is the total income earned during the taxable year, including incentive payments, signing bonuses, reporting bonuses, incentive bonuses, roster bonuses and other extras, multiplied by a fraction, the numerator of which is the number of exhibition, regular season, and post-season games the athlete played (or was available to play for his team, as for example, with substitutes), or was excused from playing because of injury or illness, in the taxing community during the taxable year, and the denominator of which is the total number of exhibition, regular season, and post-season games which the athlete was obligated to play under contract or otherwise during the taxable year, including games in which the athlete was excused from playing because of injury or illness. For purposes of these Rules and Regulations, exhibition games include only those games played before a paying audience, and played against another professional team from the same professional league.

In the case of non-resident salaried athletic team employees who are not professional athletes, deduction and withholding shall attach to personal service income in the manner set forth in Paragraph 1a., supra.

* * *