

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-Appellants,)	
)	Ohio Board of Tax Appeals
vs.)	Case No. 2011-4027
)	
CITY OF CLEVELAND BOARD)	
OF REVIEW,)	
)	
and)	
)	
NASSIM M. LYNCH)	
)	
Defendants-Appellees.)	

APPELLEES' MOTION TO STRIKE NEW ISSUE RAISED
FOR THE FIRST TIME IN APPELLANTS' REPLY BRIEF

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APPELLEES' MOTION TO STRIKE NEW ISSUE RAISED FOR THE FIRST TIME IN REPLY BRIEF

Pursuant to S.Ct.Prac.R. 4.01(A), Appellees request that a new issue—a “facial” constitutional challenge—raised for the first time by Appellants in their reply brief be stricken. This proposition was not raised in Appellants’ Merit Brief and Appellees do not have any opportunity to file additional briefs to respond to said new issue raised for the first time at the last level of briefing.

In his merit brief before this Court, Taxpayer raised an as-applied constitutional challenge to the games-played method. He does so by claiming that:

Cleveland’s application of the games-played method [] to [him] violates the Due Process Clause;

the games-played method results in an allocation that is ‘out of all appropriate proportion to the business transacted by [him] in Cleveland;

Cleveland’s application of the games-played method to [him] violates the Commerce Clause; and

[he] is entitled to a refund [] because the games-played method used by Cleveland is contrary to Ohio law and unconstitutional *as applied to him*[.]

Merit Brief of Appellant at 35; 39; 43; 47. Counsel of record in this case is also counsel of record in another professional athlete case pending in this Court involving the city of Cleveland, *Hunter T. Hillenmeyer v. Cleveland Board of Review*, Case No. 2014-0235. In *Hillenmeyer*, like here, the taxpayer raised a facial constitutional challenge for the first time in his reply brief stating (among other things) that:

Cleveland’s taxation of professional athletes is *facially* discriminatory against out-of-state interests because Cleveland *does not* apply the games-played method to employees of the Cleveland Browns.

Hillenmeyer Reply Brief at 13 (emphasis original). Here, the Taxpayer claims that:

Cleveland [] discriminates against out-of-state interests by *not applying* the games-played method to employees of the Cleveland Browns.

Reply Brief at 17 (emphasis original). The exact same new issue raised in *Hillenmeyer* but with the word “facially” deleted—a distinction without a difference. Taxpayer here (like in *Hillenmeyer*) is precluded from asserting a new facial constitutional challenge for the first time in his reply brief preventing *any* response from Appellees.¹

For the reasons herein, Appellees request that Appellants’ new facial constitutional challenge be stricken from their reply brief and not considered by this Court, Appellants having raised the issue for the first time in their reply brief.

Respectfully submitted,
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¹ Similarly, for the first time in his reply brief, Taxpayer claims that he received a “full refund of all [State of] Ohio taxes [paid for the Cleveland game]. Reply Brief at 5. Nothing in the record evidence supports that claim—the record evidence only shows that Taxpayer paid Ohio tax for the Cleveland game a fact that the Tax Administrator has consistently raised from the very beginning. Transcript Exhibits 1; 3. Taxpayer’s complaint that “[h]ad the Tax Administrator inquired into the issue, [the Tax Administrator] would have discovered that” he was refunded all state taxes paid (Reply Brief at 5) is odd since nothing in Taxpayer’s own affidavits or briefings filed below even support his new claim and Taxpayer refused to be cross-examined by the Tax Administrator having failed to appear at the hearing before the Cleveland Board and waiving his hearing before the BTA.

CERTIFICATE OF SERVICE

A copy of the foregoing Appellees' Motion To Strike New Issue Raised For The First Time In Appellants' Reply Brief was served by regular U.S. mail on Appellants' counsel, Stephen W. Kidder, Esq., Hemenway & Barnes LLP, 60 State Street, Boston, MA 02109-1899 and Richard C. Farrin, Esq., Zaino Hall & Farrin LLC, 41 South High Street – Suite 3600, Columbus, Ohio 43215 on this 20th day of August 2014.


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