

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

**MEMORANDUM OF APPELLANT HUNTER T. HILLENMEYER IN
OPPOSITION TO APPELLEES' MOTION TO STRIKE**

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SUPREME COURT OF OHIO

The Appellees (hereinafter, the “Tax Administrator”) seek to have a portion of the Reply Brief of Appellant Hunter T. Hillenmeyer’s stricken on the grounds that it purportedly raises a “new issue.” So far as appears from the motion, the portion of the Reply Brief that the Tax Administrator seeks to strike is a single paragraph that begins at the bottom of page 13 and continues onto page 14. That paragraph discusses Cleveland’s agreement with Berea, Ohio – where the Cleveland Browns practice but do not play in any games – which allows Berea to tax at least 50% of the income of Browns players and, therefore, sets a different method of taxation for Cleveland Browns players than for all visiting players. The motion should be denied.

Hillenmeyer’s Reply brief raises no new issues. As did Hillenmeyer’s opening Merit Brief, the Reply Brief argues that Cleveland’s use of the games-played method of allocating income discriminates against interstate commerce in violation of the Commerce Clause.

Compare Appellant’s Br. 31–33, *with* Reply Br. 12–14. Both Hillenmeyer’s opening brief and his Reply Brief explain how the games-played method discriminates against interstate commerce in its practical effects by subjecting players on visiting teams to a risk of multiple taxation that players on Cleveland teams can avoid. *Compare* Appellant’s Br. 31–32, *with* Reply Br. 12–13. Both Hillenmeyer’s opening brief and his Reply Brief also explain how Cleveland’s agreement with Berea discriminates against interstate commerce in violation of the Commerce Clause.

Compare Appellant’s Br. 33 n.6, *with* Reply Br. 13–14.

The paragraph of the Reply Brief that the Tax Administrator seeks to strike simply provides further detail to the argument made in Hillenmeyer’s opening brief that “Cleveland’s decision to exclude members of the Browns from the games-played method that it applies to members of all out-of-state Clubs is further evidence of impermissible discrimination against out-of-state business.” Appellant’s Br. 33 n.6.

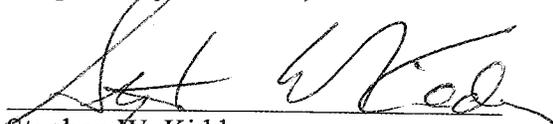
The Tax Administrator seizes on the phrase “facially discriminatory” in an effort to argue that Hillenmeyer is raising a new “facial constitutional challenge.” But the Reply Brief uses the phrase “facially discriminatory” merely to point out that Cleveland not only employs an apportionment method that discriminates against interstate commerce in its *effects* (the games-played method), but also that it overtly taxes Browns players differently from out-of-state players – and in a manner that is fundamentally inconsistent with the notion that players are paid only for playing in games. Hillenmeyer’s opening brief made that same point, even in the absence of the phrase “facially discriminatory.” *See, e.g.,* Appellant’s Br. 33 n. 6 (“Cleveland’s decision to exclude members of the Browns from the games-played method that it applies to members of all out-of-state Clubs is further evidence of impermissible discrimination against out-of-state business.”).

In an apparent effort to show some inconsistency in Hillenmeyer’s briefing, the Tax Administrator cites a number of places in Hillenmeyer’s opening brief where the phrase “as applied” is used. Notably, however, all of those references appear outside of the section of Hillenmeyer’s opening brief that argues that Cleveland discriminates against interstate commerce. *Cf.* Appellant’s Br. 31–33 (arguing in Section B that Cleveland discriminates against interstate commerce without using the phrase “as applied”). Moreover, unlike issues of fair apportionment, issues regarding the discriminatory nature of a tax necessarily call into question the facial validity of the tax. *See, e.g., Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986) (“When a statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.”).

In sum, Hillenmeyer's Reply Brief raises no new arguments or issues, and the Tax Administrator's motion to strike a portion of the Reply Brief should therefore be denied.

Dated: July 28, 2014

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum of Appellant Hunter T. Hillenmeyer in Opposition to Appellees' Motion to Strike was served on Linda L. Bickerstaff, Assistant Director of Law, City of Cleveland Department of Law, 205 West St. Clair Avenue, Cleveland, Ohio 41133, Counsel of Record for Appellees, by regular U.S. Mail, postage prepaid, on this 28th day of July, 2014.


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