

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

REPLY 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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INTRODUCTION

The Cleveland Tax Administrator does not, and cannot, dispute the basic facts and legal principles that demonstrate that application of the games-played method to Appellant Hunter T. Hillenmeyer is unlawful. The Tax Administrator does not dispute that Hillenmeyer's contract required him to perform services for the Chicago Bears in addition to playing in games. Nor does the Tax Administrator dispute that the Chicago Bears, Hillenmeyer's employer, have unequivocally declared that Hillenmeyer was "paid for all of these services and not only for games played." (Supp. 69.) Nor does the Tax Administrator dispute that, by applying the games-played method to Hillenmeyer, Cleveland on average allocated to itself more than 400% of the income that would have been allocable to Cleveland under the duty days method.

Although the Tax Administrator professes to find nothing remarkable about treating professional athletes as if they were paid only for playing in games by applying the games-played method, it fails to cite a *single* case from *any* jurisdiction upholding the games-played method in the face of challenge. *See, e.g.*, Appellees' Br. 14–15 (attempting to distinguish Hillenmeyer's authority but failing to cite any case endorsing the games-played method). Nor does the Tax Administrator identify any other jurisdiction that is home to a major professional sports Club and that taxes income using the games-played method.¹

As the Tax Administrator is forced to concede, its arguments in favor of utilizing the games-played method all rest on the premise that professional athletes are paid only for playing in games. *See, e.g.*, Appellees' Br. 13 (conceding that the games-played "method is premised on the maxim that 'players are paid to play'"); *id.* at 40–41 (arguing that the games-played method

¹ The Tax Administrator's brief incorrectly states that Pittsburgh uses the games-played method. Appellees' Br. 50. The record evidence conclusively demonstrates the fallacy of that assertion, and demonstrates that Pittsburgh in fact uses the duty days method. (*See, e.g.*, Supp. 72–73, 75, 77, 78, 82, 88, 90.)

does not “produce[] a grossly unfair result” so long as “one accepts the premise that players are paid for the games”). Indeed, the Tax Administrator argues that this Court must uphold Cleveland’s use of the games-played method “[u]nless that premise is a fiction.” *Id.* at 13.

The Tax Administrator’s premise is a fiction. The undisputed record evidence plainly established that Hillenmeyer was paid for all of the services he provided for the Chicago Bears, not just for playing in games. In the face of that evidence, Cleveland’s attempt to treat professional athletes, for tax purposes, as being compensated for only a subset of the services they perform for their employers is precisely what this Court rejected in *Hume v. Limbach*, 61 Ohio St.3d 387, 575 N.E.2d 150 (1991). Because Hillenmeyer and other professional athletes are required by contract to perform many different services for their employers in addition to playing in games – and are compensated for those services – Cleveland’s use of the games-played method cannot be reconciled with this Court’s decision in *Hume*, with Ohio law, or with the Due Process and Commerce Clauses of the United States Constitution.

Finally, the Tax Administrator fails to identify any legitimate government interest that justifies Ohio’s singling out of professional athletes for less advantageous tax treatment by excluding athletes from Ohio’s “occasional entrant” rule. As a result, R.C. 718.011 fails scrutiny under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and under the Ohio Constitution.

ARGUMENT

A. Cleveland's Attempt To Decide For Itself, Contrary To Evidence, What Services Professional Athletes Are And Are Not Compensated For Is Contrary To Ohio Law

1. Hillenmeyer was compensated for performing services other than playing in games

Hillenmeyer's contract during the relevant tax years required him to provide a number of services for the Chicago Bears, including participating "fully in Club's official mandatory mini-camp(s), official preseason training camp, all Club meetings and practice sessions," and "reasonable activities to promote the Club and the League." (Supp. 55.)² The contract also provided that Hillenmeyer would be paid a yearly salary for all of those "services and all other promises of Player." (*Id.*) Any question about what the contract requires is definitively answered by the Affidavit of Cliff Stein, the Chicago Bears Senior Director of Football Administration and General Counsel, which states that "[t]he compensation Hillenmeyer receives from the Bears is paid for all of these services and not only for games played." (Supp. 69.) Moreover, in 2006, the vast majority of Hillenmeyer's compensation was a \$4.5 million roster bonus that was earned by Hillenmeyer's mere presence on the Bears' roster on July 10 of that year, regardless of whether he played in any games. (Supp. 64.) This record evidence is undisputed, and it compels the conclusion that Hillenmeyer was *not* paid only for playing in games.

2. The non-game services Hillenmeyer was required to perform were contractual obligations, not mere conditions of employment

The Tax Administrator's only response to the evidence showing that Hillenmeyer was required to perform numerous services other than playing in games is to argue that all non-game

² Contrary to the Tax Administrator's suggestion, Hillenmeyer has never argued that players are paid for strictly *voluntary* off-season workouts or *non-mandatory* minicamp(s), or that time spent at such activities must be counted as duty days. *Cf.* Appellees' Br. 32 n.13.

activities called for by Hillenmeyer's contract were merely "condition[s] of employment" and not contractual obligations. Appellees' Br. 21.³ But courts (including this Court), have consistently recognized that services like those called for by Hillenmeyer's contract are contractual obligations and not conditions of employment. In *Hume*, for example, this Court held that a professional baseball player's participation in the spring training season and exhibition games were not conditions of employment but rather obligations for which his contract required him to be compensated. See 61 Ohio St.3d at 389; see also *Stemkowski v. Comm'r*, 690 F.2d 40, 45-46 (2d Cir. 1982) (holding that requirement to report to Club training camp was a contractual obligation, but that additional requirement to maintain good physical condition was a condition of employment).

The Tax Administrator's own authority demonstrates that the services Hillenmeyer was required to perform for the Bears were contractual obligations and not conditions of employment. The Tax Administrator mistakenly argues that, in *Favell v. United States*, 16 Cl. Ct. 700, 722 (1989), the Court of Claims found that a requirement to report to training camp was a contractual condition and not a specific obligation. Appellees' Br. 21 n.7. In fact, however, *Favell* held the exact opposite:

[T]he words "in good physical condition" modify the remainder of the clause, "to report to the Club training camp at the time and place fixed by the Club," and describe the condition placed upon the hockey player upon arrival at the training camp. The words "in good physical condition" are set off from the remainder of the paragraph by use of a comma before the word "in," which would indicate that when reading paragraph 2(a), as a whole, reference to the latter clause, "in good physical condition," is used as a contractual condition and not as a specific obligation upon the hockey player to perform a particular service to arrive at training camp "in good physical condition." *The contractual obligation placed*

³ With respect to Hillenmeyer's roster bonus, the Tax Administrator fails entirely to grapple with the evidence showing that it was unrelated to playing in games. Instead the Tax Administrator simply notes that bonuses are "considered wages for FICA tax purposes," which is both undisputed and irrelevant. Appellees' Br. 46.

upon the hockey player by this paragraph is that the player must “report” to the training camp at the fixed time arranged by the hockey club.

Favell, 16 Cl. Ct. at 722 (emphasis added). Like in *Hume*, *Stemkowski*, and *Favell*, the mandatory services required by Hillenmeyer’s contract are contractual obligations for which he was compensated, not mere conditions of employment.

3. Under *Hume* and the Revised Code, all services for which a nonresident employee receives compensation must be considered in allocating income

Because Hillenmeyer was in fact compensated for all of the services he was contractually required to perform for his employer, Cleveland cannot tax Hillenmeyer as though he were compensated for only a subset of those services. This Court’s decision in *Hume* established that all services for which a nonresident employee receives compensation from his or her employer must be taken into account in allocating income for tax purposes. *See* 61 Ohio St.3d at 389. In holding that a portion of a professional baseball player’s income from the Cincinnati Reds should be allocated to Florida rather than Ohio, the Court specifically rejected the State’s argument that “the Reds paid Hume only for the playing season.” *Id.* The Court looked instead to Hume’s contract, under which he “was employed for the training season, exhibition games, [and] the playing season.” *Id.* The holding in *Hume* is consistent with the provisions of the Revised Code, which require that employee wages be treated as having been earned for all services performed by the employee for his or her employer. *See* R.C. 718.03, 718.01(H)(10); *see also* Appellant’s Br. 15.⁴

⁴ The Tax Administrator criticizes Hillenmeyer’s reasoning (which it paraphrases but attempts to pass off as a direct quote) as “circular.” Appellees’ Br. 5–6. It is the Tax Administrator, however, that fails to recognize the inconsistency in Cleveland’s position. Cleveland looks at all services performed by Hillenmeyer in determining what income is taxable wages. It thus includes in those wages things like Hillenmeyer’s roster bonus and per diem payments, both of which are unrelated to playing in games. But then Cleveland does an about face, and ignores all of Hillenmeyer’s non-game activities when determining what portion of Hillenmeyer’s wages are allocable to Cleveland.

The Tax Administrator's attempt to distinguish *Hume* misses the mark. The Tax Administrator argues that *Hume* "did not deal with the propriety of a games-played apportionment method" and that the specific issue was how to determine Ohio's nonresident tax credit. Appellees' Br. 6–7. That is plainly wrong. While the issue was presented in the context of the proper calculation of the nonresident credit, the Tax Administrator does not (and cannot) dispute that the question of how income should be allocated when a nonresident taxpayer performs services in multiple jurisdictions was squarely addressed in *Hume*. The proper calculation of the nonresident credit was based solely on that issue. *Hume* held that, in allocating income of a professional athlete, taxing jurisdictions must look at all of the services the athlete is required to perform for his employer. *See* 61 Ohio St.3d at 389. This Court rejected the Tax Commissioner's argument that *Hume* was paid only for performing services during the playing season and not for preseason services or exhibition games. Like the Tax Administrator in this case, the Tax Commissioner in *Hume* relied on the fact that *Hume* received his yearly salary during the playing season. Based on the language in *Hume*'s contract, which is very similar to that in *Hillenmeyer*'s contract, this Court found that *Hume* was compensated for all of the services he was required to perform for his Club. The import of *Hume*'s holding, though apparently lost on Tax Administrator, has been understood clearly by the State of Ohio. *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 July 1, 2014) (quoting Ohio Department of Taxation official as stating "[*Hume*] was an important case for us – it defined the way we tax nonresident athletes" and that "[y]ou 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").

The Tax Administrator's games-played method is even less defensible than the Tax Commissioner's position in *Hume*. The Tax Commissioner allocated Hume's compensation based on the services he performed during the playing season, but did not include Hume's services to the club during the preseason. The Tax Administrator's method here excludes consideration of all of Hillenmeyer's services during the preseason except for the few days on which preseason games are played (in which he may or may not participate), and also excludes Hillenmeyer's non-gameday services during the playing season. The Tax Administrator's desperate effort to distinguish *Hume* cannot withstand the clear holding of the Court.

4. The Tax Administrator's evidence does not demonstrate that Hillenmeyer was paid only for playing in games

In an effort to find some evidentiary support for Cleveland's use of the games-played method, the Tax Administrator cherry picks select provisions of the Standard Player Contract and the Collective Bargaining Agreement that, it argues, show that player compensation or benefits are tied to games. Its evidence, however, falls far short.

Many of the provisions the Tax Administrator relies upon show only that aspects of player compensation are tied to the number of *weeks*, not *games*, remaining in a season. *See, e.g.,* Appellees' Br. 23 (noting that "if a player contract is terminated after the regular season begins, salary is proportionately reduced by the number of weeks remaining in the regular season"); 24 (noting that signing bonuses may be forfeited in proportion to the number of weeks remaining if a player retires). "Weeks" is not synonymous with "games,"⁵ and there is no inconsistency in recognizing that NFL players are compensated for all services that they perform

⁵ Notably, each NFL Club has one "bye" week during the season in which it plays in no game, but during which players are still paid. The Tax Administrator has never explained how payment during a bye week can be reconciled with its theory that players are paid only for playing in games.

for their Clubs and also that some items of compensation they receive are linked to the number of weeks remaining in a season.

The Tax Administrator further argues that incentive clauses in player contracts show that players are paid only for playing in games, because the events that trigger those clauses often occur during games. Appellees' Br. 26. But the Tax Administrator again fails to grapple with the evidence demonstrating that the single largest component of Hillenmeyer's 2006 compensation was a bonus that Hillenmeyer received for being on the Bears' roster on July 10, 2006 – well before the season or any games even began. (Supp. 64.)

In sum, none of the Tax Administrator's arguments is sufficient to overcome Hillenmeyer's evidence – including the provisions of his contract and the sworn statement of his employer – demonstrating that Hillenmeyer was compensated for all of the services he performed for the Chicago Bears, and not just for playing in games. (*See* Supp. 55, 69.) As this Court held in *Hume*, all of those services must be taken into account in allocating nonresident income for tax purposes. Stripped of the false premise that athletes are paid only for playing in games, Cleveland's use of the games-played method cannot be squared with Ohio law.

5. The games-played method is contrary to the Cleveland Codified Ordinances

The Cleveland Codified Ordinances permit Cleveland to tax wages derived from services performed within Cleveland, but not income derived from services performed elsewhere. *See* Cleveland Codified Ordinances 191.0501(b)(1). Because the games-played method treats athletes as being paid only for playing in games, when in fact they are also paid for a number of non-game activities that occur outside Cleveland, Cleveland's use the games-played method results in Cleveland taxing wages earned for services performed elsewhere, in violation of the Cleveland Codified Ordinances.

The Tax Administrator's only response is to argue that the Cleveland Codified Ordinances incorporate by reference administrative rules and regulations, including CCA Article 8:02(E)(6), through the definition of the phrase "taxable income." Appellees' Br. 8 (quoting Cleveland Codified Ordinances 191.0318). But the definition of "taxable income" is simply not relevant. The dispute here is not which components of Hillenmeyer's compensation are taxable. Rather, the dispute is whether Cleveland's *method of apportioning* that "taxable income" is lawful. In that regard, the relevant language of the Cleveland Codified Ordinances specifically *limits* the "taxable income" of nonresidents that Cleveland is authorized to apportion to itself. *See* Cleveland Codified Ordinances 191.0501(b)(1) (authorizing income tax on "all taxable income as follows: . . . 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").

B. The Games-Played Method Violates The Due Process Clause And The Commerce Clause

As demonstrated in Hillenmeyer's opening brief, the games-played method is unconstitutional as applied to him because, among other reasons, it violates the fair apportionment requirement of the Due Process Clause and the Commerce Clause, and because it discriminates against interstate commerce and results in a tax burden not fairly related to the services provided by Cleveland in violation of the Commerce Clause. Once again, the Tax Administrator's response rests on the false premise that professional athletes, including Hillenmeyer, are compensated only for playing in games.⁶

⁶ The Tax Administrator also attacks and attempts to rebut a number of arguments that were never made by Hillenmeyer. *See, e.g.*, Appellees' Br. 41–42 (arguing that there is a minimum connection between Hillenmeyer and Cleveland for purposes of the Due Process Clause, which Hillenmeyer never challenged), 46–47 (arguing that Cleveland is constitutionally permitted to include all income in the *preapportioned* tax base, which Hillenmeyer never challenged).

1. Hillenmeyer Has Demonstrated By “Clear And Cogent” Evidence That The Games-Played Method Allocates Income To Cleveland “Out Of All Appropriate Proportion”

Like other apportionment methods that the United States Supreme Court has warned are “particularly problematic,” the games-played method “focus[es] on only a small part of the spectrum of activities” by which an athlete’s income is generated – namely, games. *See Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 182, 103 S.Ct. 2933, 77 L.Ed.2d 326 (1977). The Tax Administrator does not dispute that, by applying the games-played method to Hillenmeyer, Cleveland allocated to itself, on average, approximately 400% of the income that would have been allocated to Cleveland under the duty days method. Nor does it dispute that such a discrepancy far exceeds percentages that the United States Supreme Court has stricken down as unconstitutional, even in the corporate context where states are afforded greater leeway. *See, e.g., Hans Rees’ Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 51 S.Ct. 385, 75 L.Ed. 879 (1931) (discrepancy of approximately 250% was evidence that North Carolina was attributing to itself “as percentage of income out of all appropriate proportion to the business transacted by the [taxpayer] in that state”); *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 Tax Administrator’s response to Hillenmeyer’s fair apportionment argument is to assert that Hillenmeyer failed to establish unfair apportionment by “clear and cogent evidence.” Appellees’ Br. 39 (quoting *Moorman Mfg. Co. v. G.D. Blair*, 437 U.S. 267, 274, 98 S.Ct. 2340, 57 L.Ed.2d 197 (1979)); *see also* Appellees’ Br. 40 (arguing that “[n]othing in the record shows that Taxpayer was grossly overtaxed by Cleveland” “especially if one accepts the premise that players are paid for the games”). That assertion is belied by the record evidence.

Hillenmeyer established by “clear and cogent evidence” presented to the Board of Review that he was compensated for all of the services he provided to the Chicago Bears, and

not only for playing in games. The evidence introduced by Hillenmeyer included his contract, which required him to participate “fully in Club’s official mandatory mini-camp(s), official preseason training camp, all Club meetings and practice sessions,” and “reasonable activities to promote the Club and the League.” (Supp. 55.). The contract also provided that Hillenmeyer was compensated “[f]or performance of [his] services and all other promises of Player.” (Supp. 55–56.) Hillenmeyer also submitted evidence that he and other players receive compensation in the form of bonuses unrelated to playing in games, including a \$4.5 million roster bonus that Hillenmeyer received in 2006. (Supp. 11, Tr. 78; Supp. 64.) At the hearing before the Board of Review, Thomas DePaso, Associate General Counsel of the NFL Players Association, testified extensively regarding the services that NFL players, including Hillenmeyer, are required to perform and for which they are compensated. (Supp. 5–7, Tr. 38–40; Supp. 17–19, Tr. 95–97). Finally, Hillenmeyer presented an affidavit from his employer, the Chicago Bears, unequivocally stating that “[t]he compensation Hillenmeyer receives from the Bears is paid for all of these services [i.e., the services required by Hillenmeyer’s contract] and not only for games played.” (Supp. 69.) This “clear and cogent” evidence that Hillenmeyer was compensated for numerous services unrelated to playing in games – coupled with the undisputed facts that (i) the games-played method treats Hillenmeyer as if he were compensated only for playing in games and (ii) the games-played method allocated to Cleveland 400% of the income that would allocable under the duty days method – sufficiently established that Cleveland’s application of the games-played method 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.

As Hillenmeyer explained in his opening brief, *see* Appellant’s Br. 27–28, Cleveland’s use of the games-played method further violates the fair apportionment requirement of the Due Process Clause and the Commerce Clause because it creates a real risk of 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) (explaining that “the threat of real multiple taxation (though not by literally identical statutes) may indicate a State’s impermissible overreaching”); *Goldberg v. Sweet*, 488 U.S. 252, 109 S. Ct. 582, 102 L.Ed.2d 607 (1989) (considering “risk of multiple taxation” from non-identical taxes as part of external consistency analysis), and because it does not “actually reflect a reasonable sense of how income is generated,” *Container Corp.*, 463 U.S. at 169. The Tax Administrator offers no substantive response to these arguments in its brief.⁷

In sum, because the games-played method is premised on the false assumption that professional athletes, including Hillenmeyer, are paid only for playing in games, it unfairly apportions income to Cleveland in violation of the Due Process Clause and the Commerce Clause.

2. The games-played method discriminates against interstate commerce

Although the Tax Administrator confuses the two, the prohibition against local taxes that discriminate against interstate commerce is a distinct requirement under the Commerce Clause, in addition to the requirement that local taxes be fairly apportioned. *See MeadWestvaco Corp. v. Ill. Dep’t of Revenue*, 533 U.S. 16, 24, 128 S.Ct. 1498, 170 L.Ed.2d 404 (2008) (“The Commerce Clause forbids the States to levy taxes that discriminate against interstate commerce *or* that

⁷ The Tax Administrator’s only response to Hillenmeyer’s argument regarding the risk of multiple taxation is to assert that “[t]here is no merit to this argument” and to then launch into a discussion of the fourth prong of the *Complete Auto* test, which considers the distinct question of whether games-played results in a tax burden that is not fairly related to the services provided by Cleveland. *See* Appellees’ Br. 44.

burden it by subjecting activities to multiple or unfairly apportioned taxation.” (emphasis added)); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) (describing the four distinct conditions that a local tax must satisfy to be valid under the Commerce Clause). Taxes that discriminate against interstate commerce on their face, or “in practical effect,” violate the Commerce Clause. *Am. Trucking Ass’ns, Inc. v. Scheiner*, 483 U.S. 266, 286, 107 S.Ct. 2829, 97 L.Ed.2d 533 (1992). Contrary to the Tax Administrator’s argument, once it is determined that a tax discriminates against interstate commerce, whether on its face or in its effects, no further balancing inquiry is necessary under *Pike v. Bruce Church*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), or any other test. *See, e.g., Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986) (“When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interest over out-of-state interests, we have generally struck down the statute without further inquiry.”).⁸

Here, Hillenmeyer demonstrated that the games-played method discriminates against out-of-state interests by subjecting players of visiting teams to a real risk of multiple taxation that players of Cleveland Clubs can avoid. *See* Appellant’s Br. 32–33. Moreover, Cleveland’s taxation of professional athletes is facially discriminatory against out-of-state interests because Cleveland *does not* apply the games-played method to employees of the Cleveland Browns. As noted in Hillenmeyer’s opening brief, Cleveland has entered into an agreement with the City of Berea – where the Browns practice – that entitles Cleveland to tax only 50% of the base pay of Browns players and entitles Berea to tax players’ remaining income. *See* Appellants’ Br. 33 n.6 (quoting media coverage of the agreement). Notably, the Tax Administrator’s brief completely

⁸ The Tax Administrator’s authority regarding the purported fact-intensive inquiry under *Pike* is therefore irrelevant. *See* Appellees’ Br. 36.

ignores Cleveland's arrangement with Berea, and it has never explained how that agreement can be reconciled with its position that players are not compensated for practice. In sum, because Cleveland's taxation of professional athletes discriminates against interstate commerce on its face and in its effects, Cleveland's use of the games-played method violates the Commerce Clause.

3. The 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 taxing jurisdiction, 430 U.S. at 279, meaning that "the *measure* of the tax must be reasonably related to the extent of the [taxpayer's] contact" with the taxing jurisdiction. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981). The Tax Administrator's argument that "[n]o commerce clause violation has been demonstrated" under this prong again depends entirely on the false assumption that players are compensated only for playing in games. *See* Appellees' Br. 45 (arguing that "Cleveland's tax is in proportion to the income producing activities conducted in the City"). In fact, during the relevant tax years, Hillenmeyer never spent more than 1.27% of his working days in Cleveland. *See* Appellant's Br. 9-10. Yet in each of those years Cleveland imposed its income tax on between 4.76% and 5% of Hillenmeyer's income. *Id.* Accordingly "the *measure* of the tax" – the games-played method – is not "reasonably related to the extent of" Hillenmeyer's contact with Cleveland. *See Commonwealth Edison Co.*, 453 U.S. at 626.

C. The Tax Administrator Fails To Offer A Legitimate Government Interest Necessary To Sustain R.C. 718.011's Singling Out Of Professional Athletes

The Revised Code's "occasional entrant" rule prohibits municipalities from taxing 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 singled out for

exclusion from this benefit. *Id.* To withstand scrutiny under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and under Section 2, Article I of the Ohio Constitution, such a classification among taxpayers must “rationally further a legitimate state interest.” *MCI Telecomms. Corp. v. Limbach*, 68 Ohio St.3d 195, 199, 625 N.E.2d 597 (1994); *see also Allegheny Pittsburgh Coal Co. v. County Comm’n of Webster County*, 488 U.S. 336, 344, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989); *Youngstown Sheet & Tube Co. v. City of Youngstown*, 91 Ohio App. 431, 435, 108 N.E.2d 571 (1951). No legitimate state interest has been demonstrated here.

The Tax Administrator does not appear to dispute that classifying professional athletes differently than other nonresidents for tax purposes, and subjecting them to less favorable tax treatment, must further a legitimate government interest. *See* Appellees’ Br. 48. Any suggestion by the Tax Administrator that equal protection is satisfied because all members of the class designated by the statute – professional athletes and entertainers – are treated the same is rebutted by the United States Supreme Court decision in *Williams v. Vermont*, 472 U.S. 14, 27, 105 S.Ct. 2465, 86 L.Ed.2d 11 (1985):

Yet the fact that all those not benefited by the challenged exemption are treated equally has no bearing on the legitimacy of that classification in the first place. A State cannot deflect an equal protection challenge by observing that, in light of the statutory classification, all those within the burdened class are similarly situated. The classification must reflect preexisting differences; it cannot create new ones that are supported by only their own bootstraps.

The only government interest that the Tax Administrator identifies is “*raising revenue and preserving financial soundness.*” Appellees’ Br. 48 (emphasis in original). Although raising revenue may be a legitimate interest that justifies taxing occasional entrants, the Tax Administrator fails to explain how that interest is furthered by taxing only one category of occasional entrants (athletes and entertainers) and not others. In other words, it is the

classification among occasional entrants that must further some legitimate government interest. See *MCI Telecomms.*, 68 Ohio St.3d at 199 (explaining that the Equal Protection Clause requires that “the *classification* rationally further a legitimate state interest” (emphasis added)). That classification does not further the legitimate interest of raising revenue because more revenue would be raised if municipalities were permitted to also tax doctors, lawyers, and business executives who perform work in the municipality on a few days during the year. The Tax Administrator advances no legitimate interest that is served by permitting the taxation of professional athletes and entertainers, but not these other highly compensated professionals, for work performed in an Ohio municipality on twelve or fewer days during the tax year. To the contrary, the singling out of professional athletes and entertainers suggests that the legislature has targeted a group of taxpayers whose financial circumstances are unlikely to earn them sympathy from the legislature’s electorate, and who are most likely nonresidents of the State of Ohio and not in a position to participate in the public debate. See, e.g., Barry Petchesky, *Tennessee’s Pro Athlete Tax: You’ll Find No Sympathy Here*, Deadspin.com (Mar. 28, 2010), available at <http://deadspin.com/5503841/tennessees-pro-athlete-tax-youll-find-no-sympathy-here> (accessed July 3, 2014) (agreeing that Tennessee’s “privilege tax” on professional athletes is “an arbitrary cash grab from a politically easy target”).

D. None Of Hillenmeyer’s Arguments Have Been Waived

In an effort to avoid the merits of Hillenmeyer’s constitutional challenges to Cleveland’s use of the games-played method, the Tax Administrator advances a host of waiver arguments, none of which has any merit.

The Tax Administrator first attempts to fault Hillenmeyer for failing to argue that Cleveland’s use of the games-played method, apart from violating Ohio law and the United States and Ohio Constitutions, is simply unreasonable. Appellees’ Br. 8–9. It is well-settled,

however, that “[m]unicipalities have the right to exercise all powers of local self-government and may adopt and enforce such local regulations,” including tax regulations, “that are not in conflict with the general law.” *Thompson v. City of Cincinnati*, 2 Ohio St.2d 292, 294, 208 N.E.2d 747 (1965) (citing Sections 3 and 7, Article XVIII, Ohio Constitution). An argument that the games-played method is consistent with Ohio law and constitutional, but simply bad as a matter of policy, would therefore have been futile. Moreover, the Tax Administrator cites no authority whatsoever supporting its novel assertion that Hillenmeyer’s decision not to make such a futile argument somehow forecloses this Court from reaching the constitutional challenges Hillenmeyer does assert. *See* Appellees’ Br. 9. Hillenmeyer has consistently argued at every stage that the games-played method is contrary to Ohio law, this Court’s precedent, the Cleveland Codified Ordinances, and the United States and Ohio Constitutions. None of those arguments have been waived simply because Hillenmeyer chose not to argue additionally that the games-played method is separately “unreasonable.”

The Tax Administrator next claims that Hillenmeyer’s constitutional arguments have somehow been waived because he chose to appeal the Board of Review’s decision to the Ohio Board of Tax Appeals rather than the courts of common pleas. Appellees’ Br. 9–10. Again, the Tax Administrator cites no authority for this proposition, and again none supports its novel argument. The Revised Code gives taxpayers a choice of pursuing an appeal from a decision of a municipal board of review to the appropriate court of common pleas or to the Ohio Board of Tax Appeals. R.C. 5717.011 (“Appeals from a municipal board of appeal created under section 718.011 of the Revised Code may be taken by the taxpayer or the tax administrator to the board of tax appeals or may be taken by the taxpayer or the tax administrator to a court of common pleas as otherwise provided by law.”). Nothing requires appeals involving constitutional

questions to be heard exclusively by the courts of common pleas. To the contrary, this Court has recognized that the Board of Tax Appeals serves an important role in cases presenting a constitutional challenge:

When a statute is challenged on the basis that it is unconstitutional in its application, this court needs a record, and the proponent of the constitutionality of the statute needs notice and an opportunity to offer testimony supporting his or her view.

To accommodate this court's need for extrinsic facts and to provide a forum where such evidence may be received and all parties are apprised of the undertaking, it is reasonable that the BTA be that forum.

Cleveland Gear Co. v. Limbach, 35 Ohio St.3d 229, 232, 520 N.E.2d 188 (1988); *MCI Telecomms. Corp.*, 68 Ohio St.3d at 197–198.

Finally, the Tax Administrator argues that Hillenmeyer's constitutional arguments under the Commerce Clause have been waived, apparently because Hillenmeyer's Notice of Appeal referenced the "Commerce Clause" of the United States Constitution whereas his opening brief occasionally uses the phrase "dormant Commerce Clause" in discussing the constitutional infirmity of the games-played method. Appellees' Br. 34 (arguing that "[t]axpayer has *never* alleged or even mentioned the dormant commerce clause"). This argument has no merit, and reflects the sort of "hypertechnical reading" of a Hillenmeyer's Notice of Appeal that this Court has consistently rejected. See *MCI Telecomms. Corp.*, 68 Ohio St.3d at 197 ("In resolving questions regarding the effectiveness of a notice of appeal, we are not disposed to deny review by a hypertechnical reading of the notice." (quoting *Buckeye Int'l, Inc. v. Limbach*, 64 Ohio St.3d 264, 268, 595 N.E.2d 347 (1992))).

Hillenmeyer's Notice of Appeal plainly raised the argument Cleveland's application of the games-played method to Hillenmeyer was "in violation of the Commerce Clause and the Due Process Clause of the United States Constitution." (Appx. 3.) Indeed, Hillenmeyer consistently

raised this claim at every opportunity, beginning with his application for a refund, which argued: “The City’s application of its apportionment method for taxing income of nonresident professional athletes to Mr. Hillenmeyer . . . exposes nonresident professional athletes to the risk of multiple taxation in violation of the Commerce Clause, violates the fair apportionment requirement of the Commerce Clause, [and] discriminates against nonresidents in violation of the Commerce Clause” (Supp. 119–120.)

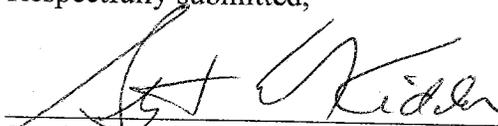
The Tax Administrator’s complaint appears to be that Hillenmeyer did not use the word “dormant” in connection with these references to the Commerce Clause. As the Tax Administrator surely knows, however, the Constitution contains no separate “dormant” Commerce Clause distinct from Congress’s power to “regulate Commerce . . . among the several States” found in Article I, Section 8, Clause 3 of the Constitution. Instead, as the United States Supreme Court noted in *Quill Corp. v. North Dakota*, 504 U.S. 298, 309, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), “the Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well.” It is this negative sweep that is referred to as the dormant aspect of the Commerce Clause or, in shortened form, as the dormant Commerce Clause. Hillenmeyer’s Commerce Clause arguments in his Notice of Appeal and briefing below clearly address the dormant aspect of the Commerce Clause. Indeed, no other Commerce Clause challenge would make sense in the context of local taxation – the Constitution’s affirmative grant of power to Congress under the Commerce Clause was never at issue. In sum, the Court should reject the Tax Administrator’s “hypertechnical reading” of the Notice of Appeal, and it should reach the merits of all of Hillenmeyer’s constitutional arguments (unless the Court concludes that the games-played method is contrary to Ohio law, in which case it need not address its constitutionality).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in his opening brief, 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: July 14, 2014

Respectfully submitted,



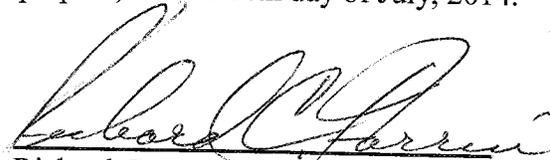
Stephen W. Kidder
(Counsel of Record)
PHV No. 3032-2014
HEMENWAY & BARNES LLP
60 State Street
Boston, MA 02109
Telephone: 617.227.7940
Facsimile: 617.227.0781
skidder@hembar.com

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 July, 2014.


Richard C. Farrin (0022850)