

ORIGINAL

IN THE SUPREME COURT OF OHIO

JEFFREY B. SATURDAY)	Case No: 2014-0292
)	
and)	
)	On Appeal from the
KAREN R. SATURDAY)	Ohio Board of Tax Appeals
)	
Plaintiff-Appellant,)	
)	Ohio Board of Tax Appeals
vs.)	Case No. 2011-4027
)	
CITY OF CLEVELAND BOARD)	
OF REVIEW,)	
)	
and)	
)	
NASSIM M. LYNCH)	
)	
Defendants-Appellees.)	

MERIT BRIEF OF APPELLEES,
CITY OF CLEVELAND BOARD OF REVIEW AND NASSIM M. LYNCH

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STATEMENT OF THE FACTS

This is the second tax refund case brought by a professional athlete that is pending before this Court involving the city of Cleveland and its games-played apportionment method.¹ At all relevant times, Jeffrey B. Saturday (“Taxpayer” or “Appellant”) was a member of the Indianapolis Colts team, of the National Football League (“NFL”). The income at issue was attributable to a game the Colts played in Cleveland against the NFL’s Cleveland Browns in 2008.

Taxpayer filed his 2008 city tax return for Cleveland tax purposes on October 15, 2009 with the Central Collection Agency (“Agency”), calculating tax due based on Cleveland’s games-played apportionment method. Tr. Exh. 1.

Later, on December 18, 2009, Taxpayer filed a *second* request for refund. Tr. Exh. 3. Taxpayer’s second request for refund included an attachment where he claimed that no tax was due at all since he “was injured at the time [of the Cleveland game] [and] did not travel with the team to Cleveland[.]” *Id.* at Attachment. (Supp. at 1.) Taxpayer also claimed that Cleveland’s games-played apportionment method “[was] illegal, erroneous, and unconstitutional” and that the City must use a “‘duty days’ formula used by all other cities and states.” *Id.* Taxpayer further argued that “excluding professional athletes from the prohibition imposed by R.C. 718.011 against municipal corporations from taxing the compensation of nonresidents for personal services performed in the municipal corporation on twelve or fewer days violate[d] the Equal Protection Clause[.]” *Id.* (Supp. at 1; 2.)

¹ Also pending is *Hunter T. Hillenmeyer v. City of Cleveland Board of Review and Nassim M. Lynch*, Case No. 2014-0235.

After his arguments were rejected by the Agency, Taxpayer requested a Ruling from the Agency's Tax Administrator, Nassim M. Lynch, challenging the denial of his second request for refund. Tr. Exh. 6.

The Tax Administrator issued a Ruling on January 25, 2011, addressing the various issues raised by Taxpayer, concluding that city tax was properly withheld and remitted in accordance with the City's games-played apportionment method. Tr. Exh. 7.

Taxpayer appealed the Tax Administrator's Ruling to the Cleveland Board of Review ("Cleveland Board"). On September 20, 2011, the Cleveland Board issued its decision affirming the Tax Administrator's Ruling in all respects finding that Taxpayer "supplie[d] no information to refute the Tax Administrator's contention that [he]" "received compensation on account of the game played in Cleveland" and that since "Taxpayer[] [] failed to submit any evidence showing the unreasonableness of the games-played method[,] he "failed to carry [his] burden of proof" that the method "[s]hould [b]e [o]verturned." Cleveland Board Decision at 2; 3; 4. (Appx. at 2; 3; 4.) The Cleveland Board also found that under city law, the game check Taxpayer received for the Cleveland game was subject to city tax notwithstanding that Taxpayer did not play in the game or travel to Cleveland for said the game. *Id.* at 4; 5. (Appx. at 4; 5.)

Taxpayer appealed to the Board of Tax Appeals ("BTA") instead of the common pleas court.² On January 28, 2014, the BTA issued its decision affirming the Cleveland Board. (Appx. at 7-11.) Taxpayer filed his notice of appeal to this Court on February 25, 2014.

² A party may appeal the decision of a municipal board of appeal to either the BTA or the common pleas court. See Ohio Rev. Code ("R.C.") 718.11; 5717.011(B). While the BTA is an optional forum such is a relatively recent option. See Am.Sub.H.B. 95, 150 Ohio Laws 629, effective June 26, 2003 for tax years 2004 and thereafter. Prior to this legislation, such appeals could only be taken to the common pleas court.

ARGUMENT

Proposition of Law No. 1:

A Games-Played Apportionment Method Is Not Prohibited By R.C. 718.01(H)(10) And R.C. 718.03, This Court's Decision In *Hume v. Limbach* Or Cleveland's Own Income Tax Ordinance.

The BTA found that Cleveland's games-played apportion method "d[id] not operate in contravention of any state statute or Ohio case precedent and '[wa]s a valid exercise of the city's municipal power to tax.'" BTA Decision, slip. op. at 5 (footnote and citation omitted.) (Appx. at 11.) Taxpayer's claim that the BTA erred in that regard is wholly without merit. See Brief of Appellant at 12.

A. Revised Code 718.01(H)(10) and 718.03.

With respect to statutory authority, Taxpayer relies on R.C. 718.01(H)(10) and R.C. 718.03. *Id.* at 2; 29. R.C. 718.01(H)(10) provides that a municipal corporation shall not tax "employee compensation that is not 'qualifying wages' as defined in Section 718.03 of the Revised Code." Under R.C. 718.03, "qualifying wages" simply "means wages, as defined in Section 3121(a) of the Internal Revenue Code ("IRC"), without regard to any wage limitations, adjusted as [provided in R.C. 718.03(A)(2)(a)-(d)]." R.C. 718.03(A)(2).

"Qualifying wages" is the uniform wage base for municipal income tax purposes in Ohio. This means that for city tax purposes, taxable wages are the wages subject to the Medicare tax on wages imposed by the Federal Insurance Contribution Act ("FICA").³ These are the wages

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

reported in Box 5 of the federal Form W-2. As Taxpayer notes on page 17 of his brief, under FICA, “the term ‘wages’ means all remuneration for employment.” 26 USC 3121(a). Here, Taxpayer is not claiming that Cleveland is taxing wages which are not FICA wages or otherwise excepted from tax under Ohio law (or that such wages were not reported in Box 5 of his federal Form W-2). Therefore, any argument that Cleveland is imposing an income tax on something that is not “qualifying wages” is disingenuous, to say the very least.

Moreover, Taxpayer’s claim that “[t]he [g]ames-[p]layed [m]ethod [i]s [c]ontrary [t]o [t]he Ohio Revised Code” is almost comical. See Brief of Appellants at 30. Taxpayer’s argument in this regard can be paraphrased as follows:

Since qualifying wages for purposes of the Ohio Revised Code means “wages” as that term is defined in the IRC and since “wages” under the IRC includes “all remuneration for employment” and further since under the IRC “employment” means “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 Cleveland is required to consider all duty days in apportioning a player’s salary.

Id. at 2; 17; 30-31. Ohio law simply adopted the FICA wage base as the wage base to be used by Ohio municipalities for municipal income tax purposes. How does Taxpayer’s circular reasoning based on how the Internal Revenue Code defines “employment” show that the games-played apportionment method is contrary to Ohio law? It does not.

The fact that the BTA felt no need to address Taxpayer’s specific allegations is most telling. The BTA recognized that the issue in this case is not about whether the income is “qualifying wages” (it clearly is) or how the Internal Revenue Code defines “employment” (which is really irrelevant), but rather how “qualifying wages” are apportioned to Cleveland

when the nonresident is a professional athlete who earns income as a result of a game in Cleveland.

B. This Court's Decision In *Hume v. Limbach*.

The BTA also held that Cleveland's games-played method "d[id] not operate in contravention of any [] Ohio case precedent[.] BTA Decision, slip op 5. (Appx. at 11.) In that regard, the BTA found its decision in *Hillenmeyer* to be controlling. BTA Decision, slip op. at 3. (Appx. at 9.) In *Hillenmeyer*, the BTA found that *Hume v. Limbach*, 61 Ohio St. 3d 387, 575 N.E.2d 150 (1991), cited by Taxpayer, to be of "little utility," explaining that *Hume*

concern[ed] 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 [Supreme] [C]ourt did not, however, indicate the method by which such allocation should be made.

Hillenmeyer v. City of Cleveland Bd. of Review, No. 2009-3688, 2014 WL 351128 (Jan. 14, 2014), slip op. at 6, n.9. (Supp. at 8.) *Hume* clearly did not deal with the propriety of a games-played apportionment method and the BTA rightly concluded that nothing in that case requires an Ohio municipality to use a particular apportionment method.

Taxpayer argues that "[w]ith respect to state income taxes, Ohio employs the duty day method of allocating a professional athlete's income." Brief of Appellant at 3. What does that prove? Further, it is clear that the state of Ohio does not use either allocation or apportionment in determining what income is taxable. Instead, the state utilizes a nonresident tax credit where the nonresident taxpayer reports all income (like residents) and the amount attributable to work performed outside Ohio is credited against all income. R.C. 5747.05(A).

The specific issue in *Hume* was how to calculate the state's nonresident tax credit and this Court ordered the BTA "to redetermine the disputed credit." 61 Ohio St.3d at 389, 575 N.E.2d at 152. The state's nonresident tax credit is available to all nonresidents earning or receiving compensation in Ohio not just nonresident professional athletes.

Hume clearly does not prohibit an Ohio municipality from adopting a games-played apportionment method nor does it suggest that other apportionment methods not based on a time or day factor cannot be used. The case simply does not assist Taxpayer as he claims. Further, since *Hume* deals with the state income tax which operates quite differently than the municipal income tax, Taxpayer is comparing apples to oranges.

C. Cleveland's Own Income Tax Ordinance.

Taxpayer's argument that "Cleveland's use of the games-played method is contrary to the Cleveland Codified Ordinances," see Brief of Appellant at 32-33, suffers from similar deficiencies as was discussed above with respect to R.C. 718.01(H)(10) and 718.03. As will be demonstrated later in this brief, the language of the Cleveland Income Tax Ordinance is very broad. The games-played apportionment method is not "contrary to" the Ordinance as Taxpayer claims through his strained reasoning and ignorance of that fact. Moreover, the Agency's Rules and Regulations have specifically been incorporated into the Ordinance. See C.O. 191.0318 ("'[t]axable income' means all qualifying wages, net profits and all other income from whatever source derived set forth in Section 191.0501 [of the Ordinance], and the Rules and Regulations as taxable." Tr. Exh. 12 at 6; 7 (emphasis added). (Appx. at 13; 14.) An ordinance can certainly incorporate rules and regulations and the like. *Buena v. Columbus*, 170 Ohio St. 64, 162 N.E.2d 467 paragraph one of the syllabus.

Proposition of Law No. 2:

This Court Should Not Be Forced To Make Constitutional Rulings Where A Party Waives Consideration Of NonConstitutional Error And Has Chosen The Wrong Forum For The Action.

One of the errors cited by Taxpayer in his Notice of Appeal to this Court is that “the BTA acted unreasonably and unlawfully by refusing to decide whether Cleveland’s method of allocating Appellants’ income on the basis of games played, rather than on the basis of total days worked, constitutes a fair or reasonable method of apportionment.” See Notice of Appeal at ¶16. There is no question that the BTA stated that it “ha[d] no jurisdiction to determine the constitutionality or *reasonableness* of [Cleveland’s] ordinance, including its application to athletes absent from games due to injury or illness” and made no finding in that regard. BTA Decision, slip op. at 5 (emphasis added). (Appx. at 11.) Although Taxpayer claimed that as error in his notice of appeal, he has clearly waived the error where he failed to assert such in his initial merit brief. See *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 894 N.E.2d 686, 2008-Ohio-4788, ¶26 (court need not address claim that was raised in complaint but was not specifically argued in merit brief). See also *Sheehan v. New Hampshire Dept. of Resources and Economic Development*, 164 N.H. 365, 370, 55 A.3d 1031, 1034 (2012) (“any issue raised in the notice of appeal but not briefed is deemed waived”); accord *Campbell v. California Dept. of Corrections and Rehabilitation*, 463 Fed.Appx. 634, 636 (9th Cir. 2011); *United States v. Pelullo*, 399 F.3d 197, 201 n.2 (3rd Cir. 2005); *Clark v. Pompanio*, 397 N.J. Super. 630, 634, 938 A.2d 972, 974 (App. Div. 2008). And Taxpayer certainly cannot now address the error by way of reply brief. See *State ex rel. Ohio Liberty Council v. Brunner*, 125 Ohio St.3d 315, 325, 928 N.E.2d 410, 420, 2010-Ohio-1845, ¶161 (court need not address issue only raised in reply brief).

It is a basic principle of appellate review that this Court should avoid deciding questions of constitutional law if a case can be decided on nonconstitutional grounds. *Kinsey v. Bd. of Trustees of Police & Firemen's Disability & Pension Fund of Ohio*, 49 Ohio St.3d 224, 225, 551 N.E.2d 989, 991 (1990). An important question for the Court here is whether the constitutional issues need be reached at all? One issue for the Court is whether it should decide constitutional issues where a party waives consideration of nonconstitutional error which may have decided the case? In other words, should a party benefit from waiver under these circumstances? Another issue is whether a party who has a statutory right to select the forum—the BTA or the common pleas court—shoulders any responsibility for choosing the improper forum to hear the action? Clearly, “[a]n administrative agency given the authority to hear such appeals may only act within the jurisdiction delineated by statute or code language.” *Cordial v. Ohio Sept. of Rehab. & Corr.*, No. 05AP-473, 2006-Ohio-2553 (10th Dist.) (citing *Waltco Truck Equip. Co. v. Tallmadge Bd. of Zoning Appeals*, 40 Ohio St.3d 41, 43, 531 N.E.2d 685 (1988); *Penn Central Transp. Co. v. Pub. Util. Comm.*, 35 Ohio St.2d 97, 298 N.E.2d 587 (1973)).

While the BTA may not have jurisdiction to determine whether Cleveland’s games-played apportionment method is reasonable, a common pleas is clearly “a court of general equity jurisdiction.” See *State ex rel. Black v. White*, 132 Ohio St. 58, 5 N.E.2d 163, *paragraph five of the syllabus* (1936); *Nahas v. George*, 153 Ohio St. 574, 580, 93 N.E.2d 5, 7 (1950). Between the BTA and the common pleas court, the common pleas court was clearly the appropriate forum for the issues Taxpayer sought to raise in this appeal. For reasons only Taxpayer can explain, he chose to file his appeal in the BTA.

Since all the issues (constitutional and nonconstitutional) in this case could have been decided by the common pleas court, wouldn't it have been desirable to have the issues passed-upon by the lower courts? This Court should not allow Taxpayer to force it to make constitutional rulings that very well may have been avoided altogether or that could have been resolved by lower courts. *Amer. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 163, 161 (1989) (cautioning that "courts should be extremely careful not to issue unnecessary constitutional rulings[]").

In this case, Taxpayer has clearly waived any nonconstitutional error that the games-played apportionment method is unreasonable by failing to argue such in his initial brief. This includes any contention that its "application to athletes absent from games due to injury or illness" is unreasonable. This Court should find that in waiving any nonconstitutional error, Taxpayer has also waived any constitutional claims in that regard as well.

Proposition of Law No. 3:

Municipalities Can Choose An Apportionment Method And It Need Not Be Based On Time Or Days But Can Be Based On Any Measurement So Long As That Measurement Is Reasonable.

As noted, the BTA held that it could not render a determination of whether Cleveland's games-played apportionment method for nonresident athletes is "reasonable." Decision, slip. op. at 5. (Appx. at 11.) The Cleveland Board, however, found that "a tax provision will be upheld so long as there is a reasonable basis for the provision" and since Taxpayer "supplie[d] no information to refute the Tax Administrator's contention that" "the Taxpayer received compensation on account of the game played in Cleveland[,] "Taxpayer[] [] failed to carry [his] burden of proof with respect to the reasonableness of the allocation of [an] athlete's income on a games-played basis[.]" Cleveland Board Decision at 3; 4. (Appx. at 3; 4.)

Although Taxpayer clearly appears to have knowingly and intelligently waived the issue, it nevertheless seems clear that he would like the Court to believe Cleveland's games-played apportionment method is not fair or reasonable. See Brief of Appellant at 1. Assuming the Court decides to address this issue (although Appellees believe that it should not), it seems clear that a games-played method is fair and reasonable.

Initially, it would be noted that traditionally the "duty-days" method and the "games-played" method have been the two most commonly used methods to apportion a nonresident professional athlete's income for tax purposes. Kara Fratto, *The Taxation of Professional U.S. Athletes in Both The United States and Canada*, 14 Sports Law J. 29, 42 (2007); John DiMascio, *The "Jock Tax" Fair Play or Unsportsmanlike Conduct*, 68 U. Pitt. L. Rev. 953, 956 (2007); Jeffrey Adams, *Why Come To Training Camp Out Of Shape When You Can Work Out In the Off-Season And Lower Your Taxes: The Taxation of Professional Athletes*, 10 Ind. Int'l & Comp. L. Rev. 79, 99 (1991). Under the "duty day" method, each day deemed by the particular taxing jurisdiction to be a 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. 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.

The major flaw in Taxpayer's argument, clearly, is that an apportionment method must be based on time or days. Under the law, no single apportionment method is required and

municipalities have wide discretion in determining what method to use. *Allied-Signal, Inc. v. Director, Div of Taxation*, 504 U.S. 768, 769 (1992). An apportionment method can be based on any measurement so long as the measurement is reasonable.

It would be noted that Cleveland (like other municipalities) utilizes apportionment methods dealing with other classes of nonresidents that are not based on time or days. If a nonresident salesperson is paid on a commission basis and such commissions directly depend on the volume of business generated, Cleveland determines what amount is attributable to city activities by multiplying the entire compensation by a fraction, the numerator of which is the volume of business transacted in Cleveland, the denominator of which is the volume of business transacted everywhere. *See* Tr. Exh. 13 at 26 (Article 8:02(E)(2)). (Appx. at 19.) If a nonresident real estate agent is not an employee and active in Cleveland, city tax is imposed on any income (commission or otherwise) earned as a result of a *sale* in Cleveland made by that agent. *See* Tr. Exh. 13 at 26 (Article 8:02(E)(3)). (Appx. at 19.) In reference to nonresident entertainers, the full amount received by the nonresident for a show or concert performed in the City is subject to tax no matter how much they may have practiced for the performance outside of Cleveland. *See* Tr. Exh. 13 at 27-28 (Article 8:02(E)(7)). (Appx. at 20-21.)

Cleveland has decided to tax professional athletes by using the games-played method. *See* Tr. Exh. 13 at 27 (Article 8:02(E)(6)). (Appx. at 20.) As a home-rule charter municipality, Cleveland can certainly exercise this prerogative. Section 3, Article XVIII, Ohio Constitution. Said method is premised on the maxim that “players are paid to play.” Unless this premise is a fiction, the Court must recognize Cleveland’s right to select the games-played apportionment method.

Proposition of Law No. 4:

No Court Has Ever Held That A Duty-Days Apportionment Formula Must Be Used To Apportion Income Of A Professional Athlete Or That A Games-Played Method Cannot Be Used.

The Court should not be persuaded by Taxpayer's claim that by reversing the BTA it "would avoid Ohio becoming the only jurisdiction to judicially endorse allocating professional athlete's income on the basis of games played." Brief of Appellant at 35. Affirming the BTA's Decision would not be a "judicial endorsement" but rather showing the proper respect for the separation of powers and "home rule" provisions of the Ohio Constitution.

Moreover, Taxpayer's argument that "[o]utside 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[]" is a blatant misstatement. *See id.* at 33. The cases he cites clearly do not stand for such proposition, as explained below:

- *Stemkowski v. Commissioner*, 690 F.2d 40 (2nd Cir. 1982) - This case involved a professional hockey player for the New York Rangers who was a nonresident alien. The player was a Canadian resident and played games in both Canada and the U.S. The issue in the case was how to tax for federal income tax purposes compensation of a nonresident alien performing service both inside and outside the U.S. As the federal appeals court clearly explained in that case "[w]hen services are performed partly within and partly outside the U.S., but compensation is not separately allocated, Treas. Reg. [§]1.861-4(b) (1975) allocates income to United States sources on a time basis[.]" *Id.* at 45 (emphasis added). A specific IRS Treasury Regulation *controlled* in that case just like Cleveland's games-played regulation controls in this case.
- *Appeal of Carroll*, No. 85-A-684-SW, 1987 WL 50144 (Cal.St.Bd.Eq., Apr. 7, 1987) - This case involved a professional basketball player, who ironically wanted the games-played and not the duty-days method applied to his situation. While the 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 that the franchise tax board had previously issued an audit rule adopting the concept of "duty days" as the basis for apportioning a nonresident professional athlete's income. *See id.* slip op. at *3, n.2 ("Audit Ruling 125.1 defines duty days for basketball players as including all days from the beginning of club training sessions through the last game in which the team competes"). Carroll only illustrates that a duty-days method does not always result in a lower percentage of income being apportioned.

- *Newman v. Franchise Tax Bd.*, 208 Cal.App.2d 972, 256 Cal.Rptr. 503 (1989) - This case did not involve a professional athlete but rather a professional actor, the late Paul Newman, a nonresident of California who 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 his 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% (30/54). Crucial to the court's reasoning was (i) that the board had adopted the duty-days allocation for professional athletes, *see id.* at 978, 256 Cal.Rptr. at 506 (referring to the same Audit Rule 125.1 discussed above), and (ii) that California law "place[d] nonresident actors in the same class as athletes." *Id.*
- *In re Bickett*, DTA No. 813160, 1996 WL 54179 (N.Y.Div.Tax.App., Feb. 1, 1996) - This case involved a professional football player for the Indianapolis Colts who calculated his New York tax liability using the duty-days method. After the Division of Taxation recalculated his tax liability using a games-played method, the taxpayer would appeal and win. The problem in the case was clear. The State of New York had a "working days" apportionment method that was "consistent" with the "duty days" concept. *See id.*, slip op. at 2. 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." *See id.* Moreover, the Division of Taxation sought to impose the games-played method as a "policy" when New York apparently "authorize[d] allocation only by 'resolution.'" *See id.*, slip op. at 3. The administrative decision in that case 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 certainly not true here.

Proposition of Law No. 5:

Ohio Law Excepts Professional Entertainers And Athletes From The “Occasional Entrant Rule” And Permits Municipalities To Tax Them Clearly Showing That Ohio Views The Two Similarly.

Ohio law allows municipalities to tax both nonresident professional entertainers and nonresident professional athletes in situations where other nonresidents cannot be taxed. Generally municipalities are prohibited from taxing compensation earned by nonresidents 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 718.011.⁴ The rule, however, does not apply to either professional entertainers or professional athletes. (Appx. at 22.)

The fact that state law exempts both professional athletes and professional entertainers from the occasional entrant rule shows that Ohio views the two similarly. The two are similar. Just like an entertainer travels to certain venues to perform so too do professional athletes. A games-played method is completely rational and reasonable when one understands that players in the NFL and other professional leagues are paid to play in games in various venues.

Proposition of Law No. 6:

A Games-Played Apportionment Method Is Not Unreasonable Where The Nature Of The Business Of The NFL Is Clearly Entertainment Based On The Games And The Players.

The nature of the business of the NFL is clearly entertainment based on the games and the players. This clearly supports the games-played apportionment method.

⁴ Revised Code 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[.]

A. The Business Of The NFL: *Entertainment*.

As one federal appeals court observed, “the National Football League[] is a highly successful entertainment product.” *United States Football League v. National Football League*, 842 F.2d 1335 (2nd Cir. 1988). That entertainment product is NFL football which the NFL and its 32 member clubs (including the Indianapolis Colts, Taxpayer’s former employer) collectively produce. The federal appellate court in *American Needle, Inc. v. NFL*, 538 F.3d 736, *rev’d other grounds* 130 S. Ct. 2201 (7th Cir. 2008), described how this product is produced as follows:

... [T]he product that the teams produce jointly—NFL football—requires extensive coordination and integration between the teams. After all, NFL football is produced only when two teams play a football *game*. Thus, although each team is a separate corporate entity or partnership unto itself, no team can produce a *game*—the product of NFL football—by itself, much less a full season of *games* or the Super Bowl. Likewise, the teams’ individual success is necessarily linked to the success of the league as a whole; to put it another way, it makes little difference if a team wins the Super Bowl if no one cares about the Super Bowl. (Emphasis added.)

Id. at 737. See also *Chicago Prof’l Sports Ltd. P’ship v. NBA*, 95 F.3d 593, 598-599 (7th Cir. 1996)

(A sports league “produces a single product; cooperation is essential (a league with one team would be like one hand clapping)”). It simply cannot legitimately be disputed that first and foremost, the NFL and other sports leagues are entertainment.

B. The Entertainment Product Is The Games.

As stated above, “NFL football is produced only when two teams play a football game.” 538 F.3d at 737. The entertainment product produced by the NFL is plainly the “games.” The NFL and teams make money from the games. The teams make money from gate receipts and concession sales at the games. The NFL and teams make money by selling (for lucrative sums)

television and other broadcast rights to the games. “All regular season NFL games are produced for network television [and] every NFL game is televised every week[.]” *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 754 F. Supp. 1336, 1343 (N.D. Ill., 1991). The games are so lucrative that the NFL now televise some of the games on its own cable television network.

C. Players Are Needed To Produce Games.

Just like “no team can produce a game—the product of NFL football—by itself,” (*American Needle*, 538 F.3d at 737), no football game can be produced without players. Consequently, there is a strong market for individuals who can play at the NFL level and fierce competition between teams for such individuals. Only the very best college football players are allowed to join the professional ranks so as to “assure the quality and attractiveness of [the] games.” *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1200 (D.C. Cir. 1978) (MacKinnon, J., concurring in part and dissenting in part). So important are the players that the NFL clubs have combined to create an annual draft for the selection of players. Tr. Exh. 9 at 46-50, Article XVI, “College Draft.” And prior to the draft, an important event is held each year in Indianapolis, Indiana known as the “NFL Scouting Combine” where college players audition and showcase their abilities to the teams. NFL Scouting Combine, <http://www.nfl.com/combine/workouts> (last accessed July 22, 2014).

Players are clearly needed for the games and are vital to the success of the NFL.

D. Players Receive Share of League Revenues.

Players share revenue with the NFL. See Tr. Exh. 9 at 82-144 , Article XXIV, “Guaranteed League-Wide Salary, Salary Cap, & Minimum Team Salary.” As one court recently observed “[b]roadcast contracts [alone] are an enormous source of shared revenue for the players and

the NFL.” *White v. NFL*, 766 F. Supp.2d 941, 951 (D. Minn., 2011). Under the collective bargaining agreement at issue in this case, players were provided with approximately 50% of all NFL revenues after deduction of approximately \$1 billion in expenses. *Brady v. NFL*, 2011 U.S. Dist. LEXIS 44523, at *19 (D. Minn., Apr. 25, 2011).

E. Players Paid For Games Not Practice.

While *Pro-Football, Inc. v. District of Columbia Dep’t of Employment Servs.*, is not a tax case, it clearly recognizes the fact that players are paid for the games. 588 A.2d 275 (D.C. 1991). 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 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. *Id.*

In a more recent workers compensation case, another court of appeals would agree with that rational, explaining its position as follows:

The purpose of a football player’s employment with a professional football team is to play in professional football games. It is not, as [the team] seemingly contends, to practice. Football practice is a means to an end—better performance in football games—it is not an end unto itself. Put another way, professional football organizations do not sign “skilled football players” so those players can lift weights and watch game film. The players are signed, and required to attend practice [], so they can perform well in games to achieve wins and earn revenue for the team. The nature of a football player’s employment, then, is defined by the games in which he participates, not the admittedly important, yet nonetheless ancillary practices he attends.

Pro-Football, Inc. v. McCants, 51 A.3d 586, 595-96 (Md. 2012).

Much like professional entertainers, professional athletes including professional football players are paid to perform before others; “practice is merely preparatory to the games.”

Professional athletes are clearly paid for the games; they are not paid to practice although practice might certainly assist to prepare them for the games.

Proposition of Law No. 7:

A Games-Played Apportionment Method Is Not Unreasonable Where Contractual Documents Governing The Taxpayer’s Employment Relationship Clearly Supports Such Method.

While Taxpayer attempted to rely on the contractual relationship between the NFL and its players as a reason to require use of a duty-days apportionment method, said contractual relationship clearly supports a games-played method. Not only is player compensation tied to the games so too is every single important right or benefit that a player may be entitled to receive. Even player discipline is based on the games.

A. The Player Contract, CBA And Player Pay.

All NFL players including Taxpayer must enter into a uniform standard NFL Player Contract, the form of which is incorporated in and governed by the Collective Bargaining Agreement (“CBA”) between the players’ union and the NFL. It would be noted that in addition to the Player Contract, the CBA has specific provisions dealing with player pay as well. The contractual arrangement between the NFL and its players clearly show that players are hired to play games and that player compensation is based on the games whether one is talking about a player’s annual salary, incentive pay provided for in the Player Contract, performance-based pay provided under the CBA or post-season pay.

1. Player Contract Shows Hired To Play Games.

Section 2 of the NFL Player Contract titled "EMPLOYMENT AND SERVICES" begins by noting that the player is being employed "as a skilled football player." Tr. Exh. 9 at 248 (emphasis added). (Supp. at 68.) Section 2 goes on to state that:

Player *will* report promptly for and participate fully in Club's official mandatory minicamp(s), official preseason training camp, all Club meetings and practice sessions, and all preseason, regular season and postseason football games scheduled for or by Club[.]

Id. This is the language Taxpayer relies on to claim that a duty days apportionment method must be used. This language, however, is merely a condition of employment and not a promise of the Contract.⁵ See *Pro-Football v. McCants*, 51 A.3d at 595-96. Section 2 ends by stating: "If invited, Player will practice for and play in any all-star game sponsored by the League. Player will not participate in any football game not sponsored by the League unless the game is first approved by the League." *Id.* This language too is merely a condition of employment although the prohibition against participating in non-League football games is most telling.

Section 3 of the NFL Player Contract provides, in pertinent part, that: "Player represents that he has *special, exceptional and unique knowledge, skill, ability, and experience as a football player[.]*" Tr. Exh. 9 at 248. (emphasis added). (Supp. at 68.) So Taxpayer was not only hired in the first instance as a "skilled football player," he makes representations attesting to such.

Section 11 of the NFL Player Contract provides that the "contract may be terminated if, in the Club's opinion, Player is anticipated to make less of a contribution to Club's *ability to*

⁵ A "condition of employment" is defined as follows: "A qualification or circumstance required for obtaining or keeping a job." Blacks Law Dictionary, 336 (9th ed. 2009). Here, this language simply means that if the player accepts the Club's job offer, then such player must accept the training and practice on the Club's terms.

compete on the playing field than another player or players[.]” *Id.* at 252 (emphasis added). (Supp. at 72.) That language alerts a player to the fact that his ability to compete on the *playing field* is what is most important.

So while Taxpayer argues that all non-game activities are just as important as playing games, his Player Contract certainly shows otherwise. A player’s ability to compete on the playing field is clearly what counts and what the player was hired to do.

2. Annual Salaries Clearly Tied To Games.

All Player Contracts, including Taxpayer’s, call for a salary during the regular season. This amount is referred to as the “Paragraph 5 salary” in the CBA. Tr. Exh. 9 at 250. (Supp. at 70.) It’s called the “Paragraph 5 salary” simply because it appears in Section 5 of every Player Contract. Section 6 of the Player Contract provides how the “Paragraph 5 salary” shall be paid and states as follows:

Section 6. Payment. *** 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 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.

Id.

As set forth above, players receive their annual salary in equal installments during the regular season. 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 regular season weeks remaining.⁶ Further, 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. A player's salary is clearly tied to the games.

Provisions in the CBA also show that the player salaries are tied to the games. Article XXXVIII of the CBA is titled "Salaries" (Tr. Exh. 9 at 179-182) and 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. ...

Tr. Exh. 9 at 180. (Supp. at 53.) Likewise, Article XIV in the CBA is titled "NFL Player Contract" (Tr. Exh. 9 at 40-44) and 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 week missed (1/17th for each regular season week missed) if the player voluntarily retires or otherwise withholds services from one or more regular season games. Tr. Exh. 9 at 43, Section 9. (Supp. at 21-22.) The forfeiture is 1/17th because the Paragraph 5 contract salary is paid in equal installments during the 17 week regular season—16 games plus one bye week for each team.

3. Players Receive *Game Checks* For Games.

Every sports fan has heard the term "game checks." The term is commonly referred to in the media when describing fines levied against suspended players for various on-field or off-

⁶ The word *weeks* versus *games* is used as a matter of administrative convenience since each team has one bye week where the team does not play but contract salary will be paid.

field infractions. The term is also used in the CBA. As an illustration, Section 3(b) of Article XXIII, dealing with “Termination Pay,” states, in pertinent part, as follows:

A player shall not be eligible for Termination Pay if, without missing a *game check* at the Paragraph 5 rate stated in his terminated contract, he signs a Player Contract with the same Club that terminated his contract, which new contract provides for Paragraph 5 salary at a rate equal to or greater than that of his terminated contract. ...

Tr. Exh. 9 at 81. (Supp. at 37.) The players are well aware that the paychecks used to pay the Paragraph 5 salary are known as “game checks.”

4. *Game Play Determines Incentive Pay.*

In addition to a player’s yearly salary (the Paragraph 5 salary), a Player Contract may contain incentive clauses. Incentive clauses are quite common in NFL Player Contracts and are performance-based bonuses that the player can earn. These incentive bonuses can be based on a player’s individual performance⁷ or the player’s team performance.⁸ A player clearly reaches these goals, whether team or individual, based on his or his team’s performance in the *games*—not practices, not meetings, not promotional events or anything else.

5. *Performance-Based Pool Based On Games.*

In addition to an incentive clause that a player might have in his own contract, Article XXXVIII-B of the CBA titled “Performance-Based Pool” provides for another type of performance-based pay that players can receive. How the “Performance-Based Pool” operates also supports the games-played method. Tr. Exh. 9 at 188-189. (Supp. at 56-57.)

⁷ For example, a bonus for individual performance might be given to an offensive player such as a running back based on his total yards rushing. Tr. Exh. 9 at 112. (Supp. at 42.)

⁸ For example, a bonus may be given to a player based on the number of team wins. Tr. Exh. 9 at 111. (Supp. at 41.)

The “Performance-Based Pool” is a pay pool or fund created by the CBA itself, and not the Player Contract. The fund consists of more than \$100 million and is distributed in its entirety at the end of the season to the players. Tr. Exh. 9 at 188, Sections 2; 3. (Supp. at 56.) A player must play at least one snap (a down) in a regular season game to be eligible to participate in the fund. Tr. Exh. 9 at 188, Section 4. (Supp. at 56.) Like incentive bonuses, whether a player receives this performance-based pay is determined by his playing time on the *playing field during games*—not practices, not meetings, not promotional events or anything else.⁹ Section 5 of the Article describes how payment from the pool is determined based on a formula that compares the player’s playing time in regular season games (playtime percentage) to his compensation. Tr. Exh. 9 at 188-189. (Supp. 56-57.) Playtime percentage is based on the player’s total plays on offense or defense plus special team play in regular season games divided by the teams’ total offense or defense plus special team plays in regular season games. Tr. Exh. 9 at 188-189. (Supp. at 56-57.) How the “Performance-Based Pool” operates under the CBA—paying only for actual time spent on the *playing field during games*, supports the games-played method as well.

6. Post-Season Pay Tied To Games.

Just like the player’s pay during the regular season supports the games-played method, so too does their pay in the post-season.

Article XLII of the CBA is titled “Post-Season Pay.” Tr. Exh. 9 at 194-195. (Supp. at 58-59.) Under the Article, only players whose team makes the playoffs are even eligible to receive

⁹ Indeed, the Pool appears to be mainly designed to reward players whose salary may not be commensurate with their performance on the playing field.

“post-season pay.” Tr. Exh. 9 at 194-195, Sections 3-5. (Supp. at 58-59.) How much a player receives will depend on how far their team advances during the playoffs since the player will receive a certain amount for each post-season game played. Tr. Exh. 9 at 194, Section 2. (Supp. at 58.) Players are only paid playoff money for each *game* played during the post-season. Also, as it is well known, during the first week of the playoffs four of the teams participating in the playoffs (the top two teams in each conference) have a bye week. The players on these four teams are not paid during the bye week although they certainly are practicing, attending meetings, promotional events, etc. Players are clearly paid to play.

B. *Games Are The Bright-Line Test For Rights/Benefits.*

As noted, in addition to the player’s compensation being tied to the games, so too is every single important right or benefit that a player might be entitled to receive.

1. *Free Agency Rights Based On Games.*

Free agency is probably one of the most important rights for the players since it is about money, specifically about the players’ ability to shop for teams and more money. Under the CBA, a player’s rights in regard to free agency depend on how many “Accrued Seasons” the player has. The more accrued seasons the player has the more rights he has in that regard (restricted versus unrestricted free agent). Tr. Exh. 9 at 56, Article XVIII, “Veterans With Less Than Three Accrued Seasons.” (Supp. at 23.) Tr. Exh. 9 at 57-67, Article XIX, “Veteran Free Agency.” (Supp. at 24-34.) What are accrued seasons based on? Accrued seasons are based on one thing *games*—not practices, not meetings, not promotional events or anything else. Under the CBA, a player achieves an accrued season for each season he was on, or should have been

on “full pay status” for a total of 6 or more regular season *games*. Tr. Exh. 9 at 56, Section 1(a). (Supp. at 23.)

2. Player Minimum Salary Tied To Games.

NFL players are also entitled to receive a minimum salary under the CBA. Article XXXVIII, “Salaries.” Tr. Exh. 9 at 179-182. (Supp. at 52-55.) A player’s minimum salary is based on what is termed “Credited Season” under the CBA. Tr. Exh. 9 at 180, Section 7. (Supp. at 53.) The more credited seasons the player has the higher is his minimum salary. Tr. Exh. 9 at 179, Section 6. (Supp. at 52-53.) What are credited seasons based on? Credited seasons are based on one thing *games*—not practices, not meetings, not promotional events or anything else. Under the CBA, for purposes of player minimum salaries, a player achieves a credited season for each season he was on, or should have been on, full pay status for a total of 3 or more regular season *games*. Tr. Exh. 9 at 180, Section 7. (Supp. at 53.)

3. Retirement/Other Benefits Use Games.

The player’s retirement plan and a host of other benefits such as “waiver rights,” “termination pay;” “severance pay;” “right to participate in a retirement savings plan;” an “annuity program” and “tuition assistance” is also based on “Credited Seasons.” Tr. Exh. 9 at 79-80 (waiver rights); 81 (termination pay); 221-222; (severance pay); 206-207 (retirement savings plan); 208-209 (annuity program); 210-211 (tuition assistance). (Supp at 35-37; 60-67.) The more credited seasons a player has the greater are his rights in regard to all these benefits. Although the definition of “credited seasons” for purposes of these benefits is different than the definition of “credited seasons” for purposes of player minimum salary (discussed above), the definition is still based on one thing *games*—not practices, not meetings, not promotional

events or anything else. Instead of 3 or more regular season games, this definition of “Credited Season” is found in the Bert Belle/Pete Rozelle NFL Player Retirement Plan which defines it as 3 or more regular or *post-season games*. Tr. Exh. 10 at 3-4, Section 1.10.) (Supp. at 80-81.)

C. Even Player Discipline Is Based On Games.

Not only are the player’s rights and benefits tied to games, so too is disciplinary action. Player discipline is covered under two Articles in the CBA—team discipline under Article VIII and commissioner discipline under Article XI. Tr. Exh. 9 at 19-22; 34-35. (Supp. at 12-17.) The maximum team sanction that a player can receive is forfeiting one game check (Paragraph 5 payment) and/or a suspension of four games/weeks without pay. Tr. Exh. 9 at 19, Section 1(a). (Supp. at 12-13.) The Commissioner is not so limited and has been known to suspend players without pay for much longer periods of time. Players are suspended without pay from *games*—not practices, not meetings, not promotional events or anything else. The NFL’s “Policy on Anabolic Steroids and Related Substances” clearly illustrates this point as well—players who test positive for a banned substance are suspended from games—not practices, not meeting, not promotional events or anything else. Tr. Exh. 11. (Supp. 82-88.)

D. Athletes Paid Separately For Non-Game Activities.

Finally, it is clear that players are paid separately for off-season work-outs, minicamps and pre-season training camp.

Article XXXV of the CBA deals with “off-season workouts;” Article XXXVI covers minicamps; while Article XXXVII addresses “pre-season training camps.” Tr. Exh. 9 at 172; 176 and 177. Players receive payment under these Articles for attendance, meal allowances, travel

expenses, housing and salary per diem payments which are separate and apart from the player's Paragraph 5 contract salary paid during the regular season. (Supp at 45-51.)

Since players are paid *before* the regular season even begins for pre-season training camp (and off-season workouts and minicamps) why would they be paid again for the same services during the regular season?

The fact that the players are paid separate and apart for these activities disproves Taxpayer's claim that a player's overall compensation as a football player is *equally* for all services performed under the Player Contract. Further, the fact that the payment for these activities is nominal in comparison to the player's Paragraph 5 salary again shows that players are paid to play games.

Proposition of Law No. 8:

The Fact That Taxpayer Did Not Play In The Cleveland Game Or Even Travel To Cleveland For Such Game Is Irrelevant Where Taxpayer Was Clearly Paid For The Game.

Taxpayer seeks to avoid the required conclusion that he was properly subject to Cleveland tax by reiterating that he "did not travel to nor perform any services in Cleveland." Brief of Appellant. Appellant's Notice of Appeal. That Taxpayer did not play in the Cleveland game or travel to Cleveland for the Cleveland game is completely irrelevant since he was clearly paid for such game.

A. Cleveland's Ordinance Is Broad and Clear.

The City's Income Tax Ordinance is clear. With regard to nonresidents, Section 191.0501(b)(1) provides that city tax shall be imposed:

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.

Tr. Exh. 12 at 5 (emphasis added). (Appx. at 14.) Under this provision, Cleveland taxes all qualifying wages “earned and/or received” for “work done or services performed or rendered within the City.” Cleveland also taxes qualifying wages “earned and/or received that is “attributable to the City.”¹⁰ Moreover, the third part of the ordinance requires Cleveland to tax “all other taxable income” “earned and/or received” “from or attributable to sources, events or transactions within the City.”

As shown, Cleveland’s Ordinance is more broadly defined than Taxpayer would have one believe and levies tax based on income earned in the City which does not require Taxpayer’s physical presence. *International Harvester Co. v. Wisconsin Dep’t of Taxation*, 322 U.S.435 (1944) (nonresidents are taxable so long as they receive income that relates to an in-state transaction or event). *See also Agle v. Tracy*, 87 Ohio St.3d 265, 719 N.E.2d 951 (1999).

B. Regulation Governing Taxation Of Nonresident Athletes.

As the BTA noted, the Agency’s “Rules and Regulations along with the income tax ordinances govern income tax matters” for Cleveland “and [are] [] incorporated *** into its Income Tax Ordinance.” BTA Decision, slip op. at 4, n.3. (Appx. at 10.) CCA Article 8:02(E)(6) sets forth the apportionment formula which captures “the entire amount of compensation earned for games that occur in the taxing community[]” and provides for the inclusion of

¹⁰ The “work done or services performed” language only pertains to the first situation (not this second one).

“incentive payments, signing bonuses, reporting bonuses, incentive bonuses, roster bonuses and other extras.” The Article clearly levies tax on a nonresident professional athlete for any compensation attributable to a game in Cleveland.

And as the BTA noted, this Article also provides that city tax is imposed even if the player “was excused from playing because of injury or illness.” BTA Decision, slip op. at 4. (Appx. at 10.). The BTA was clearly right to rely on such in finding that Taxpayer “was taxed as if he had taken a ‘sick day’ for the [Cleveland] game.”¹¹ *Id.* (Appx. at 10.)

C. Taxpayer Was Paid For The Cleveland Game.

Taxpayer clearly had a contractual right to be paid for the game in Cleveland despite any injury. Section 9 of Taxpayer’s Player Contract (and all other NFL player contracts) deals with player injury and states that “if Player is injured in the performance of his services under this contract *** Player *** will continue to receive his yearly salary[.]” Tr. Exh. 9 at 251 (“NFL Player Contract”). (Supp. at 71.) So although injured, Taxpayer was clearly entitled to receive his yearly salary. Taxpayer also had the right to be paid for the Cleveland game despite having been placed on the Indianapolis Colts’ “inactive list” for the Cleveland game. Tr. Exh. 8 at 1. (Supp. at 89.) Under Taxpayer’s CBA, inactive list players receive the same benefits and protections as active list players. Tr. Exh. 9 at 169 (Article XXXIII, “Squad Size,” Section 3). (Supp. at 44.) So just like the active list players received a game check for the Cleveland game, so too did Taxpayer even though he may not have traveled to Cleveland for that game.

¹¹ When a nonresident working in the City takes a sick day, that nonresident remains subject to Cleveland tax for the sick pay earned and/or received even though the nonresident is not physically present in the City on that sick day. The same is true for vacation days, personal time-off, etc.

In short, Taxpayer was on full pay status for the Cleveland game. While Taxpayer would like this Court to believe that he was paid a game check for “rehabilitation activities for the Colts,” brief of Appellants at 1, and not the Cleveland game—that is simply ridiculous. Taxpayer received compensation on account of the game played in Cleveland. This explains why his employer, the Indianapolis Colts, withheld and remitted city tax on those wages in accordance with Cleveland’s Codified Ordinances.

D. Taxpayer Paid Ohio Tax For Cleveland Game.

An obvious flaw in Taxpayer’s argument is shown by the fact that he was clearly subject to Ohio state income tax for the Cleveland game. Taxpayer’s Form W-2 shows that from the same wages that his employer, the Indianapolis Colts, withheld and remitted city tax, it also withheld and remitted state income tax to the State of Ohio. See Tr. Exh. 1 (Taxpayers’ filed 2008 tax return). In fact, Taxpayer even concedes such on page 10 of his brief stating that his “W-2 reflect[s] that approximately 1.24% of [his] income was allocated to Ohio” under the duty-day method. If the wages from the Cleveland game were subject to Ohio income tax, why would those same wages not be subject to city tax?

E. The Irony In Taxpayer’s Position.

As noted, players on the inactive list receive the same benefits and rights as active list players under Taxpayer’s CBA. And just like the active list players received game credit for the Cleveland game in terms of achieving an accrued and credited season for the 2008 League Year for purposes of free agency, player minimum salary, retirement and a host of other benefits like termination pay, severance pay, etc., so too did Taxpayer all without traveling to Cleveland for said game. The irony in Taxpayer’s position is evident.

Proposition of Law No. 9:

Cleveland's Taxation Of The Wages At Issue Does Not Violate The Due Process Or Commerce Clause Since Neither Require Physical Presence To Impose An Income Tax.

In his brief, Taxpayer claims that "Cleveland's taxation of [his] wages is unconstitutional" "[b]ecause [he] performed no services in Cleveland" and that therefore "taxation of his wages violates the Due Process and the Commerce Clause." Brief of Appellant at 18. Taxpayer would like one to believe that physical presence is required to impose an income tax. However, neither due process nor the commerce clause requires physical presence to impose an income tax on wages earned and/or received by a nonresident.

It is clear that there are two theoretical underpinnings of a state's (or municipality's) jurisdiction to tax income: residence and source. The source-of-income principle was first approved by the United States Supreme Court in *Shaffer v. Carter*, 252 U.S. 237 (1920) where the Court held that a state may constitutionally tax the income of nonresidents derived from sources within the state. This principle, which is well-established, recognizes the right of a state (or local jurisdiction) to tax the income of a nonresident when that income has its source within the state even when there is no physical presence by the taxpayer.

Although Taxpayer readily acknowledges the source-of-income principle (as he must), he claims that "for income derived from personal services" "the source of such income is the jurisdiction where the services are performed." Brief of Appellant at 20. Physical presence however is not the sole factor in determining if a state may tax as Taxpayer suggest. See *Northwestern States Portland Cement Co., v. State of Minn.*, 358 U.S. 450, 452 (1959) (explaining that when determining whether a nexus existed between a taxing entity and a taxpayer, physical presence was not the sole factor). In *Quill Corp. v. North Dakota*, 504 U.S.

298 (1992), the United States Supreme Court held that physical presence is not required for due process noting that “[o]ur due process jurisprudence has evolved substantially [and that] *** we have abandoned [] formalistic tests that focused on a [taxpayer’s] ‘presence’ within a State in favor of a more flexible inquiry[.]”. In *Couchot v. State Lottery Comm’n.*, 74 Ohio St.3d 417, 421, 659 N.E.2d 1225, 1228 (1998), discussing the commerce clause, this Court stated that while “[t]he [United States] Supreme Court in *Quill* reaffirmed the physical-presence requirement [for purposes of the commerce clause] as to sales and use taxes[,] [t]he court pointed out that ‘concerning other types of taxes we have not adopted a similar bright-line, physical-presence requirement.’”

Contrary to Taxpayer’s claim, a physical presence requirement clearly does not control the outcome of this case. Taxpayer’s physical presence in Cleveland was not required to impose Cleveland’s income tax on the wages earned. Said tax clearly did not violate the Due Process and Commerce Clauses on that basis.

Proposition of Law No. 10:

Cleveland’s Taxation Of The Wages Earned For The Cleveland Game Does Not Violate Due Process Under This Court’s Test Set Forth In *Angell v. City of Toledo*.

On page 21 of his brief, Taxpayer cites to Ohio appellate court cases and claim they stand for the proposition that “it is the ‘protection, opportunities and benefits’ afforded to the taxpayer — not merely to the taxpayer’s employer — that are the crux of the constitutional analysis.” This Court addressed that very argument in *Angell v. City of Toledo*, 153 Ohio St. 179, 91 N.E.2d 250 (1950) where the Court explained as follows:

In the case of *State of Wisconsin v. J.C. Penny Co.*, it was held that the test of whether a tax law violates the due process clause is whether it bears some fiscal relation to the protections,

opportunities, and benefits given by the state, or in other words, whether the state has given anything for which it can ask a return.

The municipality certainly does afford protection against fire, theft, et cetera, to the place of business of [employee's] employer and the operation thereof without which [employee's] employer could not as readily run its business and employ help. *In other words, the city of Toledo does afford to [employee] not only a place to work but a place to work protected by the municipal government of Toledo.*

Id. at 153 Ohio St. at 185, 91 N.E.2d at 253 (emphasis added) (citation omitted).

While Taxpayer acknowledges on page 49 of his brief, the “public service[] [cost] [] for major athletic events,” his suggestion that Cleveland has given *nothing* for which it can ask a return clearly fails. As shown, Taxpayer received *compensation* as a result of the game in Cleveland and Cleveland provided the protections and benefits for the game to take place (not to mention the Cleveland-owned stadium where the event occurred). While Taxpayer may not have played or even traveled to Cleveland, he like the rest of his Indianapolis Colts teammates certainly benefitted from the fact that said game was held. There is clearly sufficient contact for taxation of the income earned by Taxpayer for such game.

Proposition of Law No. 11:

The *Toliver, VonKaenel And Miley* Cases Plainly Do Not Assist Taxpayer Nor Does Taxpayer's New Argument Purportedly Based On “The [S]tatutory [Text] [Of R.C. 718.011].”

In his brief, Taxpayer cites to Ohio appellate court cases which he claims stand for the proposition that physical presence is required to tax the wages earned in Cleveland. Brief of Appellant at 16; 21-22. *Toliver v. City of Middletown*, No. CA99-08-147, 200 WL 895261 (12th Dist., June 30, 2000) is clearly distinguishable since the issue in that case was whether the municipality could tax 100% of a nonresident's wages even where work was done outside the

city. So too are *VonKaenel v. City of Philadelphia*, No. 2000AP-04-0041, 2001 WL 81700 (5th Dist, Jan. 23, 2001) and *Miley v. City of Cambridge*, No. 96 CA 44, 1997 Ohio App. LEXIS 3243 (5th Dist June 25, 1997).

Toliver involved nonresident delivery drivers and the issue in that case was whether the municipality could tax 100% of the nonresidents' wages where work was done outside the city. *Toliver*, 2000 WL 895261 at *1. The ordinance in *Toliver* provided that city tax was imposed on all wages earned "by nonresidents for work done or services performed or rendered in the City or as a result of employment in the City." *Id.* at *3. In *Toliver*, the court found the ordinance was unconstitutional because it permitted the city "to collect taxes from a non-resident performing work outside the city limits." *Id.* at *6. The court determined that the city had "no jurisdiction to impose its tax on *** earnings that are attributable to work done outside the city *** despite the fact that [taxpayers' employer] does business with [a company located in the city]." *Id.* Like *Toliver*, *VonKaenel* involved nonresident delivery drivers and the issue was whether the municipality could tax 100% of the nonresidents' wages even where work was done outside the city. *Vonkaenel*, 2001 WL 81700 at *1. The ordinance in *VonKaenel* provided that city tax was imposed on "all payments made through a New Philadelphia employment or business without any allocation to time spent working outside New Philadelphia compared to time working within New Philadelphia." *Id.* In *Miley*, "th[e] ordinance impose[d] an income tax on non-residents of the city who perform work outside the [c]ity [], for employers who have their principal place of business inside the [c]ity[.] *Miley*, 1997 Ohio App. LEXIS 3243 at *2.

The situation here clearly differs from all of those cases. First, Cleveland is not taxing 100% of the Taxpayer's total wages; Cleveland is only taxing that portion of Taxpayer's wages

that is attributable to the Cleveland game. Second, Cleveland is not taxing a nonresident for work performed outside of Cleveland; Cleveland is taxing a nonresident for wages he earned as a result of an event that occurred in Cleveland (the Cleveland game).

None of these cases assist Taxpayer as he claims. Nor does Taxpayer's new argument that "[t]he statutory text [of R.C. 718.011] plainly implies that a municipality's authority to tax a nonresident's compensation only arises in the first place if the nonresident taxpayer has performed *some* services within the municipality." Brief of Appellant at 17 (emphasis original). As explained earlier, the *only* limitation that the General Assembly has placed on municipalities with respect to taxing wage income is that such wages constitute "qualifying wages." R.C. 718.03(A)(2); 718.01(H)(10). Taxpayer's new argument is clearly without merit too.

Proposition of Law No. 12

Taxpayer Waived Any Dormant Commerce Clause Challenge To Games-Played Method Having Failed To Raise The Issue As Error In His Notice Of Appeal Or Before The Lower Tribunals.

For the first time in briefing to this Court, Taxpayer raises a dormant commerce clause challenge claiming Cleveland's games-played method "favor[s] local interest over out-of-state interests." Brief of Appellant at 44. Taxpayer argues the method favors members of Cleveland's Clubs since they can "practic[e] and conduct[] other non-game activities within the City" but "[n]on-Cleveland Clubs do not have that option[,]"; therefore "the effect of Cleveland's use of the games-played method is to discriminate against interstate commerce by subjecting players on out-of-state visiting Clubs to the threat of multiple taxation that in-state Cleveland Clubs can avoid." Brief of Appellant at 45. Taxpayer, however, has waived any dormant commerce clause challenge to the games-played method since he failed to raise the issue before the lower tribunals or in any of his notices of appeal to those tribunals or to this Court.

Paragraph 3(d) of Taxpayer's notice of appeal to the Cleveland Board states (in part):

*** Cleveland's games played apportionment method unfairly apportions income to the City for services performed elsewhere. The games played method therefore violates the fair apportionment requirements of the Commerce Clause.

Taxpayer's Notice of Appeal to the Cleveland Board at p. 5. Paragraph 5 of his notice of appeal to the BTA states (in part):

*** Cleveland's use of a games-played formula results in Cleveland unfairly apportioning to Cleveland income earned by [Appellant] for services performed elsewhere, in violation of the Commerce Clause of the United States Constitution[.]

Taxpayer's Notice of Appeal to the BTA at p. 4. And Paragraph 14 of Taxpayer's notice of appeal to this Court states (in part):

*** allocating Appellants' income on the basis of games played results in the unfair apportionment to Cleveland of income earned by Appellants for services performed elsewhere, in violation of the Commerce Clause and the Due Process Clause of the United States Constitution.

Taxpayer's Notice of Appeal at p. 4. Taxpayer has *never* alleged or even mentioned the dormant commerce clause or complained of differential treatment favoring local interests.

Clearly, a notice of appeal from the BTA to this Court must "set forth the decision of the board appealed from *and the errors therein complained of.*" R.C. 5717.04 (emphasis added).

The same is true of a notice of appeal from a municipal board to the BTA. R.C. 5717.011(C) ("A notice of appeal *** shall contain a short and plain statement of the claimed errors").

The dormant commerce clause deals specifically with "'economic protectionism [and] regulations designed to benefit in-state economic interests by burdening out-of-state competitors[.]" *Department of Revenue v. Davis*, 553 U.S. 328, 337-338 (2008) (quoting *New*

Energy Co. v. Limbach, 486 U.S. 269, 273-274 (1988), something Taxpayer has never alleged or even argued. The dormant commerce clause is intended solely to protect the interstate market, not guarantee even playing fields between competing businesses. *Columbia Gas Transmission v. Levin*, 117 Ohio St.3d 122, 882 N.E.2d 400, 2008-Ohio-511, ¶158; *Exxon Corp. v. Gov. of Maryland*, 437 U.S. 117, 127 (1978).

In this case, Taxpayer has clearly waived any issue of whether the games-played method violates the dormant commerce clause.

Proposition of Law No. 13:

Taxpayer Has Offered Only Allegations Asserting Violation Of The Dormant Commerce Clause And Not Evidence Of Record To Support His New Dormant Commerce Clause Theory.

Taxpayer not only seeks to assert an entirely new claim alleging that Cleveland's games-played method violates the dormant commerce clause but seeks to base such claim only on allegations and not evidence of record. The claim should fail for this reason as well.

The dormant Commerce Clause requires that the states not "mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (quotation marks and citation omitted). To determine whether a law violates the dormant Commerce Clause, a court first asks whether the law discriminates on its face against interstate commerce. *United Haulers Ass'n Inc. v. Oneida-Herkimer Solid Waste Management Auth.*, 550 U.S. 330, 338 (2007). Where a law is not discriminatory on its face such as Cleveland's games-played method, the U.S. Supreme Court held in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) that "it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. As one federal appeals court just recently explained: "The *Pike*

inquiry, like the discrimination test, is fact-bound.” *Colon Health Centers of Am., LLC v. Hazel*, 733 F.3d 535, 546 (4th Cir. 2013) (noting that “in order to survive a motion to dismiss, plaintiffs’ ‘factual allegations must be enough to raise a right to relief above the speculative level’ because of “[t]he fact-intensive character of this inquiry”) (citation omitted). Indeed, this is consistently shown in the U.S. Supreme Court cases applying *Pike*. See e.g., *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (reviewing evidence adduced in 14-day trial addressed to the benefits and burdens of state legislation); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470-74 (1981) (reviewing evidence adduced in extensive evidentiary hearings under *Pike*); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 (1978) (invalidating state regulation under *Pike* based upon the plaintiff’s “massive array of evidence” which disproved the regulation’s alleged benefits). Taxpayer here is asking the Court to second-guess the policy judgment to use the games-played method without a shred of record evidence (only his allegations) of the discriminatory impact it supposedly has on interstate commerce.

Proposition of Law No. 14:

Taxpayer’s Due Process And Commerce Clause Arguments Are Simply A Disguised Attempt Of Asserting Same Proposition—That An Apportionment Method Must Be Based On Time Or Days.

As noted above, Taxpayer has waived any nonconstitutional error that the games-played method is unreasonable (including application of the method to athletes absent from the game due to injury or illness) having failed to address the issue in his merit brief. Further, Taxpayer’s due process and commerce clause arguments are nothing more than a disguised attempt of asserting the same proposition—that an apportionment method must be based on time or days—which is simply not true. There is no constitutional case here.

A. Taxpayer's Complaint In This Case Is Clear.

It is true that both the due process and commerce clauses place limitations on Cleveland's taxing power—those limitations while distinct are somewhat overlapping. Due process looks to the sufficiency of the contact or connection between the taxing jurisdiction and the activity it seeks to tax; while the commerce clause considers whether the tax unduly burdens interstate commerce. *Quill Corp.*, 504 U.S. at 305-306.

Taxpayer's complaint in this case is clear—since more income is attributed to Cleveland under the games-played method than under the duty-days method, Cleveland is taxing more income than it should. This, however, hardly shows any type of constitutional infirmity. Neither constitutional provision is violated by Cleveland's games-played method.

B. *Hans Rees' Sons and Norfolk & Western.*

On page 39 of his brief, Taxpayer complains that under the games-played method “Cleveland allocated to itself over 350% [more in] income that would have been allocable to Cleveland had it applied the duty days method[.]” (Italics original.) Taxpayer contends that “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” claiming that such is a “grossly distorted result” and “out of all proportion with the services he performed in Cleveland.” *Id.* at 38; 39; 40. Taxpayer cites to *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123 (1931) and *Northfolk & Western Railway Co. v. Missouri State Tax Comm.*, 390 U.S. 319 (1968) suggesting that the games-played method here must be struck down. Taxpayer's attempted reliance on these two cases, however, must clearly be rejected.

“In both *Hans Rees’ Sons* and *Norfolk & Western*, the [United States] Supreme Court was persuaded by plaintiffs’ evidence of actual data and detailed accounting that conclusively proved that, in fact, their income was derived from other states.” *CSX Transp., Inc. v. Director, Div. of Taxation*, 22 N.J. Tax 399, 418 (N.J. Tax Ct. 2005). In *Hans Rees’ Sons*, the Supreme Court found that income attributed to the state of North Carolina was out of all appropriate proportion to the business transacted there where the taxpayer corporation demonstrated that while approximately 80% of its income was allocated to North Carolina under the state’s single-property factor formula, less than 22% of its income had its source in the corporation’s operations within North Carolina. 283 U.S. at 135-36. In *Norfolk & Western*, the Court found a grossly distorted result in a case involving application of Missouri’s single-factor formula, based on track-miles, to apportion the rolling stock of a Virginia railroad with interstate operations and only incidental business in Missouri where (i) Missouri determined the value of the railroad’s rolling stock in Missouri to be nearly \$10 million more than it had been the year before and (ii) the railroad provided evidence of the “actual count of the rolling stock in Missouri” showing that its true value was closer to the figure of the previous year. 390 U.S. at 319-22, 326-27.

These cases teach that “the States have wide latitude in the selection of apportionment formulas and that a formula-produced assessment will only be disturbed when the taxpayer has proved by ‘clear and cogent evidence’ that the income attributed to the State is in fact ‘out of all appropriate proportion to the business transacted *** in the State,’ or has ‘led to a grossly distorted result.’” *Moorman Mfg. Co. v. Blair*, 437 U.S. 267, 274 (1978) (quoting *Hans Rees’ Sons*, 283 U.S. at 135 and *Norfolk & Western*, 390 U.S. at 326). The question here is where is

any “clear and cogent evidence” demonstrating that the games-played method “grossly overstated” Taxpayer’s Cleveland income? Taxpayer cannot point to any. The duty-days apportionment method only shows that there is another method that could be utilized to measure Taxpayer’s income relating to the activity in Cleveland that generated that income. In *Hans Rees’ Sons*, the Supreme Court refused to approve the result not on the grounds that a single-property formula could not be used, but on the grounds in that particular case, that the single-property formula did not give weight to taxpayer’s income producing activities conducted outside the state and was therefore unreasonable. The same could be said for the duty-days method since it fails to give proper weight to the income producing activity Taxpayer was hired for—the games—and equates the game with one practice day, one meeting day, one travel day, attending one promotional event, etc.

The U.S. Supreme Court has also made clear its “decisions recognize the practical difficulties involved and do not require any close correspondence between the result of computations [where two different apportionment formulas may be used].” *Norfolk & Western*, 390 U.S. at 327. According to Taxpayer, “[u]nder the duty days method, approximately 1.24% of [his] income would have been allocated to Cleveland” but [b]y using the games-played method[], Cleveland allocated to itself 4.5% of [his] income.” Brief of Appellant at 39. So Taxpayer is really complaining about paying tax on a little more than 1% as opposed to a little less than 5%. This difference is of no moment notwithstanding Taxpayer’s claim that this translates to a 350% increase in the amount of income attributed to Cleveland.¹²

¹² Taxpayer’s math is wrong. Based on his own claims the correct percentage would be 275% ($1.24\% \div 4.5\%$).

Nothing in the record shows that Taxpayer was grossly overtaxed by Cleveland. There is no basis for the Court to assume that Cleveland's games-played apportionment method produced a grossly unfair result (especially if one accepts the premise that players are paid for the games). The fact that a duty days method would allow Taxpayer to pay less tax to Cleveland is not the test of unconstitutionality which Taxpayer has clearly failed to prove.

C. Substantial Evidence Exists To Support Games-Played Method.

It would be noted that while the U.S. Supreme Court in *Norfolk & Western* "conclude[d] that, on the present record, Missouri ha[d] in th[at] case exceeded the limits of her constitutional power to tax, as defined by the Due Process and Commerce Clauses [that it was still] open to the Missouri Supreme Court [] to remand the case to the appropriate tribunal to reopen the record for additional evidence to support the assessment." 390 U.S. at 329-330. Here, as shown earlier, there is substantial evidence in the record to support the games-played apportionment method. The evidence shows football is an entertainment product. The players are hired to do one thing—play in games; everything else is ancillary to that purpose. In addition, the contractual documents governing the players' employment relationship with the NFL and its teams is also clear evidence that supports the games-played method. Not only is player compensation tied to the games, every single important right or benefit that a player may be entitled to receive is based only on one thing—the *games*.

D. The Minimum Contacts Requirements Of Due Process.

Due process concerns the connection that must exist between the taxpayer and municipality before the municipality has authority to tax. *Northwestern*, 358 U.S. at 465. All it requires is some minimal connection between the governmental entity and the person,

property or transaction it seeks to tax. *Wisconsin v. J.C. Penny Co.*, 311 U.S. 435, 444 (1940); *Quill*, 504 U.S. at 305-307. “Minimum connection” considers whether there is a definite link and rational relationship between the taxing jurisdiction and the person or activity taxed. *Quill Corp.*, 504 U.S. at 36. With respect to nonresidents, the question is whether the nonresident availed himself of the protections and benefits given by the municipality. See *Angell*, 153 Ohio St. 179, 185 91 N.E.2d 25.

In *International Harvester*, the United States Supreme Court explained that “[a] state may tax such part of the income of a non-resident as is fairly attributable either to property located in the state or to events or transactions [] occurring there[.]” 322 U.S. at 441-442.

Since Taxpayer certainly earned income from an activity conducted in the City—the Cleveland game—he clearly availed himself of the benefits and protections offered by the City. The minimum connection and definite link requirement between Cleveland and Taxpayer under the games-played method is certainly met.

E. The Commerce Clause Test Of *Complete Auto*.

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

On page 43 of his brief, Taxpayer complains that the second, third and fourth prongs of the *Complete Auto* test are not met under the games-played method. Notably, Taxpayer does not complain that the substantial nexus requirement has not been met.

1. Taxpayer's Income Was Fairly Apportioned To 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. *Container Corp of Am. v. Franchise Tax Board*, 463 U.S. 159, 169 (1983). 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. *Id.* 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. *Moorman*, 437 U.S. at 276-278. A tax is fairly apportioned if it reaches only those nonresident athletes who have contacts within the City. Since Cleveland's tax is so applied, it is internally consistent—if every jurisdiction used the games-played method, no overlap whatsoever would occur. On page 36 of his brief, Taxpayer concedes (as he must) that the games-played method is “internally consistent” stating that “[t]he games-played method of allocation concededly is not internally inconsistent, because it would not result in multiple taxation if employed by every jurisdiction.”

“External consistency” looks at whether the city tax only taxes that portion of interstate revenues that reasonably reflect an activity within the city. *Oklahoma Tax Comm'r v. Jefferson Lines*, 514 U.S. 175, 185 (1995). On pages 40-41 of his brief, Taxpayer claims that the games-played method “is not externally consistent” because it taxes more than its fair share “creat[ing] a real risk of multiple taxation.”¹³ The games-played method however certainly complies with

¹³ Taxpayer claims that “Cleveland's use of the games-played method creates a real risk of multiple taxation [simply] because no other NFL jurisdiction utilizes that method of allocation.” Brief of Appellant at 40.

the external consistency requirement since Cleveland taxes only income derived from the Cleveland game. Taxpayer has no argument in this regard. A tax does not violate the commerce clause if it is “reasonably related to the extent of the contact” between the taxpayer’s activities and the taxing state. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).

2. The Games-Played Method Does Not Burden Interstate Commerce.

As to whether the tax discriminates against interstate commerce, the test is whether it places a greater burden on nonresidents than residents. *Jefferson Lines*, 514 U.S. at 266; *Complete Auto*, 430 U.S. at 279. If a tax is fairly apportioned, it has also been traditionally found not to discriminate. *Montana*, 453 U.S. at 624-625 citing *J.C. Penney*, 311 U.S. at 444; *American Trucking Assn v. Schniner*, 483 U.S. 266, 277 (1987); *Goldberg v. Sweet*, 488 U.S. 252, 255-256 (1989). Unless Cleveland’s tax is found to be discriminatory on its face (which it is not) and not designed to promote a legitimate governmental interest, it must be upheld on discriminatory grounds.

3. Income Apportioned Was Fairly Related To Cleveland Activities.

In determining if 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. *J.C. Penny*, 311 U.S. at 444. 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 nonresident athletes, in particular benefit from police, fire, roads, an economic market to showcase athletic talent etc., because the games are held in Cleveland. Nonresidents are required to pay for that service just like residents pay even though the services may not be used. The purpose of the fourth prong of the *Complete Auto* test is simply “to ensure that a State’s burden is not placed

upon persons who do not benefit from services provided by the State.” *Goldberg*, 488 U.S. at 266-267. Under this prong, the “measure of the tax” (the games) must be reasonably related to the activities of the taxpayer in the taxing state.” *Id.* at 266; *Montana*, 453 U.S. 609, 626.

Certainly, that test is met. Cleveland is not seeking more than its fair share of the benefits and protections it has provided Taxpayer. Because Cleveland’s tax is in proportion to the income producing activities conducted in the City and Taxpayer’s enjoyment of the opportunities and services Cleveland provided in connection with those income-producing activities, the city tax is certainly fairly related to the activities conducted here. No commerce clause violation has been demonstrated.

Taxpayer contends that the games-played method is not fairly related to the activities conducted in Cleveland since “[e]ven assuming that [h]e performed services in Cleveland on two days during the 2008 tax year, he performed services for the Colts on a total of 161 duty days in 2008.” Brief of Appellant at 37. Again, Taxpayer is clearly suggesting that an apportionment method must be based on time or days which is simply not true.

Taxpayer also argues that by including his roster bonus that “was [paid and] tied only to his status as a member of the Colts” shows that the games-played method is “not ‘reasonably related to the extent’ of [his] contact with Cleveland.” *Id.* at 47 (citation omitted). According to Taxpayer, “[a]pproximately 40% of NFL player compensation is paid in a form other than yearly salary, such as roster bonuses and signing bonuses.” *Id.* at 9. Bonuses and incentive pay however are clearly considered wages for FICA tax purposes and part of the athlete’s overall

compensation.¹⁴ Taxpayer's roster bonus was part of his overall total compensation. The games-played method clearly recognizes that fact.

Proposition of Law No. 15:

The Games-Played Apportionment Method's Inclusion Of Income In The Preapportioned Tax Base Is Not Tantamount To Direct Taxation Of Such Income Or Extraterritorial Taxation.

Taxpayer also seems to be suggesting that by including total compensation in the games-played formula somehow Cleveland is directly taxing *all* such income. However, the United States Supreme Court long ago in *Shell Oil Co. v. Iowa Department of Revenue*, rejected the argument that "the inclusion of income in the preapportioned tax base" "amount[s] to extraterritorial taxation." 488 U.S. 19, 22 (1988). In that case, the Court upheld the inclusion of income derived from outer continental shelf ("OCS") activities within the unitary (pre-apportioned) tax base of Iowa's income tax. In so doing, the Court rejected the taxpayer's argument that revenues derived from oil and gas production on the OCS, far distant from Iowa, should be attributable to their source, explaining as follows:

[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 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

¹⁴ Rev. Rul. 2004-109, 2004 WL 2659666 (rejecting argument that a signing bonus is not wages for purposes of FICA, FUTA or federal income tax withholding based on the fact that the players' "contract provides that the bonus is not contingent on the performance of future services").

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.

488 U.S. 19, 30-31 (1988) (citations omitted).

As stated in *Shell*, including total income within the preapportioned tax base is not tantamount to direct taxation of all 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 Cleveland activities.

Proposition of Law No. 16:

Dividing Taxpayers Into Classes For Purposes Of Levying An Income Tax Does Not Offend The Equal Protection Clause So Long As Any Resulting Tax Is Levied In A Uniform Fashion.

On page 49 of his brief, Taxpayer claims that the state statute that authorizes Cleveland to tax professional athletes who perform services in the City on twelve or fewer days—R.C. 718.011(B)—is unconstitutional because it “single[s] out nonresident professional athletes for less advantageous tax treatment than similarly situated taxpayers” since it authorizes taxation of professional athletes in cases where other nonresidents are not taxed. According to Taxpayer such “is not rationally related to any legitimate state interest.” *Id.*

This Court long ago held that taxpayers may be divided into classes for purposes of levying an income tax. *Clark v. Cincinnati*, 163 Ohio St. 532, 127 N.E.2d 363 (1955). Classifying taxpayers does not offend constitutional guarantees so long as the tax levied within each such class is levied in a uniform fashion. *Id.* at 535, 127 N.E.2d at 365. Because no fundamental right or suspect classification is at issue here, the state statute under attack (R.C. 718.011(B)) is facially neutral and must be reviewed under a rational basis test. *Oliver v. Cleveland Indians Baseball Co. Ltd. P'ship*, 123 Ohio St.3d 278, 915 N.E.2d 1205, 2009-Ohio-5030 at ¶19; *MCI*

Telecommunications Corp. v. Limbach, 68 Ohio St.3d 195, 199, 625 N.E. 597, 600 (1994). Using a rational basis test, so long as the tax is rationally related to a legitimate governmental interest, an equal protection challenge fails. *Id.*

Here, the legitimate governmental interest is *raising revenue and preserving financial soundness*. *Angell*, 153 Ohio St. at 182, 91 N.E.2d at 252 (“[a] fundamental power of government is the power to raise revenue”); *Menefee v. Queen City Metro*, 49 Ohio St.3d 27, 29, 550 N.E.2d 181 (1990) (the “state has a valid interest in preserving the financial soundness of its political subdivisions”). “The basic purpose of an income tax is to raise funds to operate the government[.]” *Clark*, 163 Ohio St. at 535, 127 N.E. 2d at 366. Discussing the purpose of the equal protection clause, this Court in *MCI* held that “[o]f course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who in all relevant respects are like.” 68 Ohio St.3d at 199, 625 N.E.2d at 600 (citation omitted).

That R.C. 718.011 permits nonresident professional athletes and entertainers to be taxed where other nonresidents are not taxed is not an equal protection violation since all members of that class are treated the same. 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.” 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, 112, (2001). Such should certainly be the case here.

CONCLUSION

Taxpayer is subject to Cleveland tax on the wages earned as a result of the Cleveland game just like he was subject to Ohio personal income tax on those same wages. That Taxpayer may not have traveled to Cleveland does not change that fact—it's not even a close question.

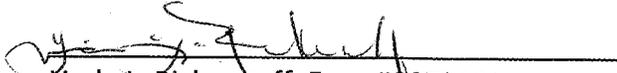
Additionally, there is no constitutional case here (as noted Taxpayer waived any nonconstitutional error by failing to assert such in his initial brief). Taxpayer's entire case is based on the fallacy that an apportionment method must be based on time or days. And Taxpayer's emphasis that Cleveland is the only jurisdiction using the games-played method is wholly irrelevant (even if true) since a tax by one jurisdiction clearly does not turn on how other jurisdictions might tax. *See Armco, Inc. v. Hardesty*, 467 U.S. 638, 654 (1978).

Finally, it is clear that the nature of the business of the NFL is entertainment based on the games. Further, the contractual documents governing the employment relationship between the NFL, its teams and the players show that *everything*—from compensation to every single right or benefit a player may receive to even discipline—is based on the games. How can it possibly be said that a tax measured by the *same games* is unreasonable? It cannot.

For all the reasons stated herein, this Court should affirm the decision of the BTA and find against Taxpayers on all of their constitutional assertions and claims.

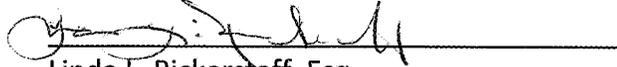
Respectfully submitted,
Barbara A. Langhenry, Esq., #0038838
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By:


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Assistant Director of Law
Attorneys for the City of Cleveland Board of Review
and Nassim M. Lynch

CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellees, City of Cleveland Board of Review and Nassim M. Lynch was served by regular U.S. mail on Richard C. Farrin, Esq., Zaino Hall & Farrin, LLC, 41 South High Street, Suite 3600, Columbus, Ohio 43215 and Stephen W. Kidder, Esq., Hemenway & Barnes, 60 State Street, Boston, MA 02109-1899, on this 24th day of July 2014.

A handwritten signature in black ink, appearing to read "Linda L. Bickerstaff", is written over a solid horizontal line.

Linda L. Bickerstaff, Esq.
Assistant Director of Law

Attorney for the City of Cleveland Board of Review
and Nassim M. Lynch

APPENDIX

CITY OF CLEVELAND
BOARD OF INCOME REVIEW

In re: Jeffrey B. Saturday
Karen R. Saturday

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Case No. 01-011

DECISION

Introduction

This cause and matter comes to be considered by the City of Cleveland Board of Income Tax Review upon a notice of appeal filed by Jeffrey B. and Karen R. Saturday, Taxpayers. The Taxpayers challenge a decision of Nassim M. Lynch, Tax Administrator for the City of Cleveland. The Tax Administrator denied a refund of income taxes withheld by Mr. Saturday's employer and paid to the City during tax year 2008. The Taxpayers argue that the Tax Administrator erred in finding that certain income received by Mr. Saturday during a year when he neither resided in nor played in an NFL football game in the City of Cleveland was includable in taxable income in Cleveland. Upon review, this Board affirms the Tax Administrator's decision.

History of the Appeal

A review of the record in this matter reveals that Mr. Saturday was employed by the Indianapolis Colts. On November 30, 2008, the Indianapolis Colts traveled to Cleveland and played a regular season NFL football game. On November 30, 2008, Mr. Saturday was deemed to be inactive due to injury, and he did not travel to Cleveland with the Colts and did not play in the game.

The Taxpayers timely filed a municipal income tax return with City of Cleveland on October 15, 2009, showing an overpayment of tax in the amount of \$16.00 (Tax Admin. Exhibit 1). On November 2, 2009, the \$16.00 overpayment was refunded to the Taxpayers and cashed (Tax Admin. Exhibit 2). On November 18, 2009, Taxpayers filed the request for refund that is the subject of this case, claiming that they are entitled to an additional refund based on the dual grounds that Mr. Saturday performed no services in the City of Cleveland in 2008 and that the City's use of apportionment of income of professional athletes on the games-played method is illegal (Tax Admin. Exhibit 3). On September 2, 2010, the City Division of Taxation, finding that Mr. Saturday's employer had incorrectly calculated the tax due, recalculated the Taxpayers' 2008 tax based on the games-played method of apportionment, resulting in an additional refund in the amount of \$300.00 (Tax Admin. Exhibit 4), paid by check in the amount of \$306.00 to Taxpayers dated October 1, 2010, and cashed (Tax Admin.

Exhibit 5). On September 29, 2010, Taxpayers' representatives requested a final administrative ruling from the Tax Administrator (Tax Admin. Exhibit 6). On January 25, 2011, the Tax Administrator issued the final ruling from which Taxpayer brings this appeal (Tax Admin. Exhibit 7).

On March 4, 2011, this Board received the current matter appealing the Tax Administrator's ruling. On March 21, 2011, this Board set the matter for hearing on April 7, 2011. On March 29, 2011, Taxpayers moved for a continuance of the hearing to allow more time to arrange attendance by witnesses. On April 4, 2011, Taxpayers' Motion for Continuance was granted for good cause shown. On April 28, 2011, this Board set the matter for hearing on June 24, 2011.

Appeal is Not Barred by Earlier Refund Based on Math Calculation.

The Tax Administrator contends that this appeal should not be heard because the Taxpayers' initial municipal income tax return constitutes one or more of the following items, any one of which would preclude this action: res judicata, election of remedies, or issue preclusion or waiver. This Board does not understand res judicata to be applicable unless there has been a hearing or other opportunity to be heard. We also do not understand how there can be an election of remedies or waiver because no election or waiver was knowingly made. In this case, the Taxpayers' first refund request was a simple mathematical calculation, and without more, this Board does not find there to be res judicata, election of remedies, or issue preclusion or waiver. Nothing in the case law submitted by the Tax Administrator convinces us otherwise since those cases seem to involve amending an earlier refund claim after the statute of limitations had run on a second refund claim. In the present case, the second refund claim was filed before the running of the statute of limitations. We, therefore, believe that this appeal is not precluded and is properly before us.

Taxpayers Failed to Meet Their Burden of Proof that Games-Played Allocation Is Unreasonable And Should Be Overturned.

The Rules and Regulations of the Tax Administrator allocate income of professional athletes based on a fraction, with the numerator being the number of games played in the City of Cleveland and the denominator being the number of games played everywhere. Other jurisdictions allocate income of professional athletes based on duty days, and employ a denominator that takes into account certain other non-game activities. Taxpayers' challenge to the use of the games played method is the lynchpin of their case. Under the duty-day method of allocation of income, November 30, 2008, may have been a day spent in rehabilitation for Mr. Saturday outside the City of Cleveland (the Board does not find sufficient established facts to determine whether Mr. Saturday was actually performing rehabilitation activities on that date or was merely

resting); whereas, under the games-played method of allocation, November 30, 2008, was a sick day for Mr. Saturday, with Cleveland being the location where Mr. Saturday would have worked if he had not received an excused absence. For the reasons stated below, we find that the Tax Administrator correctly allocated Mr. Saturday's income on a games-played basis.

Because taxation does not involve any fundamental rights, the wisdom of the taxing authority is not questioned so long as there exists a fair and substantial relation to the object of taxation. F.S. Royster Guano Co. v. Virginia, (1920) 253 U.S. 415. In other words, a tax provision will be upheld so long as there is a reasonable basis for the provision.

In lieu of presenting witnesses available for examination, the Taxpayers' have submitted into evidence the following:

Taxpayers' Exhibit A – Affidavit of Thomas J. DePaso, Associate General Counsel of the National Football League Players Association

Taxpayers' Exhibit B – Affidavit of Jeffrey B. Saturday, Taxpayer

Taxpayers' Exhibit C – Affidavit of Karen R. Saturday, Taxpayer

Taxpayers' Exhibit D – Affidavit of Kurt Humphrey, Indianapolis Colts Vice President of Finance

Taxpayers' Exhibit E – Affidavit of Dave Hammer, Indianapolis Colts Head Athletic Trainer

No witness appeared before this Board for cross-examination by the Tax Administrator or for questioning by this Board. No explanation was offered concerning the unavailability of the witnesses. This Board granted a continuance to allow for scheduling attendance of witnesses, and a second continuance was not requested.

This Board is not bound by the Rules of Evidence, but part of the job of this Board is to decide what weight to give the evidence offered and admitted into evidence. Where there has been no opportunity for cross examination of witnesses by the opposing party, the evidence will be given less weight. In Exhibit A, Mr. DePaso purports to tell this Board the basis for paying Mr. Saturday under a 315-page Collective Bargaining Agreement and NFL Player Contract. Mr. DePaso purports to sum up the relevant sections of both documents in a little over four pages. Mr. DePaso cites provisions requiring athletes to attend training camps and practices, but supplies no information to refute the Tax Administrator's contention that the Taxpayer is part of a team, that the Taxpayer's team played in the City of Cleveland, and that the Taxpayer received compensation on account of the game played in Cleveland. The remaining

affidavits set forth information about the state of Mr. Saturday's health and his whereabouts on November 30, 2008, but supply no facts that show that the games-played allocation method is unreasonable.

The sole argument made by Taxpayers is the reasonableness of the duty-day allocation method. Although the affidavits submitted by the Taxpayers show that taxation based on duty days may be a reasonable method of allocation of an athlete's income, that is not the question before this Board. The question before this Board is whether the use of the games-played method of allocation of Mr. Saturday's income was unreasonable in this case. No evidence has been submitted to support any conflict with the allocation methods of any other jurisdiction when applied to this Taxpayer, nor any other unreasonable application, effect or outcome in the context of this case.

The burden of proof is on the Taxpayers to demonstrate their right to relief. Although the Taxpayers have submitted evidence to support the reasonableness of allocation of athlete's income on the duty-day method, the Taxpayers have failed to submit any evidence showing the unreasonableness of the games-played method of allocation, despite the fact that the Taxpayers requested and were granted a continuance for the specific purpose of scheduling witnesses. While the Taxpayers might prefer that the City of Cleveland use a different allocation method, the City is not required to change its method of allocation unless it has been demonstrably proven to be unreasonable, is expressly prohibited by State statute, or is overturned by a court of law. For this reason, this Board finds that the Taxpayers have failed to carry their burden of proof with respect to the reasonableness of the allocation of athlete's income on a games-played basis, and the Tax Administrator acted appropriately with respect to income allocation in this case.

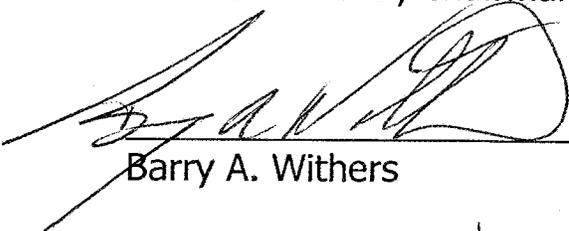
Taxpayer's Sick Pay Was Properly Allocated to the City of Cleveland.

The next issue is whether the City of Cleveland may tax income paid on a sick day for work that would have been performed in Cleveland if Mr. Saturday had not been excused from playing in the November 30, 2008 game. Taxpayers cite Toliver v. Middletown, Butler App. No. CA99-08-147 (June 30, 2000) for the proposition that Cleveland may not tax Mr. Saturday for a sick day because he did not enter the City of Cleveland on that day. The Toliver case and others cited by Taxpayers involve truckers who picked up cargo in the City of Middletown and then delivered the cargo elsewhere. In those cases, the truckers actually worked outside the City. This Board agrees with the Toliver court that where work is performed by a nonresident outside a city, such city should not tax it. On the other hand, when an employee takes a sick day, it would be an administrative burden to the taxing authority to determine where an employee is sick or injured. It is, therefore, standard accepted practice to tax the employee where he or she would have worked if he were not sick or injured.

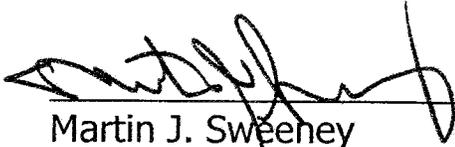
In Codified Ord. 191.031501, the City of Cleveland defines "Qualifying Wages" as wages as defined in Section 3121(a) of the Internal Revenue Code, with certain adjustments. Internal Revenue Code Section 3121(a)(2)(a) includes in Qualifying Wages the amount of any payment paid by an employer on account of sickness or accident disability. The City of Cleveland is, therefore, within its power to tax payments made by an employer during sickness or injury. Section 3.01(5) of the Tax Commissioner's Rules and Regulations states that other taxable income includes vacation, sickness or any other types of payments made under a wage or salary continuation plan. It goes on to provide that "Payments made by an employer to an employee during periods of absence from work are taxable when paid and at the tax rate in effect at the time of payment. Sick leave or sick pay, disability pay, vacation pay, terminal pay, supplemental unemployment pay and severance pay may not be excluded from taxable income" We find Section 3.01(5) of the Rules and Regulations to be within the City of Cleveland's power to tax.

For the reasons stated herein, the Tax Administrator's decision is affirmed.

Robert J. Triozzi, Chairman



Barry A. Withers



Martin J. Sweeney

CERTIFICATE OF SERVICE

A copy of the foregoing Decision as mailed by regular U.S. mail, postage prepaid, on this 20th day of September, 2011, to:

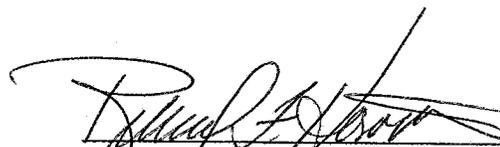
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Richard F. Horvath
Acting Director of Law

OHIO BOARD OF TAX APPEALS

Jeffrey B. Saturday and Karen B. Saturday,)	CASE NO. 2011-4027
)	
Appellants,)	(MUNICIPAL INCOME TAX)
)	
vs.)	DECISION AND ORDER
)	
City of Cleveland Board of Review and)	
Nassim Lynch, Cleveland Tax)	
Administrator,)	
)	
Appellees.)	

APPEARANCES:

For the Appellants - Hemenway & Barnes LLP
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Cleveland, Ohio 44113

Entered **JAN 28 2014**

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

Appellants appeal from a decision of the City of Cleveland Board of Review, i.e. municipal board of appeal (“MBOA”),¹ in which the MBOA denied appellants’ request for refund of income tax paid to the city of Cleveland for tax year 2008. We proceed to consider the matter upon the notice of appeal, the transcript

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.”

certified by the MBOA, and the parties' briefs. The parties waived the opportunity to present evidence at a hearing before this board.

During the period at issue, Mr. Saturday was a professional football player for the Indianapolis Colts. In tax year 2008, the city of Cleveland taxed a portion of Mr. Saturday's income based on a regular season game played between the Colts and the Cleveland Browns on November 30, 2008.² Appellants filed a request for refund of taxes paid, arguing that, because Mr. Saturday did not play in the November 30, 2008 game and did not travel to Cleveland that day with the team, no portion of his income was taxable to the city of Cleveland. Instead, because Mr. Saturday was injured, he remained in Indianapolis and participated in rehabilitation activities. The tax administrator for the city of Cleveland denied appellants' request for refund, and the denial was affirmed by the MBOA. In its decision, the MBOA found that appellants failed to meet their burden of proof that the "games-played" allocation used by the city of Cleveland is unreasonable, and that Mr. Saturday's absence from the November 30, 2008 game was properly treated as a "sick day" and therefore taxable.

Appellants thereafter filed the present appeal, stating the following specifications of error: (1) the MBOA erroneously characterized November 29 and 30 as "sick days," even though Mr. Saturday participated in rehabilitation exercises in Indianapolis on those days; (2) the city had no authority to tax Mr. Saturday's income where he "did not travel to or perform any services in Cleveland in 2008," in violation of the Ohio and U.S. constitutions; (3) "Cleveland's use of a games-played formula results 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;" (4) the MBOA erroneously concluded that appellants failed to supply facts showing that the games-played allocation method is unreasonable; (5) the MBOA erroneously found that appellants failed to present sufficient evidence because it was

² As we explained in *Hillmeyer v. City of Cleveland Bd. of Review* (Jan. 14, 2014), BTA No. 2009-3688, unreported, the city of Cleveland taxes professional athletes under the "games-played" method, which "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." *Id.* at fn. 2.

presented by affidavit rather than by live testimony at the hearing; and (6) “the exclusion of professional athletes from the protection afforded by R.C. 718.011 *** violates the Equal Protection clauses of the United States and Ohio Constitutions.” Notice of Appeal.

This board recently addressed nearly identical arguments with regard to the reasonableness and constitutionality of the “games-played” allocation method used by the city of Cleveland, in *Hillenmeyer v. City of Cleveland Bd. of Review* (Jan. 14, 2014), BTA No. 2009-3688, unreported. Therein, we stated:

“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 taxes or Ohio case precedent. 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 income for the subject years. *Columbus Southern Lumber Co. v. Peck* (1953), 159 Ohio St. 564.” *Id.* at 4-5. (Footnotes omitted.)

Accordingly, we find our decision in *Hillenmeyer* applicable to this matter, as it relates to the city of Cleveland’s authority to tax individuals under the “games-played” allocation method.

The present case presents a different factual scenario than *Hillenmeyer*. Unlike the taxpayer in that matter, Mr. Saturday was never physically present in Cleveland and was taxed as if he had taken a “sick day” for the November 30, 2008, game. The city of Cleveland imposes an income tax “[o]n all qualifying wages, earned or received *** by nonresidents of the City for work done or services performed or rendered within the City or attributable to the City ***.” Codified Ordinance 191.0501(b)(1). Central Collection Agency³ (“CCA”) Article 8.02(E)(6) is specifically applicable to nonresident professional athletes, and states, in pertinent part:

“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*. 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 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*.” (Emphasis added.)

³ As we explained in *Hillenmeyer*, *supra*, quoting the city’s brief, “[t]he 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.” *Id.* at fn. 3.

As we stated in *Hillenmeyer*, this board has no jurisdiction to determine the constitutionality or reasonableness of the ordinance, including its application to athletes absent from games due to injury or illness. Our jurisdiction is limited to a determination of whether the MBOA's decision was proper under state law. In doing so, we note that "[w]hen 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.

Despite the factual difference between this case and *Hillenmeyer*, supra, i.e., that the taxpayer at issue in that case was physically present in Cleveland for games, we find appellants' argument is based on their arguments regarding the "games-played" allocation method provided for in the city's ordinance and related rules and regulations. As we did in *Hillenmeyer*, we find that the ordinance does not operate in contravention of any state statute or Ohio case precedent and "is a valid exercise of the city's municipal power to tax."⁴ *Gesler v. City of Worthington Income Tax Bd. of Appeals*, Slip Opinion No. 2013-Ohio-4986, ¶22.

Accordingly, the decision of the MBOA, affirming the actions of the Tax 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

⁴ As such, we make no findings regarding the sufficiency of appellants' evidence before the MBOA regarding Mr. Saturday's activities on the dates in question.

Search Cleveland Codes

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PART ONE — ADMINISTRATIVE CODE

Title XVII — Taxation

Chapter 191 — Municipal Income Tax

Complete to June 30, 2010

CROSS REFERENCES

Power to levy income tax, O Const Art XVIII §3

Taxpayer's suit, Charter § 90

Payroll deductions, RC 9.42

Municipal income taxes, RC Ch 718

Division of Taxation; Administrator, CO 127.30, 127.31

191.0101 Purpose of Levy

(a) To provide funds for the purposes of general municipal operations, procurement of fixed assets or permanent improvements, payment of debt charges, the elimination of deficits in City funds and for all other lawful purposes, there shall be, and is hereby levied a tax on qualifying wages as defined in this Chapter, on net profits, and on all other taxable income, as hereinafter provided.

(b) Eight-ninths (8/9) of all monies derived from the tax so levied shall be unrestricted and may be applied to any of the purposes described in division (a) of this section.

(c) One-ninth (1/9) of all monies derived from the tax so levied shall be credited to a special revenue fund to be known as the Restricted Income Tax Fund. Moneys credited to the Restricted Income Tax Fund may be applied to only the following purposes:

(1) Elimination of any deficit balance in any fund of the City, provided that such deficit balance existed as of December 31, 1984, or exists at any subsequent time during a fiscal emergency period, as defined in Section 118.01 of the Revised Code; or

(2) Payment of the principal of or interest or any premium on any bonds or notes issued by the City to finance the construction, purchase or acquisition of fixed assets or permanent improvements; or

(3) Payment of the costs of constructing or acquiring (whether by outright purchase, lease or lease-purchase and irrespective of whether payment is made in installments or in a lump sum) of fixed assets of permanent improvements.

(Ord. No. 2208-04. Passed 12-13-04, eff. 12-17-04)

191.0301 Definitions Generally

For the purposes of this chapter the terms, phrases, words and their derivatives shall have the meanings given in the next succeeding sections.

The singular shall include the plural, and the masculine shall include the feminine and the neuter.

(Ord. No. 2393-66. Passed 11-28-66, eff. 11-28-66)

191.030101 Adjusted Federal Taxable Income

"Adjusted Federal Taxable Income" means a C corporation's federal taxable income before net operating losses and special deductions as determined under the Internal Revenue Code adjusted, as set forth in Sections 718.01(A)(1) of the Revised Code.

(Ord. No. 2208-04. Passed 12-13-04, eff. 12-17-04)

191.030102 Administrative Rulings

"Administrative Rulings" mean the rulings issued by the Tax Administrator, upon the request of a taxpayer or employer, interpreting this chapter and the Rules and Regulations. Administrative Rulings shall be binding and effective upon issuance as to the taxpayer or employer requesting the ruling.

(Ord. No. 2208-04. Passed 12-13-04, eff. 12-17-04)

"Person" means individuals, firms, companies, business trusts, estates, trusts, partnerships, limited liability companies, associations, corporations, governmental entities, and any other entity.

With respect to provisions of this chapter that impose or prescribe a penalty, the term "person" shall mean the owners of an association, pass-through entity and unincorporated business entity and the officers of a corporation.

(Ord. No. 2208-04. Passed 12-13-04, eff. 12-17-04)

191.0315 Place of Business

"Place of business" means any bona fide office, other than a mere statutory office, factory, warehouse or other space which is occupied and used by the taxpayer in carrying on any business activity individually or through one or more of his regular employees regularly in attendance.

(Ord. No. 2393-66. Passed 11-28-66, eff. 11-28-66)

191.031501 Qualifying Wages

"Qualifying wages" means wages, as defined in section 3121(a) of the Internal Revenue Code, without regard to any wage limitations, adjusted as provided in division (A)(2) of Section 718.03 of the Revised Code. "Qualifying wages" includes compensation attributable to a nonqualified deferred compensation plan or program as defined in section 3121(v)(2)(C) of the Internal Revenue Code and compensation arising from the sale, exchange or other disposition of a stock option, the exercise of a stock option, or the sale, exchange or other disposition of stock purchased by the stock option. "Qualifying wages" does not include compensation deferred before January 1, 2004, to the extent that the deferred compensation does not constitute "qualifying wages" when paid or distributed.

(Ord. No. 2208-04. Passed 12-13-04, eff. 12-17-04)

191.0316 Resident

"Resident" means an individual domiciled in the City.

(Ord. No. 2393-66. Passed 11-28-66, eff. 11-28-66)

191.031601 Resident Owner

"Resident owner" means an individual domiciled in the City who has an interest in an association, pass-through entity or unincorporated business entity.

(Ord. No. 2208-04. Passed 12-13-04, eff. 12-17-04)

191.0317 Resident Unincorporated Business Entity

"Resident unincorporated business entity" means an unincorporated business entity having an office or place of business within the City.

(Ord. No. 2393-66. Passed 11-28-66, eff. 11-28-66)

191.031701 Rules and Regulations

"Rules and Regulations" mean the Rules and Regulations promulgated by the Tax Administrator and approved by the Board of Review.

(Ord. No. 2208-04. Passed 12-13-04, eff. 12-17-04)

191.031702 S Corporation

"S Corporation" means a corporation that has made an election under Subchapter S of Chapter 1 of Subtitle A of the Internal Revenue Code for its taxable year.

(Ord. No. 2208-04. Passed 12-13-04, eff. 12-17-04)

191.031703 State

"State" means the State of Ohio.

(Ord. No. 2208-04. Passed 12-13-04, eff. 12-17-04)

191.031704 Tax Commissioner

"Tax Commissioner" means the Tax Commissioner of the State of Ohio.

(Ord. No. 2208-04. Passed 12-13-04, eff. 12-17-04)

191.0318 Taxable Income

"Taxable income" means all qualifying wages, net profits and all other income from whatever source derived set forth in Section 191.0501, and the Rules and Regulations as taxable.

(Ord. No. 2208-04. Passed 12-13-04, eff. 12-17-04)

191.031801 Taxable Situs

"Taxable Situs" means that portion of a taxpayer's net profits attributable to the City where the taxpayer conducts a business or profession both within and without the City, determined in accordance with Section

718.02 of the Ohio Revised Code.

(Ord. No. 2208-04. Passed 12-13-04, eff. 12-17-04)

191.0319 Taxable Year

"Taxable year" means the corresponding tax reporting period as prescribed for the taxpayer under the Internal Revenue Code.

(Ord. No. 2208-04. Passed 12-13-04, eff. 12-17-04)

191.0320 Taxpayer

"Taxpayer" means a person subject to the tax imposed by this chapter, whether the tax is imposed on the taxable income of the entity in the hands of the entity or on the taxable income from the entity in the hands of the owners of the entity. "Taxpayer" does not include any person that is a disregarded entity or a qualifying subchapter S subsidiary for federal income tax purposes, but "taxpayer" includes any other person who owns the disregarded entity or qualifying subchapter S subsidiary.

(Ord. No. 2208-04. Passed 12-13-04, eff. 12-17-04)

191.0321 Unincorporated Business Entity

"Unincorporated Business Entity" means either an "association," "pass-through entity" or "corporation," determined by the treatment afforded such entity for federal income tax purposes.

(Ord. No. 2208-04. Passed 12-13-04, eff. 12-17-04)

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 an 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:

(a) On all qualifying wages, net profits and other taxable income earned and/or received on and after January 1, 1967 by residents of the City;

(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;

(2) For nonresidents employed at a place of business or profession within the City, only those qualifying wages earned and/or received by such nonresident that are specifically attributable to a place or location worked that is outside the City will be treated as earned outside the City;

(c) (1) On the portion attributable to the City of the net profits earned and/or received on and after January 1, 1967, of all resident associations, pass-through entities or other unincorporated business entities treated as a pass-through entity for federal income tax purposes or professions or other activities, derived from sales made, work done, services performed or rendered, and business, or other activities conducted in the City and/or derived from sales made, work done, services performed or rendered and business or other activities attributable to the City;

(2) On the portion of the distributive share of the net profits earned and/or received on and after January 1, 1967, of a resident partner or owner of a resident association, pass-through entity or other unincorporated business entity treated as a pass-through entity for federal income tax purposes not attributable to the City and upon which the City's income tax has not been imposed and levied;

(d) (1) On the portion attributable to the City of the net profits earned and/or received on and after January 1, 1967, of all nonresident associations, pass-through entities or other unincorporated business entities treated as a pass-through entity for federal income tax purposes, professions or other activities, derived from sales made, work done, services performed or rendered, and business, or other activities conducted in the City and/or derived from sales made, work done, services performed or rendered and business or other activities attributable to the City, whether or not such association, pass-through entity or other unincorporated business entity treated as a pass-through entity for federal income tax purposes has an office or place of business in the City;

(2) On the portion of the distributive share of the net profits earned and/or received on and after January 1, 1967, of a resident partner or owner of a nonresident association, pass-through entity or other unincorporated business entity treated as a pass-through entity for federal income tax purposes not attributable to the City and upon which the City's income tax has not been imposed and levied from wherever such business is located;

ARTICLE 3:00 IMPOSITION OF TAX

3:01 Resident Employee

- A. In the case of residents of member taxing municipalities, an annual tax (see tax rate schedule) is imposed on all salaries, wages, commissions, other income, and other compensation earned and received, earned and accrued, or earned and deferred during the effective period of the ordinance.

For the purpose of determining the tax on earnings of resident taxpayers under the rate and income taxable section of the ordinance, the source of earnings and the place or places in or at which the services were rendered are immaterial. All such earnings wherever earned are taxable. The location of the place from which payment is made, or where payment is received is immaterial.

- B. The following are items subject to the tax imposed by the rate and income taxable sections of the member communities' ordinances.

1. Salaries, wages, bonuses and incentive payments earned by an individual whether directly or through an agent, and whether in cash, or in property, and whether received or deferred, for services rendered during the tax period as:
 - a. An officer, director or employee of a corporation (including charitable and other non-profit organizations), joint stock associations, or joint stock company, or any other type of entity;
 - b. An employee (as distinguished from a partner, member or owner) of a partnership, limited partnership, S Corporation, Limited Liability Partnership and Limited Liability Corporation or any form of unincorporated enterprise;
 - c. An employee (as distinguished from a proprietor) of a business, trade, or profession conducted by an individual owner;
 - d. An officer or employee (whether elected, appointed or commissioned) of the United States Government or of a corporation created and owned or controlled by the United States Government, or any of its agencies; or of the State of Ohio or any of its political subdivisions or agencies thereof; or any foreign country or dependency except as provided in the section of the ordinance indicating sources of income not taxable.
 - e. An employee of any other entity or person, whether based upon hourly, daily, weekly, semi-monthly, annual, unit of production or piecework rates; and whether paid by an individual, partnership, association, corporation (including charitable and other non-profit corporations and associations), governmental administration, agency, authority, board, body, branch, bureau, department, division, subdivision, section or unit or any other entity.
2. Commissions earned by a taxpayer whether directly or through an agent and whether in cash or in property for services rendered during the effective period of the ordinance, regardless how computed or by whom or wheresoever paid.
 - a. If the amounts received as a drawing account exceed the commissions earned and the excess is not subject to the demand of the employer for repayment, the tax is payable on the amounts received as a drawing account.
 - b. Amounts received from an employer for expenses and used as such by the individual receiving them are not deemed to be compensation if the employer deducts such expenses or advances as such from his gross income for the purpose of determining his net profits taxable under Federal law, and the employee is not required to include such receipts as income (or has directly offsetting business expenses) on his Federal Income Tax return.

- c. If commissions are included in the net earnings of the trade, business, profession, enterprise, or activity, carried on by an unincorporated entity of which the individual receiving such commission is owner or part owner and therefore subject to the tax on the net profits provision of the ordinance, they shall not be taxed under the provisions relating to salaries, wages, or commissions earned.
 3. Fees, unless such fees are properly included as part of the net profits of a trade, business, profession, or enterprise regularly carried on by an unincorporated entity owned or partly owned by said individual (i.e. fees which are taxable are those fees received by a director or officer of a corporation).
 4. Other compensation and other income shall include but are not limited to:
 - a. Tips received by waiters, waitresses and others;
 - b. Bonuses;
 - c. Gifts and gratuities in connection with employment;
 - d. Compensation paid to domestic servants, casual employees and other types of employees;
 - e. Benefits resulting from employers assuming a tax;
 - f. Fellowships, grants, or stipends paid to a graduate student in the full amount except that any amount allocated in writing for tuition, books and laboratory fees shall be excluded;
 - g. Dismissal pay which is demandable as a matter of right by virtue of the contract of employment;
 - h. Incentive payments;
 - i. Contributions by employees and/or employers on behalf of employees to retirement plans are not deductible by such employee. If such contributions are deducted by an employer from the earnings of an employee, such amounts are subject to withholding tax;
 - j. If an employer pays into a retirement or deferred compensation plan on behalf of an employee in lieu of paying said amount as wages, said payments are considered additional compensation to the employee and are subject to withholding tax.
 - k. Contributions by employers to a pension, annuity, retirement or deferred compensation plan, including simplified pension plans and similar plans, are deemed to be other compensation subject to withholding;
 - l. Income received on account of covenants not to compete;
 - m. Lottery winnings, gambling and gaming winnings, sports winnings;
 - n. Severance pay;
 - o. Jury fees, if not paid over to a taxpayer's employer;
 - p. Contributions made by or on behalf of employees to cafeteria plans and profit sharing plans;
 - q. Income deemed taxable per Federal Code Section 89 or its substantial equivalent;
 - r. Ordinary gains reported on Federal Form 4797 or its substantial equivalent;
 - s. Punitive damages on account of personal injury;
 - t. Hobby income
 5. Vacation, sickness, or any other types of payments made under a wage or salary continuation plan including 'sub pay' received from a union or other third party in lieu of wages during periods of absence from work are taxable when paid. Payments made by an employer to an employee during periods of absence from work are taxable when paid and at the tax rate in effect at the time of payment. Sick leave or sick pay, disability pay, vacation pay, terminal pay, supplemental unemployment pay, and severance pay may not be excluded from taxable income.

Payments made to an employee under a wage continuation plan, either directly or by an insurance company or another third party may not be excluded from taxable income. Such payments are attributable to the city of employment.

6. Where compensation is paid or received in property, its fair market value at the time of receipt shall be subject to the tax and to withholding. Board, lodging and similar compensation shall be included in earnings at fair market value.
7. Group term life insurance protection not paid by the employee or if the coverage paid by the employer exceeds \$50,000.00.
8. Stock options given as compensation. When exercised, regardless of the treatment by the Internal Revenue Service, the employer is required to withhold on the difference between the fair market value and the amount paid by the employee.

Employers must withhold municipal income tax on the exercise of stock options (qualified or nonqualified) if the employee acquired the option as compensation or in lieu of wages.

9. Losses from the operation of a business or profession are not deductible from employee earnings. Rental and business losses may not be used to offset wage income.
10. In the case of domestics and other employees whose duties require them to live at their place of employment or assignment, board and lodging shall not be considered as taxable compensation.
11. Intrastate, over-the-road drivers and others with similar situations reporting to a terminal, office, etc. in a member community must have a minimum of 25% of wages withheld and allocated to the city where their terminal, office, etc. is located.
12. Income generated from any illegal Federal, State or municipal transaction.

3:02 Non-Resident Employee

- A. In the case of individuals who are not residents of the taxing community there is imposed under the ordinance, a tax (see tax rate schedule) on all salaries, wages, commissions and other compensation earned and received, earned and accrued, or earned and deferred on and after the effective date of the ordinance for work done or services rendered or performed within said taxing community whether such compensation or remuneration is received or earned directly or through an agent and whether paid in cash or in property. The location of the place from which payment is made is immaterial.
- B. The items subject to tax under the rate and income taxable section of the ordinance are the same as those listed and defined in Article 3:01B. hereof. For the methods of computing the extent of such work or services performed within a taxing community, in cases involving compensation for personal services partly within and partly without said taxing community, See Article 8:02 hereof.

3:03 Resident Unincorporated Business

- A. In the case of resident unincorporated businesses, professions, enterprises, undertakings or other activities conducted, operated, engaged in, prosecuted or carried on, irrespective of whether such taxpayer has an office or place of business in his resident community, there is imposed an annual tax (see tax rate schedule) on the net profits earned during the effective period of the ordinance attributable to the resident community determined by the separate accounting method or formula provided for in Article 4:00 hereof, derived from sales made, work done or services performed or rendered and business or other activities conducted in a resident community.
- B. The tax imposed on resident associations or other unincorporated entities is upon the entities rather than the individual members or owners thereof. (For tax on that part of a

- C. Whenever the ordinance or these regulations require filing a return or payment of tax to the Administrator, or to the taxing community, such returns and/or payments for the municipalities in the Central Collection Agency shall be made directly to The Central Collection Agency, 1701 Lakeside Avenue, Cleveland, OH 44114.

8:02 Withholding Collection at Source

- A. It is the duty of each employer who employs one or more persons on a salary, wage, commission, or other compensation basis to deduct each time any such compensation is paid to or earned and deferred by an employee subject to the ordinance, the tax at the current rate from such salary, wage, bonus, incentive payment, commission or other compensation due by said employer to said employee, together with the tax at the current rate from the tips or gratuities reported to said employer by each said employee for Social Security, Medicare or Federal Income Tax purposes and shall make a return and pay to the Administrator the amount of taxes so deducted.
 - 1. The tax shall be calculated on the gross amount of all salaries, wages, bonuses, incentive payments, commissions or other form of compensation paid to or earned and deferred by an employee who is a resident of the taxing community regardless of the place where the services are rendered.
 - 2. The tax shall be calculated on the gross amount of all compensation paid to or earned and deferred by an employee who is a non-resident of the employment community for services rendered, work performed, or other activities engaged in to earn such compensation within said employment community.
 - 3. For those employees who do not pay for personal use, including commuting fees, of a vehicle owned or leased by an employer, employers are required to withhold on the value of an employee's non-cash compensation.
- B. All employers within or doing business within a taxing community are required to make the collections and deductions specified in this Article, regardless of the fact that the services on account of which any particular deduction is required as to residents of the taxing community were performed at a place of business of any such employer situated outside said taxing community.

Employers who do not maintain a permanent office or place of business in the taxing community, but who are subject to tax on net profits under the ordinance, are considered to be employers within a taxing community subject to the requirement of withholding.
- C. The mere fact that tax is not withheld will not relieve the employee of the responsibility of filing a return and paying the tax on the compensation earned.
- D. All individuals, businesses, employers, brokers or others doing business who engage persons, either on a commission basis or as independent contractors, sub-contractors, or contract employees who are not subject to withholding shall indicate the total amount of earnings, payments, commissions and bonuses to residents of the taxing community (or to non-residents who do business in the taxing community) on copies of Federal Form 1099 or successor form, or shall attach a list which shall indicate social security numbers, names, addresses and amounts paid.
- 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:

1. Employees Compensated on an Hourly, Daily, Weekly, or Monthly Basis.

a. General Rule

The deduction and withholding shall attach to the personal service compensation for the exact amount of compensation paid or earned and deferred for services performed in a taxing community, when such exact amount of compensation can be established. When no such exact determination of amounts earned or derived in the taxing community is possible, the income of employees who are compensated on an hourly, daily, weekly or monthly basis must be apportioned to the taxing community as follows:

Multiplying the gross income, wherever earned from the employment which includes employment carried on in the taxing community, by a fraction, the numerator of which is the number of days spent working in the taxing community and the denominator of which is the total working days (including holidays, vacation days, sick days and paid or unpaid leave).

The total number of working days should not exceed 260 days, unless for travel outside the United States. In those cases in which the employee is required to travel outside of the United States, the total weekend days in which the employee was required to work while outside of the United States must be added to both the numerator and the denominator.

The result is the amount of the non-resident's income allocable to the taxing community.

b. Apportionment Where Employee Performs Services In More Than One Taxing Community Each Day.

In the case of an employee compensated hourly, daily, weekly, or monthly, who regularly performs services in more than one taxing community each day, income is apportioned to the particular taxing community by multiplying the gross income, wherever earned, from the employment which includes employment carried on in the particular taxing community, by a fraction, the numerator of which is the number of hours spent working in the particular taxing community and the denominator of which is the total number of working hours.

2. Salespersons

If the non-resident is a salesman, agent or other employee whose compensation on the basis of commissions depends directly on the volume of business transacted by him, the deduction and withholding shall attach to the portion of the entire compensation which the volume of business transacted by the employee within the taxing community bears to the volume of business transacted by him within and outside of said taxing community.

3. Real Estate Agents

For non-resident licensed real estate agents who are non-employees or independent contractors (i.e. non-employee agents, or independent agents) the municipal income tax is imposed on any income (commission or otherwise) earned as a result of the sale of real property located within a taxing community. The tax is imposed on the agent's income resulting from the sale of property that is physically located within the taxing community, regardless of where the office or offices of the agent is or are located.

For non-resident or resident licensed real estate agents who are employees of a real estate brokerage or real estate company, the municipal income tax is imposed on any salary, commission or other compensation earned, as a result of the employer's maintenance of an office in the taxing community. See, CCA Rules and Regulations, Article 8:02 Withholding Collection at Source.

For Resident real estate agents who are non-employees or independent contractors (i.e. non-employee agents, or independent agents) the municipal income tax is imposed on any income (commission or otherwise) earned as a result of the sale of real property located within the municipality of residence or earned as a result of the sale of real property located outside the municipality of residence (subject to the tax credits given by the municipality) regardless of where the office or offices of the agent is or are located.

4. Over the Road Drivers

Over the road intrastate drivers and other similarly situated employees reporting to a terminal, warehouse, or office in a taxing community must have a minimum of 25% of wages withheld and allocated to the taxing community where the terminal, warehouse, or office is located.

5. Self-Employed Non-Residents Carrying on a Trade or Business Within a Taxing Community and Elsewhere. See Article 4:00, et seq., hereof.

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.

7. Entertainers

1.a. Any person who shall employ or contract for the services of any entertainer, entertainment act, sports event, promotional booth, special event, band, orchestra, rock group, theatrical performance, lecturers, speakers, etc. (this is not an exhaustive list of types of entertainers required to withhold, report or pay over a municipal income tax) shall be deemed to be an employer and shall, for

purposes of the collection of the income tax, be required to withhold, report and pay over to the Administrator the tax at the applicable rate on the gross amount so paid on the completion of the engagement, said reports to be on forms provided by the Administrator.

- b. Any person who, acting as a promoter, booking agent or employer, engages the services of or arranges the appearance of any entertainer, entertainment act, sports event, band, orchestra, rock group, theatrical performance, etc., in the taxing community, and who makes any payment arising from said appearance shall be deemed to be an employer and shall, for purposes of the collection of the income tax, be required to withhold, report and pay over to the Administrator the tax at the applicable rate, on the gross amount so paid on the completion of the engagement, said reports to be on forms provided by the Administrator.
- c. Any person who rents facilities to any entertainer, entertainment act, sports event, promotional booth, special event, band, orchestra, rock group, theatrical performance, etc. for use in performing services in the taxing community, and who makes any payment arising from said use of facilities shall be deemed to be an employer and shall, for purposes of the collection of the income tax, be required to withhold, report and pay over to the Administrator the applicable tax at the applicable rate hereof based on the gross amount so paid on completion of the engagement, said reports to be on forms provided by the Administrator.
- d. The income of non-resident entertainers is the entire amount received for performances, engagements or events that occurred in the taxing community. In the case of a non-resident entertainer who is not paid specifically for a performance, the following apportionment formula must be used:

The income earned and subject to the tax is the total annual compensation multiplied by a fraction, the numerator of which is the number of performances the entertainer performed (or was available to perform, as, for example with understudies) in the taxing community, and the denominator of which is the total number of performances which the entertainer was obligated to perform under contract or otherwise during the taxable year.

8. Excluded Personal Services

The deduction and withholding obligation shall attach in the case of any personal service compensation for labor or personal services performed in the taxing community irrespective of the residence of the employee (or, in the case of an entertainer, irrespective of the residence of the promoter, booking agent or lessor), the place in which the contract for the labor or service was made, or the place or time of payment; except that such compensation shall be deemed not to be income derived within the taxing community if:

- a. The compensation for such labor or services does not exceed a gross amount of \$50.00 in any calendar year; or
- b. There is only occasional entry into a taxing community by a non-resident employee who performs the regular duties for which he is employed almost entirely, or entirely outside of such municipality, but also enters such municipality for the purpose of receiving instruction, reporting, accounting, etc. incidental to his duties. This exclusion does not apply to professional athletes or teams, or to entertainers as defined above.

9. Employee Reports

In apportioning the earnings of an employee, an employer may accept the written reports of his employee as to any of the items set forth in 1a., 1b., 2, 3, and 10 hereof. However, the employer shall be responsible for any material error in allocation as to employment within a taxing community.

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.

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