ORIGINAL

IN THE SUPREME COURT OF OHIO

WILLIAM E. MACDONALD III and SUSAN W. MACDONALD	)	Case No: 2014-0574
Plaintiffs-Appellees,	)	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
vs.	)	
CITY OF SHAKER HEIGHTS INCOME TAX BOARD OF REVIEW, MATTHEW RUBINO and REGIONAL INCOME TAX AGENCY	)	Court of Appeals Case No. 13 APH-01-71
Defendants-Appellants.	)	

BRIEF OF AMICUS CURIAE THE CITY OF CLEVELAND IN SUPPORT OF DEFENDANTS-APPELLANTS

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INTEREST OF AMICUS CURIAE CITY OF CLEVELAND

The city of Cleveland's interest in this case is that the same Appellees-Taxpayers here have a separate case currently pending before the Ohio Board of Tax Appeals ("BTA") where they claim that wages paid in the form of nonqualified deferred compensation is exempt from city tax as a "pension" even though Cleveland law clearly defines both "pensions" and "nonqualified deferred compensation" and treats the two differently for Cleveland tax purposes. While Cleveland law clearly applies to the Cleveland case and Shaker law applies to the Shaker case, the BTA has refused to allow the Cleveland case to proceed to hearing and determination staying the case through the outcome of Shaker's appeal before the Tenth District Court of Appeals and apparently also though Shaker's appeal to this Court.[1]

The outcome of this appeal will certainly have an impact upon Cleveland's case with the Appellees-Taxpayers because of the legal issue raised in this matter, namely the standard of review for when appeals are taken from municipal boards of appeal to the BTA. Moreover, the issue is not only significant for Cleveland as it relates to its own case with said Appellees-Taxpayers but because of its likely application to all such appeals.

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[1] It would be noted that on April 11, 2013, Cleveland filed a complaint for a writ of procedendo/mandamus in the Tenth District Court of Appeals to force the BTA to vacate its stay order and proceed to hear and determine Cleveland's case on the grounds that it was error for the BTA to stay a case pending before it until a final decision is issued in another case where that other case does not affect its jurisdiction to proceed to determine the case before it. *State of Ohio ex rel. City of Cleveland v. State of Ohio, Board of Tax Appeals*, Case No. 13-AP-308. Cleveland's request for a writ was denied by a Magistrate's Decision issued on January 29, 2014. On February 12, 2014, Cleveland filed Objections to the Magistrate's Decision which remains pending.

STATEMENT OF THE FACTS

This case arises from a decision issued by the Income Tax Board of Review for the city of Shaker Heights ("Shaker Board"). It is a tax case where Taxpayers, William E. MacDonald III and Susan W. MacDonald appealed a Ruling issued by Shaker's Tax Administrator, the Regional Income Tax Agency ("RITA"), concerning an assessment of additional tax due for tax year 2006.

The wages at issue are solely attributable to William E. MacDonald's ("Taxpayer") employment. At all relevant times, Taxpayer was a resident of the city of Shaker Heights, Ohio and employed by National City Corporation ("NCC") located in the city of Cleveland, Ohio. As part of his overall compensation package, Taxpayer had been selected to participate in a nonqualified deferred compensation plan set up by NCC which it termed a "Supplemental Executive Retirement Plan ("SERP"). Shaker Board Decision at 2. (Appx. at 2.) Taxpayer retired from NCC as Vice-Chairman on December 31, 2006. Upon retirement, Taxpayer's SERP wages were included in his total taxable qualifying wages for city tax purposes and reported in Box 5 of his Form-W-2. Those SERP wages totaled $9,107,013. *Id.* at 3. (Appx. at 3.)

Taxpayers filed their 2006 joint city tax return paying city tax on amounts reported in Box 18 of Taxpayer's Form W-2 totaling $5,459,598. Thereafter, Shaker's Tax Administrator, RITA, assessed additional tax due based on the amounts reported in Box 5 of the Form W-2 totaling $14,566,611. Taxpayers appealed the assessment to the Shaker Board. *Id.*

Before the Shaker Board, Taxpayers argued that the SERP wages were not subject to city tax because the deferred compensation constituted a "pension" under Shaker's Income Tax Ordinance and therefore is exempt from city tax. *Id.*

The Shaker Board rejected Taxpayers' arguments finding that "Chapter 718" "controls what is taxable [] income" for city tax purposes and that state law requires Ohio municipalities to tax wage income on "the basis" of "qualifying wages" which is "the amount calculated and reported in Box 5 of [the] Form W-2." *Id.* at 7. (Appx. at 7.) The Shaker Board noted that "qualifying wages" "includes amounts attributable to a nonqualified deferred compensation plan" "unless such amounts have been exempted from tax by [] municipal[] [] ordinance or resolution" and "since Shaker Heights has not enacted any resolution or ordinance" "that exempts nonqualified deferred compensation" "from its income tax" such wages were subject to city tax. *Id.* at 7-8. (Appx. at 7-8.) Taxpayers appealed that decision to the BTA.

The BTA reversed the decision of the Shaker Board.[2] In reversing the Shaker Board decision, the BTA found that even though the "SERP falls within the ambit of a nonqualified deferred compensation plan, [that] such designation [did not] necessarily mandate[] its exclusion from the commonly accepted definition of pension[.]" *Id.* at 10. (Appx. at 22.) In its decision, the BTA made no finding that the Shaker Board decision was unlawful or unreasonable. (Appx. at 13-24.) The BTA did find however (i) that "the parties [were] in agreement that the amount in controversy is attributable to" "a nonqualified deferred compensation plan, and that such amount appeared in Box 5 of MacDonald's Form W-2" and (ii) that "[i]t [was] also uncontested that the city ha[d] not, by resolution or ordinance, expressly exempted from taxation amounts attributable to a nonqualified deferred

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[2] At the hearing before the BTA, Taxpayer requested and was permitted under R.C. 5717.011 to introduce additional evidence not presented to the Shaker Board including the testimony of three new witnesses. BTA Decision at 4. (Appx. at 16.)

compensation plan." *Id.* at 6-7. (Appx. at 18-19.) Shaker and RITA appealed the BTA's decision to the court of appeals. A divided court of appeals affirmed the BTA's decision. (Appx. 25-42.)

In its decision, the court of appeals noted that [R.C. 5717.011(C)] does not set forth a standard of review." Decision at ¶22. (Appx. at 31.) The court also stated that "[t]here is no provision in R.C. 5717.011(C) that suggests the BTA must give any deference to a [local] board of review decision." *Id.* at ¶24. (Appx. at 32-33.) The appellate court concluded that the BTA was free to make its "own adjudication of the appeal" with no deference to the board of review decision. *Id.*

Shaker and RITA filed a joint notice of appeal to this Court on April 14, 2014. On July 9, 2014, this Court granted jurisdiction to hear the case and allowed the appeal on Appellants' Proposition of Law No. II concerning the proper standard of review to apply in appeals from municipal income tax boards to the BTA.

ARGUMENT

Proposition of Law No. 1:

When Appeals Are Taken From Municipal Boards Of Appeal To The Board of Tax Appeals, The Board of Tax Appeals Acts In An Appellate Capacity And Decisions Of The Municipal Boards Are Presumptively Valid, Absent A Demonstration That Those Findings Are Clearly Unreasonable Or Unlawful.

As the dissent noted, this case deals with "the [proper] standard of review by which the BTA is to measure appeals from a [municipal board of appeal]." Decision at ¶34. (Appx. at 35). As the dissent also explained, the problem with the BTA's decision in this case is that "[a]t no point d[id] the BTA address the reasonableness of the Shaker Heights Board's findings let alone address the question whether [Taxpayer] has demonstrated that those findings are clearly unreasonable. Instead, the BTA acted as if it were writing on a clean slate." *Id.* at ¶45. (Appx.

at 39.) The court of appeals clearly erred in finding that there is no standard of review for the BTA to follow in considering administrative appeals from municipal boards of review, meaning that, in such appeals, decisions of municipal boards are not presumptively valid as such decisions are in the exact same type of appeal to the common pleas court. The court of appeals' decision therefore must be reversed.

A. Appeals To A Municipal Board Of Tax Appeals From A Decision By A Tax Administrator.

R.C. 718.11 requires a municipality to establish a procedural administrative appeal process. That section reads, in pertinent part:

> ***
> Whenever a tax administrator issues a decision regarding a municipal income tax obligation that is subject to appeal as provided in this section or in an ordinance or regulation of the municipal corporation, the tax administrator shall notify the taxpayer in writing at the same time of the taxpayer's right to appeal the decision and of the manner in which the taxpayer may appeal the decision.
>
> Any person aggrieved by a decision by the tax administrator *** may appeal the decision to the board created pursuant to this section by filing a request with the board. The *request* shall be in writing, *shall state why the decision should be deemed incorrect or unlawful*, and shall be filed within thirty days after the tax administrator issues the decision complained of.
>
> ***
> The board may affirm, reverse, or modify the tax administrator's decision or any part of that decision. ***

(Emphasis added.) (Appx. at 43.) Taxpayers must clearly state why a tax administrator's decision is incorrect or unlawful in an appeal to a municipal board of appeal.

B. Appeals From Municipal Boards Of Appeal To Either The BTA Or The Common Pleas Court.

The BTA's jurisdiction to hear the Shaker appeal also specifically arises under R.C. 718.11 which states "that the taxpayer or the tax administrator may appeal [a local] board's decision as provided in section 5717.011 of the Revised Code."[3] (Appx. at 43.) R.C. 5717.011(B)[4] allows the taxpayer or tax administrator to elect to appeal to either the BTA or the common pleas court reading in pertinent part as follows:

> (B) Appeals from a municipal board of appeal created under section 718.11 of the Revised Code may be taken by the taxpayer or the tax administrator to the board of tax appeals or may be taken by the taxpayer or the tax administrator to a court of common pleas as otherwise provided by law. If the taxpayer or the tax administrator elects to make an appeal to the board of tax appeals or court of common pleas, the appeal shall be taken by the filing of a notice of appeal with the board of tax appeals or court of common pleas, the municipal board of appeal, and the opposing party. *** The notice of appeal shall have attached thereto and incorporated therein by reference a true copy of the decision issued under section 718.11 of the Revised Code and shall specify the errors therein complained of[.] ***

(Appx. at 44.) R.C. 5717.011(C) further requires as follows if the appeal is taken to the BTA:

> (C) Upon the filing of a notice of appeal with the board of tax appeals, the municipal board of appeal shall certify to the board of tax appeals a transcript of the record of the proceedings before it, together with all evidence considered by it in connection therewith. Such appeals may be heard by the board at its office in Columbus or in the county where the appellant resides, or it may cause its examiners to conduct such hearings and to report their findings for affirmation or rejection. The board may order the

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3 R.C. 5717.011 was enacted as part of Am.Sub.H.B.95, 150 Ohio Laws 629, 1895 and is applicable to appeals taken from municipal boards for taxable year 2004 and thereafter. Prior to H.B. 95, taxpayers could only pursue a R.C. Chapter 2506 appeal.

4 Relevant sections to this appeal in Chapter 5717 have been revised several times since the tax year at issue here. References in this brief to sections in R.C. Chapter 5717 are as those sections existed during the relevant tax year.

> appeal to be heard upon the record and the evidence certified to it by the administrator, but upon the application of any interested party the board shall order the hearing of additional evidence, and the board may make such investigation concerning the appeal as it considers proper.

(Appx. 44.) The appeal before the BTA is based upon the record of the local board although any party has the right upon application to submit additional evidence to the BTA.

R.C. 5717.03 is titled "Decisions of board of tax appeals; effects; procedures; remand for administrative determination; final orders" and (among other things) sets forth the dispositions that the BTA must make in appeals—including appeals from municipal boards of income tax review. It provides, in pertinent part, that:

> (A) A decision of the board of tax appeals on an appeal filed with it pursuant to section 5717.01, *5717.011*, or 5717.02 of the Revised Code shall be entered of record on the journal together with the date when the order is filed with the secretary for journalization.
>
> ***
>
> (D) In the case of an appeal from a municipal board of appeal created under section 718.11 of the Revised Code, the order of the board of tax appeals and the date of the entry thereof upon the board's journal shall be certified by the board by certified mail to all persons who were parties to the appeal before the board.
>
> ***
>
> (F) The orders of the board may *affirm, reverse, vacate, modify, or remand* the tax assessments, valuations, determinations, findings, computation, or orders complained of in the appeals determined by the board, and the board's decision shall become final and conclusive for the current year unless reversed, vacated, or modified as provided in section 5717.04 of the Revised Code. When an order of the board becomes final the tax commissioner and all officers to whom such decision has been certified shall make the changes in their tax lists or other records which the decision requires.

> (G) If the board finds that issues not raised on appeal are important to a determination of a controversy, the board may remand the cause for an administrative determination and the issuance of a new *** determination *** unless the parties stipulate to the determination of such other issue without remand. An order remanding the cause is a final order. *** If the order relates to a municipal income tax matter appealed under sections 718.11 and 5717.011 of the Revised Code, the order may be appealed to the court of appeals for the county in which the municipal corporation in which the dispute arose is primarily situated.

(Appx. at 50-51 (emphasis added).)

Appeals taken to the common pleas court under R.C. 5717.011(B) are brought under R.C. 2506.01, which provides in relevant part:

> *** [E]very final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505. of the Revised Code, except as modified by this chapter.

R.C. 2506.01.

C. The BTA Clearly Acts In An Appellate Capacity In Appeals From Municipal Boards Of Appeal.

"The Board of Tax Appeals is a creature of statute and is limited to the powers with which it is thereby invested." *Steward v. Evatt*, 143 Ohio St. 547, 56 N.E.2d 159, syllabus 1 (1944). Revised Code Section 5703.02 defines the powers and duties of the BTA. It provides, in pertinent part, that:

> There is hereby created the board of tax appeals which shall exercise the following powers and perform the following duties:
>
> (A) Exercise the authority provided by law to hear and determine all *appeals* of questions of law and fact arising under the tax laws

> of this state in *appeals* from decisions, orders, determinations, or actions of any tax administrative agency established by the laws of this state ****.

R.C. 5703.02(A) (emphasis added). Clearly, the BTA is charged by statute with the duty of hearing and determining tax *appeals*.

As shown earlier, appeals from municipal boards of appeals may be taken to either the common pleas court or the BTA. *See* R.C. 5717.011(B). (Appx. at 44.) And as noted previously, appeals taken to the common pleas court under R.C. 5717.011(B) are brought under R.C. 2506.01. *See* R.C. 2506.01. In *AT&T Communications of Ohio, Inc. v. Lynch*, 132 Ohio St.3d 92, 969 N.E.2d 166, 2012-Ohio-1975, this Court specifically found that courts of common pleas are performing "an appellate function" in such appeals.[5] *Id.* at ¶15. The same is true here for the BTA.

It cannot legitimately be disputed that the BTA is acting in an appellate capacity in appeals from local boards of appeals. This is why the BTA is required to either "affirm," "reverse," "vacate," "modify" or "remand" the decision of the local board of review. These are terms used in the practice of appellate bodies.

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[5] In that case, the issue was whether "[i]n a Chapter 2506 administrative appeal, the filing of a single notice of appeal vests jurisdiction in the common pleas court over the final decision of the administrative body and all issues therein without the necessity of each party filing a separate notice of appeal." 2012-Ohio-1975 at ¶10. The Court found that "the administrative appeal is more akin to an appeal than a trial" despite the mandate of R.C. 2506.03 that "[t]he hearing of an [administrative] appeal shall proceed as in the trial of a civil action." *Id.* at ¶¶11; 14.

D. The Fact That R.C. 5717.011(C) Does Not Express A Standard Of Review Is Hardly Controlling.

As noted, the court of appeals below emphasized that "[t]he statute [R.C. 5717.011(C)] does not set forth a standard of review." Decision at ¶22. Based on that determination, the court then later concluded that "[t]here is no provision in R.C. 5717.011(C) that suggests the BTA must give any deference to a [local] board of [appeal] decision." *Id.* at ¶24. Such a conclusion is wholly unwarranted for a number of reasons.

First, the language in R.C. 5717.011(C) is the same as the language used in R.C. 5717.02, which provides for a right of appeal from final determinations of the state tax commissioner to the BTA. The last paragraph of R.C. 5717.02 reads as follows:

> Upon the filing of a notice of appeal, the tax commissioner or the director, as appropriate, shall certify to the board [of tax appeals] a transcript of the record of the proceedings before the commissioner or director, together with all evidence considered by the commissioner or director in connection therewith. Such appeals or applications may be heard by the board at its office in Columbus or in the county where the appellant resides, or it may cause its examiners to conduct such hearings and to report to it their findings for affirmation or rejection. The board may order the appeal to be heard upon the record and the evidence certified to it by the commissioner or director, but upon the application of any interested party the board shall order the hearing of additional evidence, and the board may make such investigation concerning the appeal as it considers proper.

There is no standard of review set forth in said paragraph or anywhere else in R.C. 5717.02. This Court, however, has clearly found that the tax commissioner's findings are "presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful." *Hatchadorian v. Lindley*, 21 Ohio St.3d 66, 488 N.E.2d 145 (1986), paragraph one of the syllabus. The fact that R.C. 5717.011(C) has no standard of review expressly set forth therein is

hardly controlling. Moreover, R.C. 5717.02 clearly provides that "upon [] application of any interested party the [BTA] shall order the hearing of additional evidence, and the board may make such investigation concerning the appeal as it considers proper" just as does R.C. 5717.011(C). This should show that the appeallate court's protestation that "deference to a [local] board of [appeal] decision is illogical when the BTA hears evidence not presented to the [local] board of [appeal] in conducting its own adjudication of the appeal" completely lacks merit. Decision at ¶24. (Appx. at 32-33.) This Court has even noted that a R.C. Chapter 2506 appeal "makes liberal provision for the introduction of new or additional evidence." *Cincinnati Bell, Inc. v. Village of Glendale*, 42 Ohio St.2d 368, 370, 328 N.E.2d 808, 809 (1975). The fact that the BTA can receive additional evidence does not turn the appeal into a de novo one for the BTA with no deference to the local board.

Second, where the General Assembly has intended the BTA and the common pleas court to make independent determinations in administrative appeals, it has specifically stated such. R.C. 5717.03(B) addresses the procedure to be followed in appeals from county boards of revision to the BTA. It provides, in pertinent part, that:

> In case of an appeal from a decision of a county board of revision, *the board of tax appeals shall determine the taxable value of the property whose valuation or assessment by the county board of revision is complained of*, or in the event the complaint and appeal is against a discriminatory valuations, *shall determine a valuation which shall correct such discrimination*[.] *** In correcting a discriminatory valuation, *the board of tax appeals shall increase or decrease the value of the property whose valuation or assessment by the county board of revision is complained of*[.]

(Appx. at 50 (emphasis added).) R.C. 5717.05 covers appeals from county boards of revision to the common pleas court. It provides, in pertinent part, that:

> As an alternative to the appeal provided for in section 5717.01 of the Revised Code, an appeal from the decision of a county board of revision may be taken directly to the court of common pleas[.] *** The court may hear the appeal on the record and the evidence thus submitted, or it may hear and consider additional evidence. *It shall determine the taxable value of the property whose valuation or assessment for taxation by the county board of revision is complained of*[.]

(Appx. at 52 (emphasis added).) Plainly, the standard of review in appeals from county boards of review is substantially different than most administrative appeals. This court has long held that the duty of both the court and the BTA upon an appeal from a decision of a board of revision is to "determine the taxable value of the property." R.C. 5717.03 and R.C. 5717.05 allow the BTA and the common pleas court to independently weigh the evidence which the parties have introduced at a board of revision. *See Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 76 Ohio St.3d 13, 16, 665 N.E.2d 1098 (1996). The same is not true here. Absolutely nothing in R.C. 5717.011 suggest that the Ohio General Assembly intended to authorize the BTA to independently weigh record evidence on appeal or independently decide issues based on the evidence presented to it.

Third, "'[i]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the [] answer is based on a permissible construction of the statute.'" In *Lang v. Ohio Dept. of Job & Family Servs.*, 132 Ohio St.3d 296, 982 N.E.2d 636, 2012-Ohio-5366 at ¶12 (quoting *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). The question for this Court is whether the answer given by the court of appeals as to the statute's silence—that no standard of review exist in appeals from municipal boards to the BTA—is a permissible construction of the statute? The answer is obviously no. This Court has consistently held that "when interpreting a statute, courts must

'avoid an illogical or absurd result." *AT&T*, 2012-Ohio-1975, ¶18 citing *State ex rel. Shisler v. Ohio Pub. Emps. Retirement Sys.*, 122 Ohio St.3d 148, 909 N.E.2d 610, 2009-Ohio-2522, ¶ (Pfeifer, J., dissenting), citing *In re T.R.*, 120 Ohio St.3d 136, 896 N.E.2d 1003, 2008-Ohio-5219, ¶16. It would be illogical and absurd to hold that decisions from municipal boards of appeal are presumptively valid if appealed to the common pleas court but not presumptively valid if the same matter is appealed to the BTA.

Incidentally, if the BTA had unfettered discretion, with no deference whatsoever to the decision of the local board of review, why wouldn't the BTA have been given free rein to decide any new issues raised on appeal that are "important to a determination of [the] controversy" before it. As noted previously, R.C. 5717.03(G) provides that "[i]f the board finds that issues not raised on appeal are important to a determination of a controversy, the board may remand the cause for an administrative determination and the issuance of a new *** determination *** unless the parties stipulate to the determination of such other issue without remand." If the BTA does not have to give any deference to the local board of review, why wouldn't the BTA have the right to proceed even without the stipulation of the parties? This clearly seems to negate any contention that the BTA owes the local board no deference.

The general rule in Ohio is that "an appellate court may not simply substitute its judgment for that of the trial court so long as there is some competent, credible evidence to support the lower court finding." *State ex rel. Celebrezze v. Environment Ent., Inc.*, 53 Ohio St.3d 147, 154, 559 N.E.2d 1335, 1342 (1999) (Resnick, J., concurring in part and dissenting in part). *See also Christenson v. Mount Carmel Health*, 112 Ohio App.3d 161, 170, 678 N.E.2d 255, 261 (1996) ("The general rule in an administrative appeal is that the court should not substitute

its judgment for that of the agency, giving due deference to the administrative resolution of evidentiary conflicts") (citing *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111, 407 N.E.2d 1265, 1267 (1980)). There is nothing to suggest that this rule does not apply to other types of appellate tribunals such as the BTA. The court below was clearly wrong to find that the BTA owed no deference to the decision of the Shaker Board. This situation must be corrected.

E. This Court Has Previously Found That Decisions Of Municipal Boards Of Appeal Are Presumptively Valid.

The dissent correctly cited to this Court's opinion in *Tetlak v. Bratenahl*, 92 Ohio St.3d 46, 748 N.E.2d 51, 2001-Ohio-128. The majority, however, dismissed reliance on that case in a footnote noting that "it involved [a] R.C. Chapter 2506 appeal[]." Decision at ¶24, n.1. (Appx. at 33.) *Tetlak*, however, is most relevant to this case since it involved a municipal board of appeal (also known as a board of review).

In *Tetlak*, a taxpayer filed a R.C. Chapter 2506 appeal from the local board of review's decision that his share of earnings from a nonresident Subchapter S corporation of which he was a sole shareholder was subject to the municipal residence tax. 92 Ohio St.3d at 47, 748 N.E.2d at 53. The court of common pleas reversed and the court of appeals affirmed. *Id.* The appellate court found that the "[municipality] presented no evidence to support its allegation that municipalities have authority to tax the nonwage income passed through to [taxpayer] from his S corporation." *Id.* This Court reversed finding that it was the taxpayer who had the burden of proof in said case and that the local board of review's findings were presumptively

valid, absence a demonstration that they were clearly unreasonable or unlawful.[6] *See id.* at 51-52, 746 N.E.2d at 56.

In *Tetlak*, this Court found that decisions of municipal boards of review are "presumptively valid, absent a demonstration that those findings are clearly unreasonable and incorrect." Why would that be the case in an appeal to the common pleas court and not to the BTA? And how would the difference be logical?

There is no doubt that R.C. Chapter 2506 provides for a general standard of review. R.C. 2506.04 provides that the common pleas court may find that a municipal board's decision

> is 'unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court. ***

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[6] The Court explained its reasoning as follows:

> The taxpayer, not the village has the burden of proof on the nature of the income at issue. It is well settled that "'when an assessment is contested, the taxpayer has the burden' *** to show in what manner and to what extent *** 'the commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect.' *Maxxim Med., Inc. v. Tracy* (1999), 87 Ohio St.3d 337, 339, 720 N.E.2d 911, 913 quoting *Federated Dept. Stores Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215, 5 OBR 455, 457, 450 N.E.2d 687, 688. Furthermore, the 'Tax Commissioner's finds are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful.' *Id.*, 87 Ohio St.3d at 339-340, 720 N.E.2d at 913-914.
>
> This reasoning is applicable at the municipal level. ***

Id. at 51-52, 748 N.E.2d at 56.

Id. In construing this language this Court has further elaborated that "[t]he common pleas court considers the 'whole record,' including any new or additional evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence." *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 735 N.E.2d 433, 438, 2000-Ohio-293. The court below disregarded *Tetlak* saying that "R.C. 2506.04 sets forth the standard of review that the common pleas court must apply in deciding the [R.C. Chapter 2506] appeal." Decision at ¶23. (Appx. at 32.) While that may be true, the standard of review set forth in R.C. 2506.04 does not require that decisions of municipal bodies be presumed valid. This is a Ohio Supreme Court-made rule of interpretation that must be followed by *all* Ohio courts in cases involving an appeal from a board of review.[7]

It makes no sense whatsoever to say that a decision of a municipal board of review is only presumed valid if the party elects to appeal to the court of common pleas but not the BTA. The two appeals are not as different as the court below would have one believe. The court of appeals clearly erred in this regard.

F. Taxpayers Are In Complete Agreement That Decisions Of Municipal Boards Of Appeal Are Presumptively Valid.

Taxpayers have not at any time throughout these proceedings contended that there was no standard of review in the appeal before the BTA and, in fact, appear to be in complete

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[7] The appeals court also emphasized "that the appeal provided pursuant to R.C. 2506.01 is expressly in addition to any other remedy or appeal provided by law." Decision at ¶24. (Appx. at 33). That may be true but R.C. 5717.011 clearly gives the parties the right to appeal a decision from a municipal board of appeal to the common pleas court and R.C. 2506.01 is the *procedure* to effect such appeal.

agreement with Amici that municipal board decisions are "presumptively valid, absence a demonstration that they were clearly unreasonable or unlawful." *See* Appellees' Memorandum Opposing Jurisdiction at 4-8. Instead, Taxpayers' only contention in this regard is that the BTA applied said standard of review. *See id.*

G. The BTA Simply Substituted Its Decision For That Of The Shaker Board In This Case.

Notwithstanding Taxpayers' arguments to the contrary, the problem in this case is clear—the BTA never addressed the reasonableness or lawfulness of the Shaker decision. As the dissent stated, "the BTA acted as if it were writing on a clean slate." Decision at ¶45. (Appx. at 39.) Rather than decide whether the BTA properly applied the standard of review that Taxpayers agreed was appropriate, the court of appeals decided there was no standard of review for said appeal. The court of appeals' decision must clearly be reversed.

A case that illustrates this point is *Cleveland Clinic Found. v. Bd. of Zonings Appeals*, 2012 WL 6633851, 2012-Ohio-6008.[8] The board of zoning appeals conducted a hearing and determined that a helipad was not a permitted accessory use in a local retail business district under the City's ordinance. 2012-Ohio-6008 at ¶18. The hospital appealed to the common pleas court. The trial court reversed, stating that "it is clear from a plain reading of the Code that: *** the addition of a helipad is classified as an accessory use ***." *Id.* at ¶19. The City appealed to the court of appeals which reversed again. The court of appeals reasoned that "[t]he trial court concludes that the answer is 'clear,' and proceeds to apply the [ordinance] but it *fails to explain how the BZA erred in applying and relying on [the ordinance]*. *Id.* at ¶20.

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[8] This case is currently on appeal to this Court, Case No. 2013-0654.

(Emphasis added.) The BTA did the same thing here. The Shaker Board decision was not shown to be unreasonable or unlawful—the BTA *never* made any such finding. The BTA simply substituted its judgment for that of the Shaker Board without proper legal grounds. In *Shell v. Ohio Veterinary Med. Licensing Bd.*, this Court held that deference to the agency's interpretations must be given when the agency is charged with the task of interpreting its own statute as the agency has "accumulated substantial expertise" and has been "delegated [with] enforcement responsibility. 105 Ohio St.3d 420, 827 N.E. 2d 766, 2005-Ohio-2423, ¶34. Shouldn't the Shaker Board's interpretation of a Shaker ordinance have been given at least some deference by the BTA?

CONCLUSION

The judgment of the court of appeals must be reversed since it finds that there is no standard of review for the BTA to follow in considering administrative appeals from municipal boards of review, meaning that, in such appeals, decisions of municipal boards are not presumptively valid as such decisions are in those exact same type of appeals to the common pleas court. For this reason, Amicus Curiae, City of Cleveland, urge this Court to reverse the judgment of the court of appeals.

Respectfully submitted,
Barbara A. Langhenry, Esq., #0038838
Director of Law

By:
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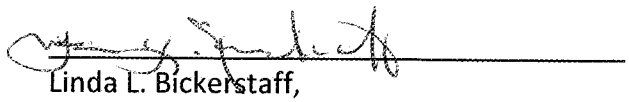
Assistant Director of Law

CERTIFICATE OF SERVICE

I certify that a copy of this Brief of Amicus Curiae City of Cleveland in Support of Defendants-Appellants was served by regular U.S. mail on William Gruber, Esq., 3400 Lee Road, Shaker Heights, Ohio 44120, counsel for the City of Shaker Heights Income Tax Board of Review and Matthew Rubino; Amy Arrighi, Esq., 10107 Brecksville Road, Brecksville, Ohio 44141, counsel for the Regional Income Tax Agency; and Christopher J. Swift, Esq. 3200 PNC Center, 1900 East Ninth Street, Cleveland, Ohio 44114-3458, counsel for William E. MacDonald III and Susan W. MacDonald on this 25th day of August 2014.



Linda L. Bickerstaff,
Assistant Director of Law

Counsel for Amicus Curiae,
The City of Cleveland

APPENDIX

COPY

SHAKERHEIGHTS

INCOME TAX BOARD OF REVIEW
CITY OF SHAKER HEIGHTS, OHIO

William E. MacDonald, III, **Susan W. MacDonald,** **Appellants,**	)	
v.	)	**DECISION**
	)	**ISSUED: AUGUST 8, 2008**
Regional Income Tax Agency, **On behalf of Robert Baker,** **Tax Administrator,** **Appellee.**	)	

In this matter before the Income Tax Board of Review ("Board"), Appellants challenge the final determination issued on February 28, 2008, by the Regional Income Tax Agency ("RITA") as Tax Administrator for the City of Shaker Heights ("City"), which concluded that RITA's income tax adjustments to Appellants' tax year 2006 liability, as set forth in RITA's change of liability notice of May 8, 2007, were correct and, therefore, the Appellants' 2006 municipal income tax liability to the City should be calculated on the wages reported in Box 5 of the Appellant's 2006 W-2, not on the wages reported in Box 18, Local wages, tips, etc. of the 2006 W-2.

This appeal was brought before this Board pursuant to Section 111.2503 of the Codified Ordinances (C.O.) of the City. The Board established Procedural Rules for the Board pursuant to Section 111.2501 C.O. at its meeting of June 6, 2008. The hearing in this matter was held pursuant to said Procedural Rules.

The hearing in this matter was held on July 9, 2008. A Court Reporter recorded the proceedings. The hearing was held in private.

In recognition of the confidential nature of this matter, this Decision does not include any specific income tax or financial data related to Appellants' specific circumstances. The Board has found that such specific information is not relevant or necessary to its Decision in this appeal.

Procedural History

1. On March 27, 2008, the City's Board received a Notice of Appeal from a final determination of the City's Tax Administrator, RITA, issued February 28, 2008, filed on behalf of William E. MacDonald, III (individually denoted as "Appellant") and Susan W. MacDonald (together denoted as "Appellants") by their legal counsel.

2. On May 9, 2008, the Board sent a letter to Appellants' counsel advising him that the Board had received the Notice and that the hearing was tentatively scheduled on July 9, 2008. The letter was sent by facsimile, electronic mail and regular U.S. mail.

3. On May 16, 2008, the Board sent a letter to legal counsel for RITA advising her of the filing, sending her a copy of the filing, and notifying her that the tentative hearing date was July 9, 2008.

4. On June 6, 2008, the Secretary to the Board issued a Pre-hearing Order, sent by facsimile and regular mail, which ordered the following:

A. The hearing of this matter shall be held on Wednesday, July 9, 2008, starting at 8:30 a.m., in Conference Room B, at Shaker Heights City Hall, 3400 Lee Road, Shaker Heights Ohio 44120.

B. Any additional brief or supporting argument on behalf of Appellant may be filed with the Secretary and served on the Appellee no later than June 18, 2008.

C. Any reply brief or supporting argument on behalf of the Appellee may be filed with the Secretary and served on the Appellant no later than June 30, 2008.

D. Any reply by Appellant to Appellee's brief or supporting argument may be filed with the Secretary and served on the Appellee no later than July 7, 2008.

E. The parties shall file with the Secretary and serve the other party a list of witnesses that party intends to call at the hearing and any documents or other material that the party intends to introduce into evidence, other than what the parties file as part of their pre-hearing briefs, no later than July 2, 2008.

F. The parties may file with the Secretary a proposed Stipulation of facts, and any such proposed Stipulation shall be filed with the Board no later than July 2, 2008.

G. The Rules and Procedure for the Hearing attached to the Order have been adopted by the Board and shall be used to conduct this process, including the hearing. These Orders and the various dates may be extended or modified at the discretion of the Board or the Board Secretary.

H. The term "served" as used in this Order means actual delivery and receipt by the receiving party by 4:59 p.m. on the required date by E-mail, facsimile or hand delivery.

5. On June 13, 2008, the Board received a letter from Appellant stating that the Notice of Appeal and attachments would serve as Appellants' brief in response to the Prehearing Order, paragraph 2.

6. On June 30, 2008, the Board received the Reply Brief of Appellee.

7. On July 2, 2008, the Board received the witness and exhibit lists from Appellants and Appellee.

8. On July 7, 2008, the Board received Appellants' Reply to Appellee's Reply Brief.

9. On July 9, 2008, the Hearing in this matter was held. After a pre-hearing conference held just prior to the start of the Hearing, certain stipulations were agreed to by the parties (which are set forth in their entirety below). At the conclusion of the Hearing, the Board and parties agreed that the appeal would be decided based on the pre-filed briefs and documentary evidence, as well as the evidence and argument presented at the Hearing, and that no post-hearing briefs would be filed. The Board then met in Executive Session to reach its decision, which is set forth in this document.

Issues Presented

The parties agreed that the issues before the Board for determination in this appeal are as follows:

1. Is the Appellant's Supplemental Executive Retirement Plan (SERP), which is a nonqualified deferred compensation plan, a "pension" as that term is used in Section 111.0901 (b) and (c) of the City's Codified Ordinances?

2. If the SERP is a "pension" under Section 111.0901 (b) and (c) of the City's Codified Ordinances, does the City's exemption set forth in that section apply only to payments made to Appellants under the SERP or does the exemption apply also to the amount stated in Box 5 of Appellant's 2006 Form W-2, which represents the present value of the portion of Appellant's SERP benefit that was not previously reported?

Standard of Proof

The Appellant must show by a preponderance of the evidence and by the applicable rules of law that the issues before the Board should be answered in the affirmative in order to prevail in this appeal.

Stipulations

1. Pre-filed Exhibits of the parties are admitted into evidence without objection:

   A. Appellants' Exhibits A – I, and
   B. Appellee's Exhibits 1 – 3.

2. Administrative notice is taken and accepted by the parties of the Municipal Tax Code, Chapter 111, of the City of Shaker Heights Codified Ordinances.

3. Administrative notice is taken and accepted by the parties of the Regional Income Tax Agency (RITA) Rules.

4. Appellant William E. MacDonald III was an employee of National City Corporation (NCC)[1] for over 38 years.

5. Appellant qualified for NCC's Supplemental Executive Retirement Plan (SERP).

6. Appellant's SERP is a nonqualified deferred compensation plan.

7. Appellant retired on December 31, 2006.

8. The present value of the portion of Appellant's SERP benefit that was not previously reported was included in Box 5 of his 2006 Form W-2.

9. On or about April 12, 2007, Mr. and Mrs. MacDonald filed with RITA their 2006 Individual Income Tax Return as residents of the City of Shaker Heights.

10. Attached to the return was Mr. MacDonald's Form W-2 Wage and Tax Statement issued to him by his employer, National City Bank (NCB).

11. In Box 5 on the NCB W-2, Mr. MacDonald's Medicare wages and tips for Tax Year 2006 equaled $__A[2]__.

12. The MacDonalds calculated their tax liability to the City of Shaker Heights not on the compensation reported in Box 5 of the W-2 but on Box 18, Local wages, tips, etc..., in the amount of $__B__ and arrived at a tax liability to Shaker Heights, before payments and credits, of $__C__.

13. On May 9, 2007, RITA issued a notice to Mr. and Mrs. MacDonald that their tax liability to Shaker Heights was to be calculated on the wages reported in Box 5 of the W-2 and provided a proposed change of tax liability for Shaker Heights from $__C__ to $__D__.

[1] NCC is the parent of National City Bank ("NCB"), which is referred to in Appellant's' Exhibit E as an "affiliated service group" of NCC (see Appendix A of Exhibit E.) NCC and NCB are used interchangeably in this Decision.

[2] The actual amounts set forth in the Stipulation have been left out of this Decision in order to maintain Appellants' privacy, and each separate amount is represented by a letter. It should be noted that the amount represented by "A" is substantially greater than the amount represented by "B" (i.e. more than 2.5 times greater) and, therefore, the amount represented by "D" is substantially greater than the amount represented by "C" (i.e. more than 3 times greater).

14. A final determination by RITA was issued to the MacDonalds on February 28, 2008.

Findings of Fact

1. The Board accepts the Stipulations agreed to by the parties and incorporates them into these Findings of Fact. There is no dispute as to the amounts of money actually stated in the Stipulations, on Appellant's W-2 Form, and in the Appellants' Tax Form for 2006 and RITA's change of liability, which amounts are not stated in this Decision.

2. As to the letters provided by Appellant as Exhibit G dated July 16, 1993 and September 29, 1993, which Appellant asserts are relevant to this appeal:

A. The relevance and probative value of these letters to this appeal are questionable due to the following:

(i) The first letter is self-serving, in that it was prepared on behalf of, among other clients, National City Corporation (NCC), the former employer of the Appellant and the entity funding the Appellant's SERP.

(ii) The second letter was prepared by the Tax Administrator for the City of Cleveland, which is a member of the Central Collection Agency (CCA), and as such it is not binding on the City of Shaker Heights, the Regional Income Tax Agency (RITA), or this Board.

(iii) The first letter also specifically asks CCA for a review of "our interpretation of the CCA Rules and Regulations." Thus, these letters did not review whether the issues and conclusions in the letters apply in matters subject to the ordinances of the City of Shaker Heights or the rules and regulations of RITA.

(iv) Both letters are dated prior to the 2004 change in State law referenced in Appellants' initial brief, at p. 7, when "[e]ffective January 1, 2004, the provisions of H.B. 95 became applicable (and)...[p]ursuant to H.B. 95, nonqualified deferred compensation reflected in Box 5 of an individual's Form W-2 became subject to municipal income taxation." Thus, these letters preceded in time the change in State law that mandates that cities use the amount stated in Box 5 of an individual's Form W-2, which included the Appellant's SERP amount, as the basis for the application of municipal income tax.

B. If the letters are relevant and probative to some degree, then:

(i) The letter dated July 16, 1993 on behalf of NCC states as to "Supplemental Retirement Plans", such as the Appellant's SERP: "Conclusion: First, there is no employer or employee contribution to tax while the individual is employed. Second, the payments received after termination of employment would be considered pension income, and thus excepted from tax." However, the City is not, in this case, attempting to tax either pre-retirement employee or employer contributions or after-retirement payments. The City is attempting to tax the pre-retirement present value of the Appellant's nonqualified deferred compensation plan as set forth in Box 5 of the Appellant's W-2, pursuant to State law. Thus, Exhibit G is silent on the issue before the Board.

(ii) The letter dated July 16, 1993 does not refer to nonqualified deferred compensation plans as pensions. It does, however, assert that "the payments received after termination of employment would be considered pension income, and thus excepted from tax."

3. As to the letters provided by Appellant as Exhibit H dated July 26, 1995 and October 31, 1995, which Appellant asserts are relevant to this appeal:

A. The relevance and probative value of these letters to this appeal are questionable for the same reasons listed in finding no. 2, above.

B. If the letters are relevant and probative to some degree, the letter dated October 31, 1995 simply states that "under current ordinance and regulations CCA will not tax unfunded, nonqualified deferred compensation plans." The letter does not explain on what basis the plans are to be exempt from municipal taxation or whether the benefits under these plans are considered to be "pensions."

4. The Internal Revenue Code does not define "pension."

5. The federal Employment Retirement Income Security Act (ERISA) definition of pension includes nonqualified deferred compensation plans, according to testimony on behalf of Appellants. However, the same witness stated that the ERISA definition of pension would also include true deferred compensation plans in which the employee's income is actually withheld in the employee's plan.

6. The Appellant's SERP is an unfunded promise to pay by his former employer, NCC. When the amount is fixed, determinable, and not subject to forfeiture, at the time of the employee's retirement, the present value of the entire benefit is included in Box 5 on the employee's W-2 for that year. The benefit could be paid as an annuity, as the Appellant decided to take it, or as a lump sum. The form of payment chosen by the employee does not affect the amount that appears in Box 5 on the W-2. No actual payments were made to the Appellants in 2006. Payments began in 2007.

7. The Appellant was always aware of the SERP to which he was entitled. He was aware that the longer he worked for NCC the greater the benefit under the plan.

8. Appellant, Mr. MacDonald, was a resident of Shaker Heights at least until December 27, 2006.

9. According to testimony at the hearing of this appeal, the Shaker Heights exemption language in Section 111.901 C.O. is very similar to the language of many other cities in the State.

10. Cleveland's CCA has notified Appellants that Cleveland's ordinance does not exempt Appellant's SERP from taxation when included in Box 5 of Appellant's 2006 W-2.

11. Testimony at the hearing identified the City of Findlay, Ohio as possibly the only or one of a very few cities that has specifically exempted nonqualified deferred compensation plans from local taxation since 2004.

12. No evidence was presented that indicated that Appellants were discriminated against or were otherwise singled out for taxation of these particular benefits.

Conclusions of Law

1. There is no dispute that no payments were made to Appellants under the SERP until 2007. Whether such payments are taxable by the City or not is not at issue in this case.

2. There is no dispute that Appellant's SERP was not specifically funded by National City Corporation prior to Appellant's retirement and that none of Appellant's cash salary was deferred to fund the SERP; however, whether Appellant's SERP was funded or not funded prior to retirement, and/or whether it includes deferred cash salary payments owed to Appellant, are not relevant factors in determining whether the Appellants should prevail or not in this appeal.

3. There is no dispute that, as a matter of law, Appellant's SERP is a nonqualified deferred compensation plan as described in section 3121 (v) (2) (C) of the United States Internal Revenue Code ("IRC"), and that, once the amount of the SERP was fixed, determinable, and not subject to forfeiture, the present value of the portion of Appellant's SERP benefit that was not previously reported was included in Box 5 of Appellant's 2006 Form W-2.

4. State law, and in particular, Chapter 718 R.C., controls what is taxable as income by the City.

5. Chapter 718 was amended by the General Assembly through House Bill 95, which amendments went into effect for tax years beginning January 1, 2004.

6. Chapter 718 requires that local governments use the State's definition of "qualifying wages" as the basis for application of any local income tax. (Section 718.01 (F) (10) R.C.)

7. "Qualifying wages" under Chapter 718 is the amount calculated and reported in Box 5 of an individual's Form W-2, which is the Medicare wage base, as defined in section 3121 (a) IRC; such amount includes amounts attributable to a nonqualified deferred compensation plan as described in section 3121 (v) (2) (C) IRC, unless such amounts have been exempted from tax by a municipality by ordinance or resolution. (Section 718.03 (A) (2) (c)).

8. Section 718.01 R.C. provides as follows:

(E) The legislative authority of a municipal corporation may, by ordinance or resolution, exempt from withholding and from a tax on income the following: (2) Compensation attributable to a nonqualified deferred compensation plan or program described in section 3121(v)(2)(C) of the Internal Revenue Code.

9. Section 718.03 R.C. provides as follows:

(A) As used in this section: (2) "Qualifying wages" means wages, as defined in section 3121(a) of the Internal Revenue Code, without regard to any wage limitations, adjusted as follows: (c) Deduct any amount attributable to a nonqualified deferred compensation plan or program described in section 3121(v)(2)(C) of the Internal Revenue Code if the compensation is included in wages and has, by resolution or ordinance, been exempted from taxation by the municipal corporation.

10. Section 718.03 (A) (2) (c) R.C. allows the deduction of "any amount attributable to a nonqualified deferred compensation plan or program," if the compensation "has, by resolution or ordinance, been exempted from taxation by the municipal corporation."

11. There is no dispute that under Ohio law, the present value of Appellant's SERP at the time of Appellant's retirement, as a nonqualified deferred compensation plan, was included in local qualifying wages and included in Box 5 of Appellant's 2006 W-2, becoming the requisite basis for application of the City's income tax, unless an exemption permitted in Chapter 718 R.C. applies.

12. Shaker Heights has not enacted any resolution or ordinance since the adoption of Section 718.03 R.C. that exempts nonqualified deferred compensation included in wages from its income tax ordinance.

13. The relevant Shaker Heights income tax ordinances were enacted in 1966, long before the current version of Section 718.03 R.C.

14. Section 111.901 C.O. sets forth the exemptions from the City's income tax, as follows:

111.0901 SOURCES OF INCOME NOT TAXED.

The tax provided for herein shall not be levied on the following:

(a) Pay or allowance of active members of the Armed Forces of the United States, or the income of religious, fraternal, charitable, scientific, literary or educational institutions to the extent that such income is derived from tax exempt real estate, tax exempt tangible or intangible property, or tax exempt activities.

(b) Poor relief, unemployment insurance benefits, old age pensions or similar payments including disability benefits received from local, State or Federal governments, or charitable, religious or educational organizations.

(c) Proceeds of insurance paid by reason of the death of the insured, pensions, disability benefits, annuities, or gratuities not in the nature of compensation for services rendered from whatever source derived.

(d) Receipts from seasonal or casual entertainment, amusements, sports events and health and welfare activities when any such are conducted by bona fide charitable, religious or educational organizations and associations.

(e) Alimony received.

(f) Personal earnings of any natural person under eighteen (18) years of age.

(g) Compensation for personal injuries or for damages to property by way of insurance or otherwise.

(h) Interest, dividends and other revenue from intangible property.

(i) Gains from involuntary conversion, cancellation of indebtedness, interest on Federal obligations, items of income already taxed by the State of Ohio from which the City is specifically prohibited from taxing, and income of a decedent's estate during the period of administration, except such income from the operation of a business.

(j) Salaries, wages, commissions, and other compensation and net profits, the taxation of which is prohibited by the United States Constitution or any act of Congress limiting the power of the States or their political subdivisions to impose net income taxes on income derived from interstate commerce.

(k) Salaries, wages, commissions, and other compensation and net profits, the taxation of which is prohibited by the Constitution of the State of Ohio or any act of the Ohio General Assembly limiting the power of the City of Shaker Heights to impose net income taxes.

15. Section 111.901 C.O. does not specifically exempt amounts included in wages that are attributable to a "nonqualified deferred compensation plan or program" described in section 3121 (v) (2) (C) IRC.

16. According to testimony at the hearing of this appeal, the Shaker Heights exemption language in Section 111.901 C.O. is very similar to the language of many other cities in the State. The NCC letter in support of Appellants dated June 14, 2007 (Appellee Exhibit 3), states that Shaker's and Cleveland's exemption language are "virtually identical." Testimony at the hearing also confirmed that Cleveland's CCA has notified Appellants that Cleveland's ordinance does not exempt Appellant's SERP from taxation when included in Box 5 of Appellant's 2006 W-2. Testimony at the hearing also identified the City of Findlay, Ohio as possibly the only or one of a very few cities that has specifically exempted nonqualified deferred compensation plans from local taxation since 2004. The Board finds that these facts are relevant to the extent that they indicate that at the time the Ohio General Assembly enacted the current version of Section 718.03 through H.B. 95, local income tax laws in Shaker and Cleveland, as well as in other cities around the State, already exempted "pensions and similar retirement payments." However, the General Assembly did not specifically refer, though it could have referred, to "pensions and similar payments" in describing the exemption a municipality could adopt for any amount attributable to a nonqualified deferred compensation plan or program described in section 3121(v)(2)(C) of the Internal Revenue Code.

17. The General Assembly specified the language of exemption that local governments were to use by ordinance or resolution if they wanted to exempt such benefits from tax. The plain language of Section 718.01 provides that a municipality may by ordinance exempt from taxation the following: "compensation attributable to a

nonqualified deferred compensation plan or program described in section 3121(v)(2)(C) of the Internal Revenue Code." The language in Section 718.03 is almost identical.

18. Chapter 718 R.C. and Section 111.901 C.O. must be interpreted in their plainest meaning, if possible, without lengthy fact finding and legal argument as to whether a nonqualified deferred compensation plan benefit as set forth in Box 5 of a W-2 at the time of retirement is or is not a "pension or similar payment" or otherwise falls within the wording of the City's ordinance. Clearly, the language used by the General Assembly has not been incorporated into the City's exemption language, either before H.B. 95 was enacted in 2003 or since. Thus, the City did not specifically exempt nonqualified deferred compensation plan benefits under the IRC from taxation, either before or after passage of the current Chapter 718 R.C. The City would have had to enact legislation after the effective date of the current form of Chapter 718 R.C., amending Chapter 111 C.O. to include the specific language of Chapter 718, in order to exempt this specific type of qualifying wages from taxation.

19. Even if it is assumed that the City did not have to amend its ordinance and specifically use the language in Chapter 718 R.C. in order to exempt nonqualified deferred compensation plan benefits from taxation under the City's ordinances, the City's exemption in Chapter 111 C.O. of "pensions and similar payments" and the "proceeds" from pensions, does not include Appellant's SERP benefit set forth in his 2006 W-2.

A. First, such benefit is not a "pension." The nonqualified deferred compensation plan benefits included in Box 5 of the 2006 W-2 was not an amount that had been paid to Appellants; rather the amount was the portion of the present value of the Appellant's SERP that had not been previously reported, and that was, at the time of its reporting, known, fixed and not subject to forfeiture to the benefit of Appellant. It was not a pension as that term is commonly used, which is a payment of retirement benefits after retirement.

B. Second, the amount on the W-2 had not yet been paid to Appellants and Appellants had not received any proceeds from the benefit. Section 111.901 C.O. exempts payments or proceeds from pensions.

C. Appellants argue that the words "proceeds of" found in Section 111.0901 (c) applies only to the first item, namely, "...insurance paid by reason of the death of the insured," and not to the word "pension." However, this does not change the legal conclusion that the common understanding of the word "pension" contemplates payments made in some form to the employee. Thus, there is no legal need to refer to the "proceeds" of a "pension"; the word itself contemplates payments made to a former employee.

20. Appellants' argument that the City's exemption ordinance does exempt Appellant's SERP amount stated on his W-2 fails to distinguish between pension payments (which are exempt from Shaker Heights income tax) and the employer's actions by which it funds or commits itself to fund these pension payments, as explained below:

A. At the end of 2006, NCC committed its general assets to the payment of Appellant's SERP. It is the present value of that commitment (which is found in Box 5 of the 2006 W-2 Form) which constituted income to Appellants subject to the City's income tax.

B. The employer has the option, when it commits itself to these future payments, to set aside specific funds for this purpose, thereby giving to the employee a secured claim if the future payments are not made, or the employer may simply commit its general assets to these future payments. The latter is what NCC did as to the Appellant's SERP. In either case, the present value of these actions (as found in Box 5 of the W-2 Form) is income to the employee under State law and, therefore, under the City's income tax ordinance.

C. Appellants argue that this cannot be compensation to Appellant, since no "cash" was ever deducted from his monthly pay checks to fund the amount stated in Box 5. However, Appellant's "payments" to create this fund took place by his previous ongoing service to NCC. As a senior executive, Appellant had the contractual right to SERP benefits if and when he completed his time and other requirements set out in the NCC SERP program. Thus, with each month of service to NCC, Appellant, by his employee services, was "paying" for his contractual right to get those SERP benefits following his retirement.

D. This "deferred" compensation continued to accrue in Appellant's favor until the end of 2006 when, in fact, its present value, shown in Box 5 of his W-2, was actually recognized as due and owing, though as yet unpaid and, thus, is income subject to the City's income tax.

E. Appellant chose to use that "income" to purchase a joint life annuity. But Appellant had the option to take this sum in cash, emphasizing that it was deferred compensation to which Appellant was now entitled.

21. The federal "moving statute" prohibits the taxation of retirement benefits of non-residents, which are defined, according to Section 114 of Title 4 of the United States Code, as the income from a plan under section 3121 (v) (2) (C) IRC, if such plan is part of a series of periodic payments or is a payment received after termination of employment (ref. Appellants' Notice of Appeal, at pp. 8-9.) Appellants claim in their Appeal statement that taxation of the amount included in Box 5 of Appellant's 2006 Form W-2 violates the federal moving statute (4 U.S.C. Section 114). As discussed above, the issue before this Board does not involve the taxation of such payments. Thus, the evidence and argument presented does not demonstrate that the federal moving statute prohibits the City from taxing Appellant's SERP amount set forth in Box 5 of Appellant's 2006 W-2.

22. The Board therefore finds that the Appellant's SERP as set forth in Box 5 of Appellant's 2006 Form W-2:

A. is not a "pension" as that term is used in Section 111.901 (b) or 111.901 (c) C.O.

B. is not a pension payment, and is not proceeds from a pension, as those terms are used in Section 111.901 C.O.

C. is not exempt from taxation under any other language of Section 111.901 C.O.

23. The Board also finds that taxation of the amount included in Box 5 of Appellant's 2006 Form W-2 does not violate the federal moving statute (4 U.S.C. Section 114.)

Wherefore, this Board finds that by a preponderance of the evidence and law, the amount included in Box 5 of Appellant's 2006 Form W-2 related to his SERP is taxable by the City as income, and is not exempt from taxation under Section 111.901 C.O. or any other law, and that Appellants' appeal to this Board is denied.

Approved this 8th day of August, 2008.

Robert Zimmerman, Chairperson

Margaret Anne Cannon, Member

Morris Shanker, Member

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LAW DEPARTMENT

OHIO BOARD OF TAX APPEALS

William E. MacDonald, III, and Susan W. MacDonald,	)	CASE NO. 2008-K-1883
	)	
Appellants,	)	(MUNICIPAL INCOME TAX)
	)	
vs.	)	DECISION AND ORDER
	)	
City of Shaker Heights, Robert Baker, Tax Administrator, and Regional Income Tax Agency,	)	
	)	
Appellees.	)	

APPEARANCES:

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Entered DEC 2 8 2012

Ms. Margulies, Mr. Johrendt, and Mr. Williamson concur.

Appellants filed the present appeal seeking to overturn a decision issued by the city of Shaker Heights Income Tax Board of Review, hereinafter referred to as "MBOA",[1] which affirmed an adjustment effected by the city's tax administrator, in this instance the Regional Income Tax Agency ("RITA"),[2] to appellants' jointly filed 2006 municipal income tax return. We proceed to consider this matter upon appellants' notice of appeal, the statutorily required transcript ("S.T.") certified by the MBOA pursuant to R.C. 5717.011, the record of the hearing convened before this board, and the briefs submitted on behalf of the parties and amici curiae.[3]

The pertinent facts are generally not in dispute. William E. MacDonald, III, a resident of the city of Shaker Heights until December 27, 2006, had been employed by National City Corporation for thirty-eight years until his retirement on December 31, 2006. At the time of his retirement, MacDonald was vice-chairman of National City and qualified for benefits under the company's Non-Contributory Retirement Plan and Supplemental Executive Retirement Plan ("SERP"). See Exs. 1 through 4. MacDonald elected to receive SERP benefits beginning in 2007 in the form of a joint and survivor annuity that will cease upon the second death of either of the MacDonalds. S.T., Tab 11A at 34-35; Ex. 5. Pursuant to the

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[1] While the city of Shaker Heights established a "board of tax review" to hear and decide appeals involving challenges to decisions made by the city's tax administrator, see S.T., Ex. 13, Codified Ordinance Section ("COS") 111.2501, consistent with language appearing in R.C. 718.11 and 5717.011, as well as prior decisions of this board, we will continue to refer to such tribunal as a municipal board of appeal ("MBOA").

[2] While COS 111.0302 discloses that the "'[a]dministrator' means the Director of Finance," through COS 111.2311 the city authorized RITA to administer and enforce the city's income tax provisions, authorizing it to perform the duties and act with the authority of the city's administrator. S.T., Ex. 13.

[3] Through prior order, two exhibits attached to the brief filed on behalf of the city of Cleveland were stricken from consideration. *MacDonald v. City of Shaker Hts.* (Interim Order, Dec. 21, 2010), BTA No. 2008-K-1883, unreported.

parties' stipulation submitted to the MBOA, S.T., Tab 10,[4] the present value of MacDonald's SERP benefit not previously reported was included in Box 5 of his 2006 Form W-2, entitled "medicare, wages, and tips," and totaled $14,566,611. S.T., Tab 11D. Appellants jointly filed their 2006 city income tax return, calculating their tax liability on the amount reported in Box 18 of MacDonald's Form W-2, entitled "local wages, tips, etc.," i.e., $5,459,597.84. S.T., Tab 10.

Thereafter, RITA, acting as the city's tax administrator, noticed appellants that their tax liability would be recalculated so as to include as taxable income the amount appearing in Box 5 on Form W-2, resulting in an increase in their city tax liability from $71,447 to $230,820. Id. As provided for in R.C. 718.11, appellants appealed to the MBOA, presenting the testimony of Patricia M. Emond, then senior vice president with National City responsible for the management of the company's executive compensation programs, Richard Toman, a tax attorney with National City, and appellant William MacDonald. The city's tax administrator called as its witnesses Mark Taranto, RITA's assistant director of tax, and Jim Neusser, former tax commissioner for the city of Akron. The MBOA ultimately denied appellants' objection to the tax administrator's recalculation, concluding the amount included in Box 5 of MacDonald's Form W-2 related to his SERP benefits was not a pension or otherwise exempted from taxation under the city's ordinances, that the taxation of such amount did not violate federal law, and that it therefore constituted income taxable by the city of Shaker Heights.

[4] While the "proposed stipulations" are unsigned, the parties acknowledged their agreement to their terms during the MBOA's hearing. S.T., Tab 11A at 10.

From this decision, appellants filed the present appeal pursuant to R.C. 5717.011, where the parties were accorded an opportunity to present evidence in addition to that provided to the MBOA. At this board's hearing, appellants again called Patricia Emond as a witness, as well as William J. Dunn, a certified public accountant, certified financial planner, and partner with PricewaterhouseCoopers, Dr. Ray G. Stephens, a professor of accounting, and Thomas M. Zaino, former Tax Commissioner of Ohio, the latter testifying regarding Am.Sub.H.B. No. 95.[5]

Initially, we acknowledge the standard by which our review is to be conducted. Although the Supreme Court has not yet considered an appeal filed pursuant to R.C. 5717.011,[6] it has reviewed similar appeals taken from municipal boards of appeal to common pleas courts pursuant to R.C. 2506.01, commenting in *Tetlak v. Bratenahl* (2001), 92 Ohio St.3d 46, as to the burden borne by an appellant:

> "The taxpayer, not the village, has the burden of proof on the nature of the income at issue. It is well settled that '"when an assessment is contested, the taxpayer has the burden '*** to show in what manner and to what extent ***' the commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect."' *Maxxim Med., Inc. v. Tracy* (1999), 87 Ohio St.3d 337, 339, *** quoting *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215 ***. Furthermore, the 'Tax Commissioner's findings are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful.' Id., 87 Ohio St.3d at 339-340, ***."

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[5] Since we do not find the legislation discussed by Zaino to be dispositive of the outcome of this appeal, we simply note the limitations which exist regarding this board's ability to rely upon extrinsic evidence to divine the General Assembly's intent in its enactment. See, generally, *Financial Indemnity Co. v. Cargile* (1972), 32 Ohio Misc. 103. See, also, *Jack Schmidt Lease, Inc. v. Tracy* (July 14, 1995), BTA No. 1994-M-13, unreported, affirmed sub nom. *Zalud Oldsmobile Pontiac, Inc. v. Tracy* (1996), 77 Ohio St.3d 74.

[6] For taxable years beginning on or after January 1, 2004, the General Assembly, through Am.Sub.H.B. No. 95, effective September 26, 2003, and uncodified section 156, enacted R.C. 5717.011, thereby establishing the Board of Tax Appeals as an alternative forum with concurrent jurisdiction to hear and decide appeals from municipal boards of appeal with regard to taxable years beginning on or after January 1, 2004.

> "This reasoning is applicable at the municipal level." Id. at 51-52. (Parallel citations omitted.")

See, also, *Marion v. Marion Bd. of Rev.* (Aug. 10, 2007), BTA No. 2005-T-1464, unreported, at 3 ("[W]hen cases are appealed from a municipal board of review to the BTA, the burden of proof is on the appellant to establish its right to the relief requested. Cf. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121.").

In order to provide funding for its municipal functions, the city of Shaker Heights has levied an annual tax "on all salaries, wages, commissions and other compensation[.]" COS 111.0101 and 111.0501. While it is constitutionally permissible for a municipality to impose such a tax, the General Assembly may nevertheless restrict such authority:

> "Municipal taxing power in Ohio is derived from the Ohio Constitution. Section 3, Article XVIII of the Constitution, the Home Rule Amendment, confers sovereignty upon municipalities to 'exercise all powers of local self-government.' As this court stated in *State ex rel. Zielonka v. Carrel* (1919), 99 Ohio St. 220, 227, *** '[t]here can be no doubt that the grant of authority to exercise all powers of local government includes the power of taxation.'
>
> "However, the Constitution also gives to the General Assembly the power to limit municipal taxing authority. Section 6, Article XIII provides that '[t]he General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation *** so as to prevent the abuse of such power.' Section 13, Article XVIII provides that '[l]aws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes ***.' See *Franklin v. Harrison* (1960), 171 Ohio St. 329, ***." *Cincinnati Bell Tel. Co. v. Cincinnati* (1998), 81 Ohio St.3d 599, 602. (Parallel citations omitted.)

In this regard, the General Assembly enacted R.C. 718.01(F),[7] which provides in part:

> "A municipal corporation shall not tax any of the following:
>
> "***
>
> "(10) Employee compensation that is not 'qualifying wages' as defined in section 718.03 of the Revised Code[.]"

Relevant herein, R.C. 718.03(A) defines the term "qualifying wages" in the following manner:

> "As used in this section:
>
> "***
>
> "(2) 'Qualifying wages' means wages, as defined in section 3121(a) of the Internal Revenue Code, without regard to any wage limitations, adjusted as follows:
>
> "***
>
> "(c) Deduct any amount attributable to a nonqualified deferred compensation plan or program described in section 3121(v)(2)(C) of the Internal Revenue Code if the compensation is included in wages and has, by resolution or ordinance, been exempted from taxation by the municipal corporation."[8]

In this instance, the parties are in agreement that the amount in controversy is attributable to MacDonald's SERP, a nonqualified deferred compensation plan, and that such amount appeared in Box 5 of MacDonald's Form W-2 entitled "local wages, tips, etc." It is

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[7] Applicable to taxable years beginning on or after January 1, 2008, this provision now appears in R.C. 718.01(H)(10). See Am.Sub.H.B. No. 24, uncodified section 3.

[8] Consistent with the above-referenced provision, R.C. 718.01(E) also indicated that "[t]he legislative authority of a municipal corporation, may, by ordinance or resolution, exempt from withholding and from tax on income the following: *** (2) Compensation attributable to a nonqualified deferred compensation plan or program described in section 3121(v)(2)(C) of the Internal Revenue Code." Applicable to taxable years beginning on or

also uncontested that the city has not, by resolution or ordinance, expressly exempted from taxation amounts attributable to a nonqualified deferred compensation plan. It is therefore the city's position that such amounts are taxable.

However, appellants argue that the amount attributable to National City's SERP constitutes a pension which is nontaxable pursuant to COS 111.0901:

> "The tax provided for herein shall not be levied on the following:
>
> "***
>
> "(b) Poor relief, unemployment insurance benefits, old age pensions or similar payments including disability benefits received from local, State or Federal governments, or charitable, religious or educational organizations.
>
> "(c) Proceeds of insurance paid by reason of the death of the insured, pensions, disability benefits, annuities, or gratuities not in the nature of compensation for services rendered from whatever source derived."

The MBOA rejected appellants' claim that the National City SERP was a pension, holding as follows:

> "A. First, such benefit is not a 'pension.' The nonqualified deferred compensation plan benefits included in Box 5 of the 2006 W-2 was not an amount that had been paid to Appellants; rather the amount was the portion of the present values of the Appellant's SERP that had not been previously reported, and that was, at the time of its reporting, known, fixed and not subject to forfeiture to the benefit of Appellant. It was not a pension as that term is commonly used, which is a payment of retirement benefits after retirement.
>
> "B. Second, the amount on the W-2 had not yet been paid to Appellants and Appellants had not received any proceeds from the benefit. Section 111.901 [sic] C.O. exempts payments or proceeds from pensions.

Footnote contd.

after January 1, 2008, this provision now appears in R.C. 718.01(E)(1)(b). See Am.Sub.H.B. No. 24, uncodified section 3.

> "C. Appellants argue that the words 'proceeds of' found in Section 111.0901(c) applies [sic] only to the first item, namely, '... insurance paid by reason of the death of the insured,' and not to the word 'pension.' However, this does not change the legal conclusion that the common understanding of the word 'pension' contemplates payments made in some form to the employee. Thus, there is no legal need to refer to the 'proceeds' of a 'pension'; the word itself contemplates payments made to a former employee." S.T., Tab 12 at 10.

Appellants assert that the MBOA's characterization of pension is unduly restrictive and is inconsistent with both the terms and purpose of the National City SERP. Because the term "pension" is not defined in the city's tax code, appellants refer to several other sources, including a U.S. Treasury regulation,[9] dictionaries,[10] the testimony of its witnesses, and the terms of the SERP itself, when advocating it is a pension.

Patty Emond, manager of National City's executive compensation program, testified that National City implemented its SERP in order "[t]o provide competitive pension benefits to executives." She explained that SERPs became popular in the 1980s when federal tax law changes established limits on the amount of annual compensation that could be used in calculating benefits for employee pension plans and, as a result, companies sought ways to provide benefits through supplemental plans. National City's SERP is considered a defined benefit plan where the employer provides a specific benefit or sets forth a specific formula

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[9] Appellants refer to example 8 set forth in Treasury Regulation §31.3121(v)(c), which describes one particular type of SERP as a pension.

[10] In their brief, appellants state that "[f]or example, Webster's Third New International Dictionary of the English Language defines 'pension,' in part, as 'one paid under given conditions to a person following his retirement from service (as due to age or disability) or to the surviving dependents of a person entitled to such pension.' Similarly, Black's Law Dictionary (9th Ed.) defines 'pension' as '[a] fixed sum paid regularly to a person (or to the person's beneficiaries), esp. by an employer as a retirement benefit.'" Appellants' brief at 13-14. It is not uncommon for courts to refer to such sources when looking to ascribe a definition to common, undefined words. See, e.g., *Sunoco, Inc. (R&M) v. Toledo Edison Co.*, Slip Opinion No. 2011-Ohio-2720, at ¶39; *Global Knowledge Training, L.L.C. v. Levin*, 127 Ohio St.3d 34, 2010-Ohio-4411, at ¶35.

used to derive such benefit. In this instance, a targeted replacement ratio of approximately 60% of pre-retirement income was established as the intended benefit, derived by employing a calculation that takes into consideration salary, bonuses, and total years of service, limited in part by Social Security compensation and MacDonald's qualified pension plan benefit. See Ex. 5.

Emond distinguished the National City SERP from other deferred compensation programs in place, both qualified and non-qualified,[11] indicating that while National City withheld city income tax on the forms of deferred compensation received by MacDonald, it did not do so with regard to SERP benefits as they were treated by National City as an unfunded obligation to pay pension benefits to MacDonald. She also indicated that National City reflected its SERP as a pension plan in its 2006 annual report to its shareholders. See Ex. 7, at 76-78. Emond's testimony in this regard is consistent with the stated purpose of the National City SERP as set forth in section 1.2:

> "1.2 Purpose. The purpose of the SERP is to provide for the payment of certain pension, disability and survivor benefits in addition to benefits which may be payable under other plans of the Corporation. The Corporation intends and desires by the provisions of the SERP to recognize the value to the Corporation of the past and present service of employees covered by the SERP and to encourage and assure their continued service to the Corporation by making more adequate provision for their future security than other plans of the Corporation provide." Exs. 1 and 2.

William Dunn, who testified that he advises companies with regard to the establishment of compensation programs, identified several factors impacting the

[11] In this regard, Emond testified that National City "offer[ed] a qualified deferred compensation plan which would be the 401(k) plan that allowed for deferrals of salary and bonus. We also had non-qualified deferred

establishment and tailoring of pension plans over the past thirty years, e.g., economic, regulatory, employer/employees' goals, as well as the variances amongst such plans. Dunn indicated that "'pension' is a term unfortunately that is not a term of art, it's a term of common usage, and as a result different people will call pensions different things." H.R. at 68. Continuing, "I would personally say a pension is any plan sponsored by an employer that provides for post-retirement income that's designed to supplement their income for life." Id. at 69. Ray Stevens, a professor of accounting, testified that the manner by which National City reported its SERP was consistent with Generally Accepted Accounting Principles ("GAAP").

While the National City SERP falls within the ambit of a nonqualified deferred compensation plan, we do not find such designation necessarily mandates its exclusion from the commonly accepted definition of pension which has not been otherwise limited by the city. As the MBOA pointed out in its decision, "[t]here is no dispute that Appellant's SERP was not specifically funded by National City Corporation prior to Appellant's retirement and that none of Appellant's cash salary was deferred to fund the SERP." S.T., Tab 12 at 7. Where the city has left the term pension open to interpretation, it is appropriate to look to other sources in order to determine what may be considered pension benefits. See, generally, *Wardrop v. Middletown Income Tax Review Bd.*, Butler App. No. CA2007-09-235, 2008-Ohio-5298, at ¶24 ("It is beyond dispute, however, that the Superintendent of Taxation, who is charged with promulgating rules and regulations to define and amplify Middletown's tax ordinance, cannot add to or exceed the plain language of the ordinance itself. See, e.g., *Ransom & Randolph Co. v. Evatt* (1944), 142 Ohio St. 398, 407-408; *City of Cincinnati v. De Golyer* (1969), 26 Ohio

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compensation which allowed for deferrals of salary and bonus as well, uh, and those were allowed in excess of the limits imposed on the 401(k) plan." H.R. at 38.

App.2d 178, 181-182, affirmed (1971), 25 Ohio St.2d 101."). Although we reach a different outcome based upon the language employed, consistent with the approach adopted by the court in *Wardrop*,[12] we need look no further than the terms of National City's SERP to discern its purpose, i.e., "to provide for the payment of certain pension, disability and survivor benefits in addition to benefits which may be payable under other plans," and the city's tax code to determine taxable status, i.e., "[t]he tax provided for herein shall not be levied on *** pensions[.]" Cf. *Ladd v. City of Oregon* (Mar. 29, 2011), BTA No. 2008-K-2371, unreported.

We conclude that the amount reflected in Box 5 of MacDonald's Form W-2 attributable to SERP payments constitutes a pension benefit and as such is not subject to tax by virtue of COS 111.0901. Given our conclusion in this regard, we need not reach the other arguments made by appellants. Consistent with the preceding, it is the decision and order of this board that the decision of the city of Shaker Heights Income Tax Board of Review must be, and hereby is, reversed.

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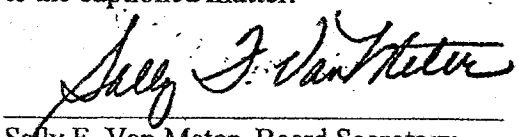
[12] The *Wardrop* court held that "to determine whether payments made under AK Steel's SERP plan are taxable by Middletown, we need only to examine the language of the plan and the city tax code. Article I of the SERP plan itself identifies it as '*an unfunded deferred compensation arrangement* maintained by the Company for the purpose of providing supplemental retirement benefits for a select group of management or highly compensated employees[.]' (Emphasis added.) Middletown's code authorizes a tax on 'qualifying wages, commissions, other compensation, and other taxable income[.]' MCO §890.03(a)(2). The code defines 'other compensation' to include '*earnings designated as deferred compensation*.' MCO §890.02(a)(26) (emphasis added). Because the SERP plan describes itself as a 'deferred compensation arrangement' and Middletown's ordinances impose

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.



Sally F. Van Meter, Board Secretary

Footnote contd.——————————————

a tax on 'earnings designated as deferred compensation,' the trial court correctly concluded that SERP payments are not exempt from municipal taxation." Id. at ¶39. (Emphasis sic.)

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Feb 27 12:17 PM-13AP000071

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

William E. MacDonald, III, et al.,	:	
Appellants-Appellees,	:	
v.	:	No. 13AP-71 (BTA No. 2008-K-1883)
City of Shaker Heights Income Tax Board of Review et al.,	:	(REGULAR CALENDAR)
Appellees-Appellants.	:	

D E C I S I O N

Rendered on February 27, 2014

Baker & Hostetler LLP, and *Christopher J. Swift*, for William E. MacDonald, III and Susan MacDonald.

William M. Ondrey Gruber, for City of Shaker Heights and Robert Baker.

Barbara A. Langhenry, Director of Law, and *Linda L. Bickerstaff*, for amicus curiae city of Cleveland.

Shana F. Marbury, for amicus curiae The Greater Cleveland Partnership; and *Linda Woggon*, for amicus curiae Ohio Chamber of Commerce.

APPEAL from the Ohio Board of Tax Appeals

KLATT, J.

{¶ 1} Appellants, City of Shaker Heights, Robert Baker, Tax Administrator, and Regional Income Tax Agency, appeal from a decision and order of the Board of Tax Appeals ("BTA") finding that the supplemental executive retirement plan ("SERP") of

appellee, William E. MacDonald, III, constituted a pension benefit that was not subject to tax by the city of Shaker Heights. Because the BTA's decision is not unreasonable or unlawful, we affirm.

Facts and Procedural History

{¶ 2} The relevant facts in this case are undisputed. MacDonald was employed by National City Corporation ("National City") for over 38 years. MacDonald was a resident of the city of Shaker Heights until December 27, 2006. On December 31, 2006, MacDonald retired from his employment at National City. At the time of his retirement, MacDonald was vice chairman of National City and he qualified for benefits under National City's qualified retirement plan and SERP. The SERP is a nonqualified deferred compensation plan that was intended to supplement the qualified retirement plan.

{¶ 3} MacDonald received his benefit from the qualified plan and the SERP in the form of a joint and survivorship annuity measured by the joint lives of MacDonald and his wife, appellee, Susan MacDonald. The MacDonalds began receiving monthly annuity payments in 2007. Those payments will cease upon the death of the last surviving spouse. MacDonald received no 2006 payments under the SERP. However, at the time of MacDonald's December 31, 2006 retirement, the present value of his SERP benefit became fixed and determinable.

{¶ 4} The National City SERP was unfunded before MacDonald's retirement and did not represent a salary deferral. Rather, the SERP, in conjunction with the qualified plan, provided an income replacement ratio of approximately 60 percent of pre-retirement income as a benefit upon retirement, after taking into account the other benefits receivable by MacDonald including social security.

{¶ 5} The MacDonalds jointly filed their 2006 city income tax return for Shaker Heights. The present value of MacDonald's SERP benefit not previously reported was included in box 5 of their 2006 form W-2[redacted]d "Medicare, wages and tips," and totaled $14,566,611. The MacDonalds calculated[redacted]2006 city income tax liability based upon the amount reported in box 18 of MacDonalds' form W-2[redacted]ed "local wages, tips, etc." Box 18 indicated an amount of $5,459,597.

{¶ 6} The Regional Income Tax Agency, acting as Shaker Height's tax administrator, issued a notice to the MacDonalds indicating that their 2006 municipal tax

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liability would be calculated based on the value listed in box 5 of his form W-2 ($14,566,611), rather than the amount listed in box 18 ($5,459,597). Shaker Heights sought to tax in 2006 the present value of the future monthly payments to the MacDonalds under the SERP. This determination by the tax administrator significantly increased the MacDonalds' municipal tax liability. The MacDonalds contended that the SERP benefit was a pension, and therefore, exempt from municipal taxation pursuant to the Codified Ordinances of the City of Shaker Heights ("C.O".) 111.0901. They appealed the tax administrator's determination to the Shaker Heights Income Tax Board of Review ("board of review").

{¶ 7} The matter proceeded to hearing before the board of review. The parties were afforded the opportunity to call witnesses, submit evidence, and argue their respective positions. The board of review found that (1) the SERP benefit was not a pension as that term is used in the city's income tax ordinance; (2) the SERP benefit was not a pension payment or proceeds from a pension as these terms are used in the city's income tax ordinance; and (3) the SERP benefit is not exempt from taxation under any other provision of the city's taxing ordinances.

{¶ 8} The MacDonalds appealed the board of review's decision to the BTA pursuant to R.C. 5717.011. The record of proceedings before the board of review was filed with the BTA. After the BTA allowed discovery, the matter proceeded to hearing. Over appellants' objection, the BTA permitted the parties to introduce additional evidence at the hearing. The BTA reversed the decision of the board of review, finding that the SERP benefit was a pension, and therefore, not subject to municipal tax under C.O. 111.0901.

{¶ 9} Appellants appeal, assigning the following errors:

> [I.] The Board of Tax Appeals erred when it found that the amounts attributable to the Appellee's, William E. MacDonald III ("MacDonald"), non-qualified deferred compensation plan constitute a pension benefit and are not subject to tax by the City of Shaker Heights as a "pension".
>
> [II.] The Board of Tax Appeals erred in allowing the introduction of new evidence and new witnesses, and conducting a de novo review of the decision of the Shaker Heights Municipal Income Tax Board of Review, when the Appellees, William E. MacDonald, III and Susan W. MacDonald were afforded every opportunity to introduce

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witnesses and testimony before the Shaker Heights Municipal Board of Review.

Legal Analysis

{¶ 10} An appellate court reviews a decision of the BTA to determine whether it is reasonable and lawful. R.C. 5717.04; *HIN, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 124 Ohio St.3d 481, 2010-Ohio-687, ¶ 13; *Cousino Constr. Co. v. Wilkins*, 108 Ohio St.3d 90, 2006-Ohio-162, ¶ 10. "It is well settled that [an appellate] court will defer to factual determinations of the BTA if the record contains reliable and probative support for them." *Strongsville Bd. of Edn. v. Wilkins*, 108 Ohio St.3d 115, 2006-Ohio-248, ¶ 7; *Am. Natl. Can Co. v. Tracy*, 72 Ohio St.3d 150, 152 (1995).

A. First Assignment of Error

{¶ 11} Appellants contend in their first assignment of error that the BTA erred in finding that the SERP benefit constitutes a pension that is not subject to Shaker Heights municipal tax. Appellants advance three arguments to support this contention. First, appellants contend that the BTA erred when it examined whether the SERP benefit constituted a pension. According to appellants, because a benefit from a nonqualified deferred compensation plan such as the SERP is not expressly exempted from the municipal tax under C.O. 111.0901(b) and 111.0901(c), it is by definition taxable. We disagree.

{¶ 12} State law permits a municipality to tax "qualifying wages." R.C. 718.01(H)(10). Qualifying wages include amounts attributable to a nonqualified deferred compensation plan unless the municipality has exempted that compensation from taxation. The city of Shaker Heights has exempted pensions from its municipal tax. C.O. 111.0901(b) and (c). The term "pensions" is not defined in Shaker Heights municipal code. The MacDonalds argued before the board of review and the BTA that a benefit from a nonqualified deferred compensation plan such as the SERP is a pension, and therefore, its value must be deducted from the qualifying wage. Nothing in Shaker Heights municipal code or in state law clearly indicates whether or not benefits from a nonqualified deferred compensation plan, such as the SERP at issue here, is a pension. Therefore, we reject appellants' argument that the BTA erred when it examined whether the SERP benefit constitutes a pension for purposes of C.O. 111.0901(c).

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{¶ 13} In their second argument, appellants contend that the pension exemption contained in C.O. 111.0901(b) and (c) is limited to payments made to a retired employee from the employer after retirement. Because the present value of the SERP benefit listed in box 5 of the MacDonald's 2006 form W-2 [redacted] t reflect payments received by MacDonald in 2006, appellants contend that the [redacted] benefit is not a pension, and therefore, it is taxable as qualifying wages. In support of this argument, appellants primarily rely on the testimony of Mark Taranto, the assistant tax director for the Regional Income Tax Agency. Mr. Taranto testified that the common usage and interpretation of the term pension as used in the city's income ordinance is a payment after retirement.

{¶ 14} However, the BTA relied upon other testimony presented at the hearing indicating that benefits from a nonqualified deferred compensation plan, such as the SERP at issue, is a pension. Patricia Edmond, former executive vice president at National City, testified that the SERP was intended to provide a pension. Edmond also stated that National City classified its SERP as a pension in its 2006 annual report to shareholders. William Dunn, a senior benefits partner at PriceWaterhouseCoopers testified that National City's SERP was a pension. In addition, professor Ray Stephens, an accounting expert, testified that the reporting of National City's SERP as a pension was proper under general accepted accounting principles ("GAAP").

{¶ 15} Both appellants and the MacDonalds presented evidence and advanced arguments that supported their respective positions. The BTA examined all the evidence presented at the hearing and reflected in the record. Based upon this evidence, the BTA concluded that the MacDonalds' SERP benefit listed in box 5 of their 2006 form W-2 [redacted] ension and, therefore, that amount must be deducted from the MacDonalds' inco [redacted] calculating the taxable qualifying wage. This determination is not unreasonable or unlawful.

{¶ 16} Appellants also contend that the BTA's decision conflicts with *Wardrop v. Middletown Income Tax Review Bd.*, 12th Dist. No. CA2007-09-235, 2008-Ohio-5298. Although the *Wardrop* case also involved the issue of whether a SERP benefit was taxable under Middletown's ordinance, the language of the ordinance was substantially different than the Shaker Heights ordinance at issue here. In *Wardrop*, the Middletown

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ordinance expressly stated that earnings designated as "deferred compensation" were taxable. *Id.* at ¶ 36. In addition, the Middletown ordinance expressly distinguished tax-exempt "pensions" from taxable "earnings designated as deferred compensation." *Id.* at ¶ 38. Because the SERP plan at issue in *Wardrop* described itself as a "deferred compensation arrangement" and because Middletown's ordinance expressly imposed a tax on earnings designated as deferred compensation, the appellate court affirmed the trial court's judgment that the SERP payments were not exempt from municipal taxation. These facts are in marked contrast to those presented in this case. Here, the Shaker Heights ordinance does *not* expressly tax deferred compensation. Moreover, *Wardrop* involved an R.C. Chapter 2506 appeal—not an appeal pursuant to R.C. Chapter 5717. For the reasons discussed in connection with appellants' second assignment of error, there are significant differences between these two avenues of appeal. For all these reasons, we find *Wardrop* distinguishable, and therefore, unpersuasive.

{¶ 17} In their third and final argument in support of their first assignment of error, appellants contend that the BTA should not have concluded that the SERP benefit is a pension based solely upon National City's characterization and treatment of the SERP as a pension. We disagree with appellants' characterization of the rationale used by the BTA in arriving at its decision.

{¶ 18} The BTA did not conclude that MacDonalds' SERP benefit was a pension solely because National City treated the SERP as a pension. The BTA's decision also notes the testimony of William Dunn who stated that "a pension is any plan sponsored by an employer that provides for post-retirement income that's designed to supplement their income for life." The SERP at issue meets this definition. Ray Stevens, a professor of accounting, also testified that the manner in which National City reported the SERP (as a pension) was consistent with GAAP. Lastly, the BTA noted that MacDonald's SERP benefit was not specifically funded by National City prior to MacDonald's retirement and that none of MacDonald's cash salary was deferred to fund the SERP benefit. The BTA found that all these factors supported its determination that MacDonald's SERP benefit constituted a pension. Because the BTA's decision is not unreasonable or unlawful, we overrule appellants' first assignment of error.

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B. Second Assignment of Error

{¶ 19} In its second assignment of error, appellants contend that the BTA erred by (1) holding a hearing and allowing the introduction of additional evidence and additional witnesses that could have been presented to the board of review; and (2) conducting a de novo hearing without giving deference to the board of review's decision. We disagree with both of these arguments.

{¶ 20} In support of their argument that the BTA erred by allowing the MacDonalds to present additional evidence at the hearing, appellants cite to the process for an appeal of a "final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state" to a court of common pleas. R.C. 2506.01(A). Appellants point out that in an appeal of a board of review decision to a court of common pleas, R.C. 2506.03 limits the reviewing court's authority to consider evidence outside the administrative record. However, those limitations do not exist in an appeal to the BTA pursuant to R.C. 5717.011(C). In fact, upon the application of any interested party, the BTA is required to "order the hearing of additional evidence, and the board may make such investigation concerning the appeal as it considers proper." R.C. 5717.011(C). Here, the MacDonalds requested a hearing before the BTA. Therefore, appellants' contention that the BTA erred when it permitted the introduction of additional evidence conflicts with the express language in R.C. 5717.011(C). The BTA did not err by permitting the introduction of additional evidence.

{¶ 21} Appellants also contend that the BTA erred by conducting a de novo hearing without giving deference to the board of review's decision. In essence, appellants contend that the BTA failed to apply the correct standard of review. Again, we disagree.

{¶ 22} Pursuant to R.C. 5717.011(C), the BTA may hear an appeal based solely upon the record and any evidence considered by the administrative body below, or upon application of any interested party, it must set a hearing, permit the introduction of additional evidence, and "make such investigation concerning the appeal as it considers proper." *Id.* The statute does not set forth a standard of review.

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{¶ 23} Appellants argue for a very deferential standard of review for R.C. 5717.011 appeals by again looking to appeals from a municipal taxing authority to a court of common pleas pursuant to R.C. Chapter 2506. Although a court of common pleas may hold a hearing in an R.C. Chapter 2506 appeal, its review must be confined to the transcript of the administrative proceeding unless the appellant satisfies one of the conditions contained in R.C. 2506.03. In addition, R.C. 2506.04 sets forth the standard of review that the common pleas court must apply in deciding the appeal. R.C. 2506.04 provides:

> If an appeal is taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code, *the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record.* Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party on questions of law as provided in the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code.

(Emphasis added.)

{¶ 24} However, because R.C. 2506.03 and 2506.04 contain significant provisions not in R.C. 5717.011, appellants' reliance on these statutes, and case law involving R.C. Chapter 2506 appeals, is misplaced. As previously noted, R.C. 5717.011 contains no provision that limits the BTA's review to the record developed in the administrative proceedings below when a hearing is requested. There is no provision in R.C. 5717.011(C) that suggests the BTA must give any deference to a board of review decision. The BTA's authority is not limited by an express standard of review. Moreover, deference to a board of review decision is illogical when the BTA hears evidence not presented to the board of

review in conducting its own adjudication of the appeal.[1] It is not this court's role to second-guess the state legislature's policy reasons for establishing two different appeal mechanisms for board of review decisions. We note that the appeal provided pursuant to R.C. 2506.01 is expressly in addition to any other remedy or appeal provided by law. R.C. 2506.01(B). Because the BTA did not err when it permitted the MacDonalds to introduce additional evidence at the hearing and when it considered that evidence in reaching its decision, we overrule appellants' second assignment of error.

{¶ 25} Having overruled appellants' two assignments of error, we affirm the order of the BTA.

Order affirmed.

O'GRADY, J., concurs.
TYACKS, J., concurs in part and dissents in part.

TYACK, J., concurring in part and dissenting in part.

{¶ 26} I respectfully concur in part and dissent in part.

{¶ 27} Most of the facts in this case are not in dispute. William E. MacDonald, III ("MacDonald"), was a resident of the city of Shaker Heights until December 27, 2006. MacDonald had been employed by National City Corporation for 38 years until his retirement on December 31, 2006. MacDonald was vice-chairman and qualified for benefits under the company's Non-Contributory Retirement Plan and Supplemental Executive Retirement Plan ("SERP"). MacDonald elected to receive SERP benefits beginning in 2007 in the form of a joint and survivor annuity that will cease upon the death of MacDonald and his wife. The value of MacDonald's SERP benefit, that had not been previously been reported, was included in Box 5 of his 2006 Form W-2 [redacted] totaled $14,566,611. Mr. and Mrs. MacDonald filed their 2006 city income ta[redacted]n with Shaker Heights, calculating their tax liability on the amount reported in Box 18 of

[1] For these same reasons, we respectfully find the dissent's reliance upon *AT&T Communications of Ohio, Inc. v. Lynch*, 132 Ohio St.3d 92, 2012-Ohio-1975 and *Tetlack v. Bratenahl*, 92 Ohio St.3d 46 (2001) to be misplaced. Both cases involved R.C. Chapter 2506 appeals. In addition, we did not hold that appellants had the burden of proof at the hearing before the BTA. Rather, we held that the BTA did not act unreasonably or unlawfully in finding that the MacDonalds satisfied their burden in establishing that the SERP benefit was a pension.

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MacDonald's W-2 [redacted] which totaled $5,459,597.84. It is not disputed that the SERP is a nonqualified defe[redacted]mpensation plan.

{¶ 28} The Regional Income Tax Agency ("RITA"), acting as Shaker Heights' tax administrator, issued a notice to MacDonald that his municipal tax liability would be calculated based on Box 5 of his W-2 [redacted] Donald appealed to the Shaker Heights Income Tax Board of Review ("Shaker Hei[redacted]oard") which is a municipal board of appeal ("MBOA"), arguing that the SERP was a pension and was exempt from municipal taxation.

{¶ 29} The Shaker Heights Board concluded that the amount in Box 5 that was attributable to MacDonald's SERP was not a pension and had not been exempted by Shaker Heights' Code of Ordinances 111.0901 and therefore is taxable as it is found in Box 5 of MacDonald's W-2 [redacted] MacDonalds appealed to the BTA, which reversed and found that the SERP paymen[redacted]stitute a pension and are not subject to taxation. Appellants, Shaker Heights et al., then timely appealed to this court.

{¶ 30} Courts reviewing a BTA decision must consider whether the decision was "reasonable and lawful." *Cousino Constr. Co. v. Wilkins*, 108 Ohio St.3d 90, 2006-Ohio-162, ¶ 10. An appellate court will reverse a BTA decision that is based upon an incorrect legal conclusion. *Gahanna-Jefferson Local School Dist. Bd. of Edn. v. Zaino*, 93 Ohio St.3d 231 (2001). But "[t]he BTA is responsible for determining factual issues and, if the record contains reliable and probative support for these BTA determinations," this court will affirm them. *Am. Natl. Can Co. v. Tracy*, 72 Ohio St.3d 150, 153 (1995).

The Board of Tax Appeals did not follow the proper standard of review

{¶ 31} Appellants' second assignment of error asserts that the BTA improperly conducted a de novo review of the Shaker Heights Board's decision and improperly allowed the introduction of new evidence that could have been presented to the MBOA. I agree in part. The BTA did not employ the correct standard of review because the MBOA's findings are presumptively valid absent a demonstration that those findings are clearly unreasonable or unlawful. However, there is no statutory prohibition to the BTA allowing additional evidence.

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{¶ 32} An appellate court's scope of review on issues of law is plenary, including the issue of whether the court or agency below applied the proper standard of review. *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, ¶ 43.

{¶ 33} Appeals from a MBOA may be made to the county's court of common pleas or the BTA, and are governed by R.C. 5717.011:

> Upon the filing of a notice of appeal with the board of tax appeals, the municipal board of appeal shall certify to the board of tax appeals a transcript of the record of the proceedings before it, together with all evidence considered by it in connection therewith. * * * The board may order the appeal to be heard upon the record and the evidence certified to it by the administrator, but upon the application of any interested party the board shall order the hearing of additional evidence, and the board may make such investigation concerning the appeal as it considers proper.

{¶ 34} R.C. 5717.011(C). There is no guidance in the statute as to the standard of review. Nor has the Supreme Court of Ohio articulated the standard of review by which the BTA is to measure appeals from a MBOA. This is mostly due to the recent enactment of R.C. 718.11 in 2003, beginning to apply for the 2004 tax year, which required the creation of a MBOA in all municipal corporations that impose an income tax. R.C. 718.11.

{¶ 35} By examining two similar tax appeal procedures to the one at bar, I believe we can determine the potential standard of review in this case. The first standard is for an appeal from the Ohio Tax Commissioner to the BTA in which "the tax commissioner's findings 'are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful.' Consequently, the taxpayer carries the burden 'to show the manner and extent of the error in the Tax Commissioner's final determination.' " *Global Knowledge Training, L.L.C. v. Levin*, 127 Ohio St.3d 34, 2010-Ohio-4411, ¶ 12, quoting *Stds. Testing Laboratories, Inc. v. Zaino*, 100 Ohio St.3d 240, 2003-Ohio-5804, ¶ 30. The second is for an appeal from a municipal board of review to a court of common pleas, which is authorized by R.C. 2506.01, and "the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." R.C. 2506.04.

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{¶ 36} Analyzing two cases from the Supreme Court, *Tetlak v. Bratenahl*, 92 Ohio St.3d 46, 2001-Ohio-129, and *AT&T Communications of Ohio, Inc. v. Lynch*, 132 Ohio St.3d 92, 2012-Ohio-1975, I believe we are able to determine that appeals from a municipality board of review to the BTA is most analogous to appeals from the Tax Commissioner. In *Tetlak*, taxpayer Joseph Tetlak challenged the taxable status the distributive share of his S corporation that he argued for the purposes of municipal taxation was intangible income and therefore exempt. *See Tetlak* generally. Tetlak initially filed a protest which was denied by the tax administrator of the Village of Bratenahl who stated that the distributions was income from an unincorporated business entity and therefore taxable by municipalities. *Id.*

{¶ 37} Tetlak appealed to the Bratenahl Board of Review which upheld the tax administrator's denial of Tetlak's protest. *Id.* Tetlak then filed an administrative appeal pursuant to R.C. 2506.01 in the common pleas court. The trial court found that the municipality may tax the distributions but the "determination must be supported by 'the preponderance of substantial, reliable, and probative evidence on the whole record.' R.C. 2506.04. Finding that the [tax administrator] did not make such determination, the court reversed the decision of the board of review." *Id.* at 47. The Eighth District Court of Appeals affirmed the decision and the case went before the Supreme Court. *Id.*

{¶ 38} The Supreme Court expresses, in reversing the judgment, that deference is to be given to a municipality when reviewing an income tax determination:

> The taxpayer, not the village, has the burden of proof on the nature of the income at issue. It is well settled that ' "when an assessment is contested, the taxpayer has the burden '* * * to show in what manner and to what extent * * *' the commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect." ' *Maxxim Med., Inc. v. Tracy* (1999), 87 Ohio St.3d 337, 339, 720 N.E.2d 911, 913, quoting *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215, 5 OBR 455, 457, 450 N.E.2d 687, 688. Furthermore, the 'Tax Commissioner's findings are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful.' *Id.*, 87 Ohio St.3d at 339–340, 720 N.E.2d at 913–914.
>
> This reasoning is applicable at the municipal level.

Tetlak at 51-52.

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{¶ 39} From this, I would conclude that the decisions of a MBOA are to be treated with the same deference as those of the Tax Commissioner when appealed. The Supreme Court twice uses the standards for the Tax Commissioner and specifically states that this "reasoning is applicable at the municipal level" equating the deference given to the Tax Commissioner and the hurdles required to overcome it as applicable to the Bratenahl tax administrator or the Bratenahl Board of Review. *Id.* The case at bar is analogues to the *Tetlak*; both cases examine the taxable status of a type of income by a municipality, the Bratenahl Board of Review and the Shaker Heights Board in both cases concluded that the income was taxable, both of the boards' decisions were overturned upon appeal. The difference being the municipalities' boards' decision in *Tetlak* was appealed to a common pleas court as opposed to the BTA. *Tetlak* emphasis that the taxpayer must overcome the tax assessor's findings by showing that they are faulty or incorrect and that they are presumed valid absent a showing of them being clearly unreasonable or unlawful. *Id.*

{¶ 40} *AT&T Communications* affirms that, while appeals from a MBOA to a common pleas court under R.C. 2506.01 resemble de novo proceedings, they are not de novo. *AT&T Communications* at ¶ 13. In *AT&T Communications*, a refund of the city of Cleveland's income tax was denied by the tax administrator. *See AT&T Communications* generally. AT&T appealed to the Cleveland Board of Income Tax Review which affirmed the refusal of the refund and AT&T filed an appeal pursuant to R.C. 2506.01. *Id.* Similar to *Tetlak*, *AT&T Communications* is a municipal income tax dispute in which after the MBOA affirms that administrator's findings the taxpayer appeals to the court of common pleas.

{¶ 41} The Supreme Court affirmed that the courts of common pleas exercise appellate jurisdiction: "[W]hile an appeal under R.C. 2506.01 resembles a de novo proceeding, it is not de novo. There are limits to a court of common pleas review of the administrative body's decision. For example, in weighing evidence, the court may not 'blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise.' " *AT&T Communications* at ¶ 13, quoting *Dudukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202 (1979). We find that the BTA may not conduct a de novo review of a MBOA's findings nor may they substitute their own judgment. It is the MBOA not the BTA that has the expertise in the municipalities own

taxing ordinances. There must be deference given to a MBOA's findings. The standards that must be employed and the dispositions that must be reached are more limited than relief that could be awarded pursuant to a trial, therefore the administrative appeal is more akin to an appeal than a trial. *See AT&T Communications* at 14.

{¶ 42} Examining *Tetlak* and *AT&T Communications*, I would find that in a MBOA's decision appealed pursuant to R.C. 5717.011 to the BTA, the taxpayer, not the village, has the burden of proof on the nature of the income at issue. *Tetlak* at 51. When an assessment of a tax administrator is contested, the taxpayer has the burden to show in what manner and to what extent the findings and assessments were faulty and incorrect. *Id.* Furthermore, an appeal pursuant to R.C. 5717.011(C) is not a de novo proceeding, it is more akin to an appeal than a trial, there may not be a substitution of judgment, and the MBOA's findings are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful. *See Tetlak* at 51-52; *AT&T Communications* at ¶ 13-14.

{¶ 43} Shaker Heights' second assignment of error also argues that MacDonald was precluded from introducing new evidence to the BTA that could have been introduced to the MBOA. There is no statutory basis for this argument nor any case law that suggests the BTA should be restricted in this way. The BTA is in fact required upon the application of any interested party to "order the hearing of additional evidence, and the board may make such investigation concerning the appeal as it considers proper." R.C. 5717.011(C). While a court of common pleas in an R.C. 2506.01 appeal may consider evidence outside the administrative record, that authority is limited. There is no statutory equivalent in R.C. 5717.011. *See AT&T Communications* at ¶ 13. We find the BTA is able to hear evidence in a MBOA appeal that could have been presented to the MBOA. Generally, however, it would not be in a taxpayer's interest to purposely withhold evidence from a MBOA as the MBOA's findings should be presumptively valid absent a demonstration they are clearly unreasonable or unlawful.

The BTA did not address the MBOA's findings or presume them as valid

{¶ 44} Examining the BTA's decision and the Shaker Heights Board's decision, I would find that the proper standard of review was not employed by the BTA which conducted a hearing with no deference to factual findings, or interpretation of Shaker Heights' city code by the Shaker Heights Board. The Shaker Heights Board's findings are

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required to be shown to be clearly unreasonable for the BTA to draw a different conclusion. This includes the reading of Shaker Heights' Code of Ordinances 111.0901 which originally found MacDonald's SERP not to be a pension and exempt from the municipal income tax.

{¶ 45} Though the BTA cites *Tetlak* in its decision, it does not accord any deference to Shaker Heights Income Tax Board of Review's findings of fact that MacDonald's SERP is not a pension. At no point does the BTA address the reasonableness of the Shaker Heights Board's findings let alone address the question whether MacDonald has demonstrated that those findings are clearly unreasonable. Instead, the BTA acted as if it were writing on a clean slate.

{¶ 46} The Shaker Heights Board concluded that the amount reported on MacDonald's W-2 [redacted] table to his SERP was not a pension but rather an amount that had not been prev [redacted] reported, "and that was, at the time of its reporting, known, fixed and not subject to forfeiture to the benefit of Appellant. It was not a pension as that term is commonly used, which is a payment of retirement benefits after retirement." Shaker Heights Board's decision, at 10. The factual determinations about the SERP lead the Shaker Heights Board to conclude that it was not a pension:

> [MacDonald] had the contractual right to SERP benefits if and when he completed his time and other requirements set out in the [National City] SERP program. Thus, with each month of service to [National City], [MacDonald], by his employee services, was "paying" for his contractual right to get those SERP benefits following his retirement.
>
> This "deferred" compensation continued to accrue in [MacDonald]'s favor until the end of 2006 when, in fact, its present value, shown in Box 5 of his W-2 [redacted] actually recognized as due and owing, though as yet un [redacted] d, thus, is income subject to the City's income tax.
>
> [MacDonald] chose to use that "income" to purchase a join life annuity. But [MacDonald] had the option to take the sum in cash, emphasizing that it was deferred compensation to which [MacDonald] was now entitled.

Shaker Heights Board's decision, at 11.

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{¶ 47} These are some of the factual and legal conclusions of the Shaker Heights Board that must be presumed valid unless demonstrated that they are clearly unreasonable or unlawful.

{¶ 48} The BTA did not really address the conclusions of the Shaker Heights Board. Instead, the BTA stated that while the SERP "falls within the ambit of a nonqualified deferred compensation plan, we do not find such designation necessarily mandates its exclusion from the commonly accepted definition of pension." BTA's decision, at 10. The BTA then simply made the determination that the SERP was a pension. This ignored the Shaker Heights Board's conclusion that the SERP is a deferred compensation that could be used by MacDonald as proof that the SERP was not a pension.

{¶ 49} The BTA then concluded that "we need look no further than the terms of National City's SERP to discern its purpose, i.e., 'to provide for the payment of certain pension, disability and survivor benefits in addition to benefits which may be payable under other plans.' " BTA decision, at 11. This fails to address the conclusions and arguments made by Shaker Heights Board. Again, I find that the BTA did not presume Shaker Heights Income Tax Board of Review's findings as valid and did not show what demonstrates those findings to be clearly unreasonable or unlawful.

{¶ 50} The second assignment of error should be affirmed in part and overruled in part. Since the majority of this panel does not do so, to that extent, I respectfully dissent in part.

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

William E. MacDonald, III, et al.,	:	
Appellants-Appellees,	:	
v.	:	No. 13AP-71 (BTA No. 2008-K-1883)
City of Shaker Heights Income Tax Board of Review et al.,	:	(REGULAR CALENDAR)
Appellees-Appellants.	:	
	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on February 27, 2014, appellants' assignments of error are overruled, and it is the judgment and order of this court that the order of the Ohio Board of Tax Appeals is affirmed. Costs assessed against appellants.

KLATT and O'GRADY, JJ.
TYACK, J., concurs in part.

/S/JUDGE

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Tenth District Court of Appeals

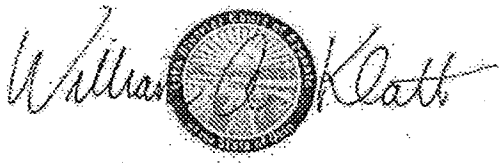
Date: 02-27-2014

Case Title: WILLIAM E MACDONALD III -VS- CITY OF SHAKER HEIGHTS

Case Number: 13AP000071

Type: JEJ - JUDGMENT ENTRY

So Ordered



/s/ Judge William A. Klatt

718.11 Board of tax appeals.

The legislative authority of each municipal corporation that imposes a tax on income shall maintain a board to hear appeals as provided in this section. The legislative authority of any municipal corporation that does not impose a tax on income on the effective date of this amendment, but that imposes such a tax after that date, shall establish such a board by ordinance not later than one hundred eighty days after the tax takes effect.

Whenever a tax administrator issues a decision regarding a municipal income tax obligation that is subject to appeal as provided in this section or in an ordinance or regulation of the municipal corporation, the tax administrator shall notify the taxpayer in writing at the same time of the taxpayer's right to appeal the decision and of the manner in which the taxpayer may appeal the decision.

Any person who is aggrieved by a decision by the tax administrator and who has filed with the municipal corporation the required returns or other documents pertaining to the municipal income tax obligation at issue in the decision may appeal the decision to the board created pursuant to this section by filing a request with the board. The request shall be in writing, shall state why the decision should be deemed incorrect or unlawful, and shall be filed within thirty days after the tax administrator issues the decision complained of.

The board shall schedule a hearing within forty-five days after receiving the request, unless the taxpayer waives a hearing. If the taxpayer does not waive the hearing, the taxpayer may appear before the board and may be represented by an attorney at law, certified public accountant, or other representative.

The board may affirm, reverse, or modify the tax administrator's decision or any part of that decision. The board shall issue a final decision on the appeal within ninety days after the board's final hearing on the appeal, and send a copy of its final decision by ordinary mail to all of the parties to the appeal within fifteen days after issuing the decision. The taxpayer or the tax administrator may appeal the board's decision as provided in section 5717.011 of the Revised Code.

Each board of appeal created pursuant to this section shall adopt rules governing its procedures and shall keep a record of its transactions. Such records are not public records available for inspection under section 149.43 of the Revised Code. Hearings requested by a taxpayer before a board of appeal created pursuant to this section are not meetings of a public body subject to section 121.22 of the Revised Code.

Effective Date: 09-26-2003

R.C. § 5717.011

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Chapter 5717. Appeals (Refs & Annos)
5717. 011 Appeal from municipal board of appeal; notice of appeal; hearing

(A) As used in this chapter, "tax administrator" has the same meaning as in section 718.01 of the Revised Code.

(B) Appeals from a municipal board of appeal created under section 718.11 of the Revised Code may be taken by the taxpayer or the tax administrator to the board of tax appeals or may be taken by the taxpayer or the tax administrator to a court of common pleas as otherwise provided by law. If the taxpayer or the tax administrator elects to make an appeal to the board of tax appeals or court of common pleas, the appeal shall be taken by the filing of a notice of appeal with the board of tax appeals or court of common pleas, the municipal board of appeal, and the opposing party. The notice of appeal shall be filed within sixty days after the day the appellant receives notice of the decision issued under section 718.11 of the Revised Code. The notice of appeal may be filed in person or by certified mail, express mail, or authorized delivery service as provided in section 5703.056 of the Revised Code. If the notice of appeal is filed by certified mail, express mail, or authorized delivery service as provided in section 5703.056 of the Revised Code, the date of the United States postmark placed on the sender's receipt by the postal service or the date of receipt recorded by the authorized delivery service shall be treated as the date of filing. The notice of appeal shall have attached thereto and incorporated therein by reference a true copy of the decision issued under section 718.11 of the Revised Code and shall specify the errors therein complained of, but failure to attach a copy of such notice and incorporate it by reference in the notice of appeal does not invalidate the appeal.

(C) Upon the filing of a notice of appeal with the board of tax appeals, the municipal board of appeal shall certify to the board of tax appeals a transcript of the record of the proceedings before it, together with all evidence considered by it in connection therewith. Such appeals may be heard by the board at its office in Columbus or in the county where the appellant resides, or it may cause its examiners to conduct such hearings and to report to it their findings for affirmation or rejection. The board may order the appeal to be heard upon the record and the evidence certified to it by the administrator, but upon the application of any interested party the board shall order the hearing of additional evidence, and the board may make such investigation concerning the appeal as it considers proper.

(D) If an issue being appealed under this section is addressed in a municipal corporation's ordinance or regulation, the tax administrator, upon the request of the board of tax appeals, shall provide a copy of the ordinance or regulation to the board of tax appeals.

(2003 H 95, eff. 9-26-03)

RESEARCH REFERENCES

Encyclopedias

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Chapter 5717. Appeals (Refs & Annos)

5717.01 Appeal from county board of revision to board of tax appeals; procedure; hearing

An appeal from a decision of a county board of revision may be taken to the board of tax appeals within thirty days after notice of the decision of the county board of revision is mailed as provided in division (A) of section 5715.20 of the Revised Code. Such an appeal may be taken by the county auditor, the tax commissioner, or any board, legislative authority, public official, or taxpayer authorized by section 5715.19 of the Revised Code to file complaints against valuations or assessments with the auditor. Such appeal shall be taken by the filing of a notice of appeal, in person or by certified mail, express mail, or authorized delivery service, with the board of tax appeals and with the county board of revision. If notice of appeal is filed by certified mail, express mail, or authorized delivery service as provided in section 5703.056 of the Revised Code, the date of the United States postmark placed on the sender's receipt by the postal service or the date of receipt recorded by the authorized delivery service shall be treated as the date of filing. Upon receipt of such notice of appeal such county board of revision shall by certified mail notify all persons thereof who were parties to the proceeding before such county board of revision, and shall file proof of such notice with the board of tax appeals. The county board of revision shall thereupon certify to the board of tax appeals a transcript of the record of the proceedings of the county board of revision pertaining to the original complaint, and all evidence offered in connection therewith. Such appeal may be heard by the board of tax appeals at its offices in Columbus or in the county where the property is listed for taxation, or the board of tax appeals may cause its examiners to conduct such hearing and to report to it their findings for affirmation or rejection.

The board of tax appeals may order the appeal to be heard on the record and the evidence certified to it by the county board of revision, or it may order the hearing of additional evidence, and it may make such investigation concerning the appeal as it deems proper.

(2002 H 675, eff. 3-14-03; 2000 H 612, eff. 9-29-00; 1983 H 260, eff. 9-27-83; 1981 S 6; 1976 H 920; 1953 H 1; GC 5610)

UNCODIFIED LAW

2002 S 180, § 4, eff. 4-9-03, reads:

(A) As used in this section, "qualifying taxpayer" means a person satisfying all of the following:

(1) The person disputes the valuation or assessment of one or more parcels of real property classified according to use as commercial real property;

(2) The person filed an original complaint against the valuation or assessment of such property under section 5715.13 or 5715.19 of the Revised Code that was dismissed by a county board of revision, the Board of Tax Appeals, or a court for lack of jurisdictional validity upon finding the filing of the complaint was the unauthorized practice of law;

(3) The person has not paid in full the taxes, assessments, or charges due on the valuation or assessment of such property for the tax years to which those complaints relate.

(B) A qualifying taxpayer or a qualifying taxpayer's attorney may file, with the Board of Tax Appeals, a complaint with respect to property described in division (A) of this section and with respect to any tax years to which the original complaints related and occurring within one sexennial reappraisal period within the ten years preceding the effective date of this section. The complaint shall be filed on or with any forms, prescribed by the Tax Commissioner under section 5715.30 of the Revised Code or otherwise, for the filing of a complaint under section 5715.13 or 5715.19 of the Revised Code, and such a form shall constitute a proper form for filing a complaint with the Board of Tax Appeals under this section if the filing otherwise complies with this section. At the same time as the complaint is filed, the qualifying taxpayer shall file a notice of the complaint with the county board of revision with which the original complaint was filed. The complaint and the notice of complaint shall be filed not later than six months after the effective date of this section. The board of revision, upon receiving notice of the complaint, shall notify, by certified mail, any person that was a party to any proceeding on the original complaint conducted by the board of revision, and file proof of such notice with the Board of Tax Appeals. Notwithstanding sections 5703.02, 5715.13, 5715.19, and 5717.01 of the Revised Code, the Board of Tax Appeals is hereby vested with original jurisdiction to hear and determine such complaints.

Upon the proper and timely filing of a complaint under this section, the Board of Tax Appeals shall proceed as otherwise prescribed in section 5717.01 of the Revised Code to hear the complaint on the basis of the evidence offered to the Board of Tax Appeals, or to cause its examiners to hear the complaint on such evidence and report their findings to the Board. The Board of Tax Appeals shall certify its action to the county auditor. Notwithstanding section 5715.22 of the Revised Code, if the Board of Tax Appeals finds that the amount of taxes, assessments, and charges paid for the tax years to which the complaint relates exceeds the amount due for those years, the county auditor shall not draw a warrant for the refund of the overpayment or any portion thereof, and shall not credit the overpayment or any portion thereof against the amount of any taxes, assessments, or charges that may be due in the future from the qualifying taxpayer. The county auditor shall adjust the amount of taxes, assessments, and charges shown to be due on the current tax list from the years to which the complaint relates in accordance with the Board's finding, and shall certify such adjustment to the county treasurer, who shall adjust the tax duplicate accordingly. The finding of the Board of Tax Appeals under this section may be appealed by the parties and in the manner prescribed under section 5717.04 of the Revised Code for the institution of appeals from decisions of the Board of Tax Appeals determining appeals from decisions of county boards of revision.

(C) It is the intent of the General Assembly to exercise its authority under Ohio Constitution, Article II, Section 28, to pass a general law authorizing courts to carry into effect, upon such terms as are just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors in instruments and proceedings arising out of their want of conformity with the laws of this state. This section is remedial legislation and does not affect pending or past complaints where jurisdiction over a complainant absolutely vested with a county board of revision. It is the intent of the General Assembly that if a board of revision never had jurisdiction over a complainant because the complainant's previous complaint failed to vest jurisdictional validity because of an unauthorized practice of law violation, then no rights have vested with respect to the determination of the total valuation or assessment of a commercial parcel owned by the complainant, and, as such, there is not a reasonable expectation of finality with regard to said determination. Further, it is the intent of the General Assembly that this section merely modifies the existing right of a property owner, granted under sections 5715.13 and 5715.19 of the Revised Code, to file a complaint against a determination of the total valuation or assessment of a commercial parcel owned by the complainant, by expanding the statute of limitations under which a complaint can be filed.

2002 S 180, § 5, eff. 4-9-03, reads:

Section 4 of this act is hereby repealed on the first day of the seventh month beginning after the effective date of this section.

HISTORICAL AND STATUTORY NOTES

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Chapter 5717. Appeals (Refs & Annos)

5717.02 Appeals from final determination of the tax commissioner; procedure; hearing

Except as otherwise provided by law, appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be taken to the board of tax appeals by the taxpayer, by the person to whom notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner is required by law to be given, by the director of budget and management if the revenues affected by such decision would accrue primarily to the state treasury, or by the county auditors of the counties to the undivided general tax funds of which the revenues affected by such decision would primarily accrue. Appeals from the redetermination by the director of development under division (B) of section 5709.64 or division (A) of section 5709.66 of the Revised Code may be taken to the board of tax appeals by the enterprise to which notice of the redetermination is required by law to be given. Appeals from a decision of the tax commissioner concerning an application for a property tax exemption may be taken to the board of tax appeals by a school district that filed a statement concerning such application under division (C) of section 5715.27 of the Revised Code. Appeals from a redetermination by the director of job and family services under section 5733.42 of the Revised Code may be taken by the person to which the notice of the redetermination is required by law to be given under that section.

Such appeals shall be taken by the filing of a notice of appeal with the board, and with the tax commissioner if the tax commissioner's action is the subject of the appeal, with the director of development if that director's action is the subject of the appeal, or with the director of job and family services if that director's action is the subject of the appeal. The notice of appeal shall be filed within sixty days after service of the notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner or redetermination by the director has been given as provided in section 5703.37, 5709.64, 5709.66, or 5733.42 of the Revised Code. The notice of such appeal may be filed in person or by certified mail, express mail, or authorized delivery service. If the notice of such appeal is filed by certified mail, express mail, or authorized delivery service as provided in section 5703.056 of the Revised Code, the date of the United States postmark placed on the sender's receipt by the postal service or the date of receipt recorded by the authorized delivery service shall be treated as the date of filing. The notice of appeal shall have attached thereto and incorporated therein by reference a true copy of the notice sent by the commissioner or director to the taxpayer, enterprise, or other person of the final determination or redetermination complained of, and shall also specify the errors therein complained of, but failure to attach a copy of such notice and incorporate it by reference in the notice of appeal does not invalidate the appeal.

Upon the filing of a notice of appeal, the tax commissioner or the director, as appropriate, shall certify to the board a transcript of the record of the proceedings before the commissioner or director, together with all evidence considered by the commissioner or director in connection therewith. Such appeals or applications may be heard by the board at its office in Columbus or in the county where the appellant resides, or it may cause its examiners to conduct such hearings and to report to it their findings for affirmation or rejection. The board may order the appeal to be heard upon the record and the evidence certified to it by the commissioner or director, but upon the application of any interested party the board shall order the hearing of additional evidence, and it may make such investigation concerning the appeal as it considers proper.

(2002 S 200, eff. 9-6-02; 2000 S 287, eff. 12-21-00; 2000 H 612, eff. 9-29-00; 1994 S 19, eff. 7-22-94; 1985 H 321, eff. 10-17-85; 1985 S 124; 1983 H 260; 1981 H 351; 1977 H 634; 1976 H 920; 1973 S 174; 1953 H 1; GC 5611)

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Chapter 5717. Appeals (Refs & Annos)

5717.03 Decisions of board of tax appeals; effects; procedures; remand for administrative determination; final orders

(A) A decision of the board of tax appeals on an appeal filed with it pursuant to section 5717.01, 5717.011, or 5717.02 of the Revised Code shall be entered of record on the journal together with the date when the order is filed with the secretary for journalization.

(B) In case of an appeal from a decision of a county board of revision, the board of tax appeals shall determine the taxable value of the property whose valuation or assessment by the county board of revision is complained of, or in the event the complaint and appeal is against a discriminatory valuation, shall determine a valuation which shall correct such discrimination, and shall determine the liability of the property for taxation, if that question is in issue, and the board of tax appeals's decision and the date when it was filed with the secretary for journalization shall be certified by the board by certified mail to all persons who were parties to the appeal before the board, to the person in whose name the property is listed, or sought to be listed, if such person is not a party to the appeal, to the county auditor of the county in which the property involved in the appeal is located, and to the tax commissioner.

In correcting a discriminatory valuation, the board of tax appeals shall increase or decrease the value of the property whose valuation or assessment by the county board of revision is complained of by a per cent or amount which will cause such property to be listed and valued for taxation by an equal and uniform rule.

(C) In the case of an appeal from a review, redetermination, or correction of a tax assessment, valuation, determination, finding, computation, or order of the tax commissioner, the order of the board of tax appeals and the date of the entry thereof upon its journal shall be certified by the board by certified mail to all persons who were parties to the appeal before the board, the person in whose name the property is listed or sought to be listed, if the decision determines the valuation or liability of property for taxation and if such person is not a party to the appeal, the taxpayer or other person to whom notice of the tax assessment, valuation, determination, finding, computation, or order, or correction or redetermination thereof, by the tax commissioner was by law required to be given, the director of budget and management, if the revenues affected by such decision would accrue primarily to the state treasury, and the county auditors of the counties to the undivided general tax funds of which the revenues affected by such decision would primarily accrue.

(D) In the case of an appeal from a municipal board of appeal created under section 718.11 of the Revised Code, the order of the board of tax appeals and the date of the entry thereof upon the board's journal shall be certified by the board by certified mail to all persons who were parties to the appeal before the board.

(E) In the case of all other appeals or applications filed with and determined by the board, the board's order and the date when the order was filed by the secretary for journalization shall be certified by the board by certified mail to the person who is a party to such appeal or application, to such persons as the law requires, and to such other persons as the board deems proper.

(F) The orders of the board may affirm, reverse, vacate, modify, or remand the tax assessments, valuations, determinations, findings, computations, or orders complained of in the appeals determined by the board, and the board's decision shall become final and conclusive for the current year unless reversed, vacated, or modified as provided in section 5717.04 of the Revised Code. When an order of the board becomes final the tax commissioner and all officers to whom such decision has been certified shall make the changes in their tax lists or other records which the decision requires.

(G) If the board finds that issues not raised on the appeal are important to a determination of a controversy, the board may remand the cause for an administrative determination and the issuance of a new tax assessment, valuation, determination, finding, computation, or order, unless the parties stipulate to the determination of such other issues without remand. An order remanding the cause is a final order. If the order relates to any issue other than a municipal income tax matter appealed under sections 718.11 and 5717.011 of the Revised Code, the order may be appealed to the court of appeals in Franklin county. If the order relates to a municipal income tax matter appealed under sections 718.11 and 5717.011 of the Revised Code, the order may be appealed to the court of appeals for the county in which the municipal corporation in which the dispute arose is primarily situated.

(2003 H 95, eff. 9-26-03; 1983 H 260, eff. 9-27-83; 1977 H 634; 1976 H 920; 1973 S 174; 131 v H 337; 128 v 410; 127 v 65; 1953 H 1; GC 5611-1)

HISTORICAL AND STATUTORY NOTES

Pre-1953 H 1 Amendments: 119 v 34; 118 v 344, § 15; 107 v 550

R.C. § 5717.05

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Chapter 5717. Appeals (Refs & Annos)

5717.05 Appeal from decision of county board of revision to court of common pleas; notice; transcript; judgment

As an alternative to the appeal provided for in section **5717.01** of the Revised Code, an appeal from the decision of a county board of revision may be taken directly to the court of common pleas of the county by the person in whose name the property is listed or sought to be listed for taxation. The appeal shall be taken by the filing of a notice of appeal with the court and with the board within thirty days after notice of the decision of the board is mailed as provided in section 5715.20 of the Revised Code. The county auditor and all parties to the proceeding before the board, other than the appellant filing the appeal in the court, shall be made appellees, and notice of the appeal shall be served upon them by certified mail unless waived. The prosecuting attorney shall represent the auditor in the appeal.

When the appeal has been perfected by the filing of notice of appeal as required by this section, and an appeal from the same decision of the county board of revision is filed under section **5717.01** of the Revised Code with the board of tax appeals, the forum in which the first notice of appeal is filed shall have exclusive jurisdiction over the appeal.

Within thirty days after notice of appeal to the court has been filed with the county board of revision, the board shall certify to the court a transcript of the record of the proceedings of said board pertaining to the original complaint and all evidence offered in connection with that complaint.

The court may hear the appeal on the record and the evidence thus submitted, or it may hear and consider additional evidence. It shall determine the taxable value of the property whose valuation or assessment for taxation by the county board of revision is complained of, or if the complaint and appeal is against a discriminatory valuation, shall determine a valuation that shall correct the discrimination, and the court shall determine the liability of the property for assessment for taxation, if that question is in issue, and shall certify its judgment to the auditor, who shall correct the tax list and duplicate as required by the judgment.

In correcting a discriminatory valuation, the court shall increase or decrease the value of the property whose valuation or assessment by the county board of revision is complained of by a per cent or amount that will cause the property to be listed and valued for taxation by an equal and uniform rule.

Any party to the appeal may appeal from the judgment of the court on the questions of law as in other cases.

(1988 H 934, eff. 3-17-89; 131 v H 337; 128 v 410; 127 v 65; 1953 H 1; GC 5611-4)

HISTORICAL AND STATUTORY NOTES