

IN THE SUPREME COURT OF OHIO

William E. MacDonald, III, et al,	)	Case No. 14-0574
	)	
Appellees,	)	On Appeal from the
	)	Franklin County Court of Appeals
	)	Tenth Appellate District
	)	
City of Shaker Heights Income Tax Board	)	Court of Appeals
of Review, et al,	)	Case No. 13 AP-71, 2014-Ohio-708
	)	
Appellants.	)	
	)	

---

**JOINT MERIT BRIEF OF THE APPELLANTS CITY OF SHAKER HEIGHTS,  
MATTHEW J. RUBINO, AND THE REGIONAL INCOME TAX AGENCY**

---

William M. Ondrey Gruber (0005950)  
 Director of Law, City of Shaker Heights  
 3400 Lee Road  
 Shaker Heights, OH 44120  
 Telephone: (216) 491-1445  
 Facsimile: (216) 491-1447  
 Email: William.Gruber@shakeronline.com

Christopher J. Swift (0025763)  
 Michael K. Gall (0078567)  
 Baker & Hostetler LLP  
 Cleveland, OH 44114  
 Telephone: (216) 861-7461  
 Facsimile: (216) 696-0740  
 Email: cswift@bakerlaw.com

*Attorney for Appellants  
 City of Shaker Heights and Matthew J. Rubino*

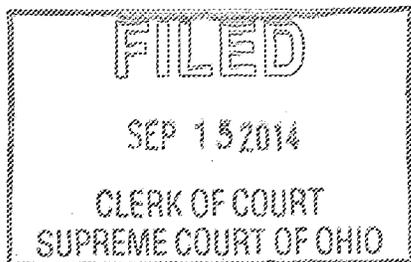
*Attorneys for Appellees  
 William E. MacDonald, III and  
 Susan MacDonald*

Amy L. Arrighi (0070061)  
 Regional Income Tax Agency  
 10107 Brecksville Road  
 Brecksville, OH 44141  
 Telephone: (440) 922-3201  
 Facsimile: (440) 922-3515  
 Email: aarrighi@ritaohio.com

Edward J. Bernert (0025808)  
 Baker & Hostetler LLP  
 Capital Square, Suite 2100  
 65 East State St.  
 Columbus, OH 43215  
 Telephone: (614) 462-2687  
 Facsimile: (614) 462-2616  
 Email: ebernert@bakerlaw.com

*Attorney for Appellant  
 Regional Income Tax Agency*

*Attorney for Appellee  
 William E. MacDonald, III and  
 Susan MacDonald*



Linda L. Bickerstaff (0052101)  
Assistant Director of Law  
City of Cleveland, Ohio  
205 W. St. Clair Avenue  
Cleveland, OH 44113  
Telephone: (216) 664-2070  
Facsimile: (216) 420-8299  
Email: lbickerstaff@cityofcleveland.oh.us

*Attorney for the Amicus Curiae  
City of Cleveland*

## TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	iii
Statement of Facts	1
A. Appellee, William E. MacDonald, III	1
B. The Taxpayers' 2006 Municipal Income Tax Return	2
C. Taxpayers' Appeal to the City's Municipal Board of Appeals (MBOA)	2
D. Taxpayers' Appeal to the Ohio Board of Tax Appeals ("BTA")	5
E. The Appellants' Appeal to the Court of Appeals	6
F. Appeal to the Ohio Supreme Court	7
Argument	8
<p>Proposition of Law - The BTA failed to follow the proper standard of review in the Appellee taxpayer's appeal from the Appellant City's MBOA, because in appeals from a MBOA to the BTA, the BTA acts in an appellate capacity such that (a) decisions of MBOAs are presumptively valid, and (b) a decision of a MBOA should not be overturned unless the BTA finds the decision is unlawful, arbitrary, capricious, unreasonable or unsupported by the preponderance of substantial, reliable and probative evidence.</p>	
A. Introduction	8
B. Ohio Law Requires Local MBOAs, Which Provide A Quasi-Judicial First Level Administrative Appeal for Taxpayers	11
C. Appeals From Local MBOAs Provide a Second Level of Appeal for Taxpayers or Administrators	14
D. The Standard of Review that the BTA Should Be Required to Apply in Appeals from MBOAs Can be Found in the Express Intentions of the General Assembly and in the Implications of Allowing the BTA to Ignore the Decisions and Procedures of MBOAs	17

## TABLE OF CONTENTS (Cont'd)

E. The BTA Failed to Consider the Decision of the City's MBOA Presumptively Valid, or to Make Any Finding that the Decision of the City's MBOA Was Clearly Unlawful, Arbitrary, Capricious, Unreasonable or Unsupported by the Preponderance of Substantial, Reliable and Probative Evidence	22
Conclusion	23
APPENDIX	PAGE
Joint Notice of Appeal to the Supreme Court of Ohio	1
Judgment and Order of the Court of Appeals, Tenth District Case No. 13AP-71, dated February 27, 2014	5
Decision of the Court of Appeals, Tenth District Case No. 13AP-71, dated February 27, 2014	7
Decision and Order of the Ohio Board of Tax Appeals, Case No. 2008-K-1883, Issued December 28, 2012	23
Decision of the Income Tax Board of Review, City of Shaker Heights, Ohio, Issued August 8, 2008	35
R.C. 718.11	47
R.C. 5717.011	48
R.C. 2506.03	50
R.C. 2506.04	51
Shaker Heights Codified Ordinances 111.0302	52
Shaker Heights Codified Ordinances 111.2311	53
Shaker Heights Codified Ordinances 111.2501	54
Shaker Heights Codified Ordinances 111.2502	54
Shaker Heights Codified Ordinances 111.2503	54

## TABLE OF AUTHORITIES

CASES	PAGES
<i>AT&amp;T Communications of Ohio v. Lynch</i> , 132 Ohio St.3d 91, 969 N.E.2d 166, 2012-Ohio-1975	10
<i>Bosher, et al v. City of Euclid Income Tax Board of Review, et al</i> , (8 <sup>th</sup> Dist., Cuyahoga County) 2002-Ohio-2671, 2002 Ohio App. LEXIS 2673	16
<i>Dolohanty v. City of Mayfield Hts.</i> , 8 <sup>th</sup> Dist. Cuyahoga No. 71682, 1997-LW-4185 (Oct. 9, 1997)	10
<i>HCMC, Inc. v. Ohio Dept. of Job &amp; Family Svcs.</i> , 179 Ohio App. 3d 707, 2008-Ohio-6223, 2008 WL 5064951 (10 <sup>th</sup> Dist)	14
<i>MacDonald v. City of Shaker Heights, et al.</i> , Case No. 2008-K-1883 (December 28, 2012) (“BTA Slip Op”)	5, 22
<i>Maxxim Med., Inc. v. Tracy</i> (1999), 87 Ohio St.3d 337, 339, 720 N.E.2d 911, 913	6
<i>M.J. Kelley Co. v. Cleveland</i> , 32 Ohio St.2d 150, 250 N.E.2d 562 (1972)	11
<i>Schrader v. Equitable Life Assur. Soc. Of the United States</i> , 20 Ohio St.3d 41, 485 N.E.2d 1031 (1985)	18
<i>State ex rel. McArthur v. DeSouza</i> , 65 Ohio St.3d 25, 599 N.E.2d 268 (1992)	11
<i>Tetlak v. Bratenahl</i> , 92 Ohio St.3d 46, 748 N.E.2d 51, 2001-Ohio-128	6, 10
<i>Union Title Co. v. State Bd. of Edn.</i> , 51 Ohio St.3d 189, 555 N.E.2d 931 (1990)	11
<i>William E. MacDonald, et al. v. City of Shaker Heights Income Tax Board of Review, et al.</i> , 10 <sup>th</sup> Dist. No. 13AP-71, 2014-Ohio 708	passim
STATUTES	PAGES
<u>Internal Revenue Code</u>	
I.R.C. 3121(v)(2)(C)	1

**TABLE OF AUTHORITIES (Cont'd)**

STATUTES	PAGES
<u>Ohio Revised Code</u>	
R.C. 718.01	19, 20
R.C. 718.11	4, 9, 11, 12, 13 16, 17, 19, 21
R.C. Chapter 2506	13, 14, 15, 16, 18
R.C. 2506.01	6, 9
R.C. 2506.02	15
R.C. 2506.03	14, 15
R.C. 2506.04	9, 17, 18
R.C. Chapter 5717	16
R.C. 5717.011	6, 8, 9, 14, 17, 18, 19
R.C. 5717.011(A)	19
R.C. 5717.011(B)	21
R.C. 5717.011(C)	7
R.C. 5717.011(D)	15, 16, 18, 19
 ORDINANCES	 PAGES
Shaker Heights Codified Ordinances 111.0302	1
Shaker Heights Codified Ordinances 111.2311	1
Shaker Heights Codified Ordinances 111.2501	2, 12
Shaker Heights Codified Ordinances 111.2502	12
Shaker Heights Codified Ordinances 111.2503	12

## STATEMENT OF FACTS

In this case, the Appellants, the City of Shaker Heights (“City”), Matthew J. Rubino<sup>1</sup>, and the Regional Income Tax Agency (“RITA”)<sup>2</sup>, jointly appealed to this Court the decision of the Court of Appeals for the Tenth District that found in favor of the Appellee taxpayers, William E. MacDonald, III, and Susan W. MacDonald (“Taxpayers”). The Court of Appeals upheld the decision of the Ohio Board of Tax Appeals (“BTA”), which had found in favor of Appellee Taxpayers in their appeal from the decision of the City of Shaker Heights Income Tax Board of Review (which is referred to herein, and in the various proceedings before the BTA and Court of Appeals, as the City’s Municipal Board of Appeal, or “MBOA”).

The factual background of the case, and its history, are as follows:

### A. Appellee, William E. MacDonald, III.

Appellee, William E. MacDonald, was employed by National City Corporation (“National City”) for over 38 years. (Appendix 38.)<sup>3</sup> Mr. MacDonald was a resident of the City during his employment with National City until December 27, 2006, four days before his retirement. (Appx. 24.) Mr. MacDonald qualified for National City’s Supplemental Employee Retirement Plan (“SERP”). (Appx. 38.) The SERP is a nonqualified deferred compensation plan, as described in Internal Revenue Code Section 3121(v)(2)(C). (Appx. 38 and 41.)

---

<sup>1</sup> Matthew J. Rubino is the City’s Director of Finance and Tax Administrator, pursuant to Section 111.0302 of the City’s Codified Ordinances (“C.O.”), which says that the term “Administrator” means “the Director of Finance who shall administer and enforce the provisions of the City of Shaker Heights Income Tax.” Robert Baker was the City’s Finance Director, and the original party appellee named by Taxpayers in the appeal to the BTA, until his retirement in 2013.

<sup>2</sup> RITA is the City’s agent, generally authorized to administer and enforce the provisions of the City’s income tax ordinances, pursuant to Section 111.2311 C.O.

<sup>3</sup> The MBOA’s Decision in this matter was issued on August 8, 2008 (which is attached as Appendix pp. 35-46). Appellants and Appellees stipulated a number of facts before the MBOA, which are set forth in the MBOA Decision. (Appx. 37-39)

Mr. MacDonald retired from National City on December 31, 2006. (Appx. 38.) At the time of Mr. MacDonald's retirement, his SERP benefit became fixed and determinable and the present value estimate of the SERP benefit was reported in Box 5 of Mr. MacDonald's Tax Year 2006 National City Form W-2 Wage and Tax Statement. (Appx. 24-25 and 38.)

**B. The Taxpayers' 2006 Municipal Income Tax Return.**

At the time that the Taxpayers filed their Tax Year 2006 municipal income tax return with the City, they calculated their tax liability to the City on the wages reported in Box 18 of Mr. MacDonald's 2006 National City Form W-2, and not on the wages reported in Box 5 of the Form W-2. On May 9, 2007, RITA, as the tax administrator for the City, issued a notice to the Taxpayers that the tax must be calculated on the wages reported in Box 5 of the Form W-2, and advised the Taxpayers of the corrected liability. (Appx. 38.)

By letter dated February 28, 2008, RITA issued a final determination letter to the Taxpayers, determining that the amounts attributable to the SERP, and reported in Box 5 of the 2006 National City Form W-2, were taxable to the City. (Appx. 35.)

**C. Taxpayers' Appeal to the City's Municipal Board of Appeals (MBOA).**

On March 27, 2008, the Taxpayers, through their legal counsel, filed a Notice of Appeal with the City's MBOA. (Appx. 36.) On May 9, 2008, the MBOA advised the Taxpayers that the hearing was tentatively scheduled on July 9, 2008, pending the availability of the Taxpayers and their counsel and witnesses. (Appx. 36.) On June 6, 2008, having received no objection from the Taxpayers to the scheduled hearing date, the MBOA issued Procedural Rules pursuant to the City's ordinances. (Section 111.2501 C.O.) (Appx. 36.) The MBOA also issued a Pre-hearing Order, which ordered the following:

- The hearing of this matter would 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.

- Any additional brief or supporting argument on behalf of Taxpayers could be filed with the Secretary and served on the City and RITA no later than June 18, 2008.
- Any reply brief or supporting argument on behalf of the City and RITA could be filed with the Secretary and served on the Taxpayers no later than June 30, 2008.
- Any reply by Taxpayers to the City's and RITA's brief or supporting argument could be filed with the Secretary and served on the City and RITA no later than July 7, 2008.
- The parties had to file with the Secretary and serve the other party a list of witnesses that party intended to call at the hearing and any documents or other material that the party intended to introduce into evidence, other than what the parties filed as part of their pre-hearing briefs, no later than July 2, 2008.
- The parties were permitted to file with the Secretary a proposed Stipulation of facts, and any such proposed Stipulation was to be filed with the MBOA no later than July 2, 2008.
- The Rules and Procedure for the Hearing attached to the Order had been adopted by the MBOA and were to be used to conduct this process, including the hearing. These Orders and the various dates could be extended or modified at the discretion of the MBOA or the MBOA Secretary.

(Appx. 36.)

On June 13, 2008, the MBOA received a letter from the Taxpayers stating that the Notice of Appeal and attachments would serve as their brief in response to the Prehearing Order. (Appx. 36.) On July 2, 2008, the MBOA received the witness and exhibit lists from both parties. On July 7, 2008, the MBOA received the Taxpayers' Reply to the City's and RITA's Reply Brief, which

was submitted on June 30, 2008. (Appx. 37.)

The hearing was held on July 9, 2008. After a pre-hearing conference, certain stipulations were agreed to by the parties. (Appx. 37.) The hearing was held in private in consideration of the appellant Taxpayers' privacy at that stage, according to City and State law. See Section 718.11 Ohio Revised Code ("R.C."). A Court Reporter recorded the proceedings and a complete transcript was prepared. (Appx. 35.) At the hearing the MBOA allowed opening and closing statements by counsel, and allowed testimony from witnesses of the parties' choosing, including direct and cross examination. Members of the MBOA themselves engaged in questioning of witnesses. Counsel for the appellant taxpayers presented the testimony of Patricia M. Emond, Senior Vice President at National City Bank, Richard Toman, a tax attorney for National City Bank, and William E. MacDonald, the appellant taxpayer. RITA presented Mark Taranto, Assistant Director of Tax at RITA, and James Neusser, former tax commissioner for the City of Akron and a special advisor to RITA. Decision of the Court of Appeals ("Decision") at ¶7 (Appx. 9 and 25.)

At the conclusion of the Hearing, the MBOA 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. (Appx. 37.) Counsel for the Taxpayers raised no objections to any aspect of the hearing procedure or their ability to present their case.

The MBOA issued its Decision on August 8, 2008, finding that (1) the SERP is not a pension as that term is used in the City's income tax ordinance; (2) the SERP is not a pension payment or proceeds from a pension as those terms are used in the City's income tax ordinance; (3) the SERP is not exempt from taxation under any other language of the City's income tax ordinance; and (4) taxation of the amounts attributable to the SERP did not violate the federal

“Moving Statute”. The Decision also included substantial findings of fact and conclusions of law. (Appx. 39-46.)

**D. Taxpayers’ Appeal to the Ohio Board of Tax Appeals (“BTA”).**

The Taxpayers filed their Notice of Appeal with the BTA on October 8, 2008. On or about November 11, 2008, the City’s MBOA certified the transcript of the record of proceedings, including the hearing transcript, orders and decision of the Board, filings of the parties, and all of the evidence offered in connection with the appeal, all of which were listed in the “Certification of Complete Transcript and Record,” and all of which were filed with the BTA. The BTA allowed discovery, and RITA responded to interrogatories propounded by the Taxpayers’ counsel in March 2009. Decision at ¶8 (Appx. 9.) The BTA held the hearing on September 7, 2010.

At the BTA hearing counsel for the appellant Taxpayers presented the testimony of Patricia M. Emond, then the former Senior Vice President at National City Bank. Ms. Emond acknowledged that she presented Exhibits C, D and E before the MBOA, and that these were the same as Exhibits 1, 2, 3 and 4 presented to the BTA. BTA Transcript at 29. Counsel for the appellant Taxpayers also presented before the BTA the testimony of William J. Dunn, a Certified Public Accountant, Professor Ray Stephens, a certified public accountant and professor at Ohio University, and Thomas M. Zaino, a certified public accountant and tax attorney.

On December 28, 2012, the BTA issued its Decision, finding that amounts attributable to William MacDonald’s SERP are pension benefits, exempt from tax under the City’s municipal income tax ordinance. In its Decision, the BTA started out saying that it was proceeding to consider the appeal based on the appellant Taxpayer’s notice of appeal, the transcript of the MBOA hearing, the record before the BTA and the briefs filed by the parties to the BTA. *MacDonald v. City of Shaker Heights, et al.*, Case No. 2008-K-1883 (December 28, 2012) (“BTA Slip Op”). (Appx 24.)

The BTA then declared the standard of review it was applying was that the taxpayer had the burden of proof. The BTA stated:

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, it has reviewed similar appeals taken from municipal boards of appeal to common pleas courts pursuant to R.C. 2506.01...

(Id., at 4). The BTA continued, quoting from *Tellak v. Bratenahl*, 2001-Ohio-129, 92 Ohio St. 3d 46, 51-52, 748 N.E.2d 51, 56:

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 \*52 valid, absent a demonstration that those findings are clearly unreasonable or unlawful.” *Id.*, 87 Ohio St.3d at 339–340,... This reasoning is applicable at the municipal level.

(Id., at 4-5). (Appx. 26-27.)

Yet, despite this citation above to the law, the only reference the BTA made to the MBOA’s decision was a quote from one of the twenty-three Conclusions of Law articulated by the MBOA. The BTA then proceeded to analyze and reference only the testimony presented by the appellant Taxpayers at the BTA hearing to conclude that the SERP was a pension benefit and not taxable under the City’s income tax ordinance.

#### **E. The Appellants’ Appeal to the Court of Appeals.**

The City and RITA jointly filed an appeal from the BTA decision on January 25, 2013, in the Tenth District Court of Appeals in Franklin County. The Court of Appeals issued its Decision in the appeal on February 27, 2014. As to the issue that has been accepted for appeal to the Supreme Court, the Court of Appeals stated:

Appellants [City and RITA] also contend that the BTA erred by conducting a de novo hearing without giving deference to the [municipal] board of review’s decision. In essence,

appellants contend that the BTA failed to apply the correct standard of review. Again, we disagree.

*William E. MacDonald, et al. v. City of Shaker Heights Income Tax Board of Review, et al.*, 10<sup>th</sup> Dist. No. 13AP-71, 2014-Ohio 708. Decision at ¶21 (material in brackets added). (Appx. 13.) The Court then explained, referring to R.C. 5717.011(C) <sup>4</sup>, that: “The statute does not set forth a standard of review.” (Id.) Moreover, the Court found: “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.” Decision at ¶24. (Appx. 14.)

In a Dissenting opinion, Judge J. Tyack concluded as to the standard of review to be applied by the BTA in an appeal from an MBOA: “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.” Decision at ¶31. (Appx. 16.)

**F. Appeal to the Ohio Supreme Court.**

On July 9, 2014, this Court accepted the second of the two Propositions of Law submitted by Appellants for appeal in Appellants' Motion in Support of Jurisdiction.

---

<sup>4</sup> R.C. 5717.011 was amended in 2013 by H.B. 138, which re-designated sub-section (C) to sub-section (D). The pertinent language in this appeal was not changed by that legislative amendment.

## ARGUMENT

### Proposition of Law

The BTA failed to follow the proper standard of review in the Appellee Taxpayers' appeal from the Appellant City's MBOA, because in appeals from a MBOA to the BTA, the BTA acts in an appellate capacity such that (a) decisions of MBOAs are presumptively valid, and (b) a decision of a MBOA should not be overturned unless the BTA finds the decision is unlawful, arbitrary, capricious, unreasonable or unsupported by the preponderance of substantial, reliable and probative evidence.

#### A. Introduction

This is a case of first impression for the Supreme Court in which it is being asked to decide the appropriate standard of review to be applied by the Ohio Board of Tax Appeals ("BTA") in appeals from local Municipal Boards of Income Tax Appeals ("MBOAs"). The Court of Appeals decided below that there is no standard of review that the BTA is required to apply in a taxpayer's appeal from a MBOA. This resulted from the Court's finding that the "BTA's authority is not limited by an *express* standard of review." Decision at ¶24 (Appx. 14.) (Emphasis added.)

The majority of the Court acknowledged that R.C. 5717.011 establishes joint jurisdiction of the BTA and courts of common pleas in appeals from local MBOAs, but the statute does not create any standard of review for the BTA in such appeals. Decision at ¶22 (Appx. 13.) Thus, the Court's majority concluded that, absent any *express* statutory standard, they would not set one, and further, that there is nothing in the law that suggests the BTA must give deference to a local MBOA. That lack of an express standard means that the BTA may apply whatever standard of review it chooses in MBOA appeals, including the one it chose in this appeal, which was to decide the appeal based solely on the evidence presented to the BTA in a hearing de novo, giving no

deference or even any consideration to the testimony and evidence presented to the MBOA or to the findings of fact and conclusions of law issued by the MBOA.

The Dissenting opinion of the Court of Appeals agreed that there “is no guidance in the statute (R.C. 5717.011) as to the standard of review.” The Dissent noted further: “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, which began to apply for the 2004 tax year, which required the creation of a MBOA in all municipal corporations that impose an income tax.” Decision at ¶34 (Appx. 17.) However, the Dissent argued that the lack of an *express* standard did not mean there is *no* standard, or that the BTA can apply whatever standard it decides to apply. The Dissent found:

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.'

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.

Id. Finally, the Dissent concluded:

...the BTA may not conduct a de novo review of a MBOA's findings nor may they substitute their own judgment... 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.

(Appx. 19-20.).

The majority of the Court acknowledged that there is a well-established legal standard of review for appeals from MBOAs to common pleas courts, which requires the courts to act in an

appellate capacity, and to consider decisions of MBOAs presumptively valid absent a demonstration that those decisions are clearly unreasonable or unlawful. Decision at ¶23 (Appx. 14). This well-established legal standard has been explained and applied in a number of cases. See *AT&T Communications of Ohio, Inc. v. Lynch*, 132 Ohio St.3d 91, 969 N.E. 2d 166, 2012-Ohio-1975 (the common pleas court performs an appellate function with respect to appeals from administrative bodies, including MBOAs, and the court may not substitute its judgment for that of the administrative body); *Tetlak v. Bratenahl*, 92 Ohio St.3d 46, 748 N.E.2d 51, 2001-Ohio-128 (the [MBOA's] findings are presumptively valid absent a determination that they were clearly unreasonable or unlawful); *Dolohanty v. City of Mayfield Heights*, 8<sup>th</sup> Dist. Cuyahoga No. 71682, 1997 LW 4185 (Oct. 9, 1997) (due deference must be given to the [MBOA's] findings of fact and the court may not substitute its judgment for that of the [MBOA]). But the Court found here that in appeals from MBOAs to the BTA the MBOA decisions are not presumptively valid since the statute allows appeals to the BTA from a MBOA without expressly requiring the same standard as applies to appeals from a MBOA to the common pleas court.

The majority of the Court of Appeals has established a new precedent that the Ohio General Assembly, in creating two avenues of appeal from local MBOAs, not only created two different *procedural* choices for appellants, it also created two different *legal standards* for appellants to choose from; one that requires deference to the local MBOA, and one that requires no such deference. This conclusion is illogical and unreasonable, and fails to take into consideration the express intention of the General Assembly in creating a first level of quasi-judicial administrative appeals at the local level by requiring municipalities with an income tax to create MBOAs.

Instead, it is logical and reasonable that in appeals to the BTA from MBOAs, the BTA must consider the decisions of MBOAs presumptively valid, and that a decision of a MBOA should

not be overturned unless the BTA finds, considering all of the evidence, that the decision is unlawful, arbitrary, capricious, unreasonable or unsupported by the preponderance of substantial, reliable and probative evidence.

**B. Ohio Law Requires Local MBOAs, Which Provide a Quasi-Judicial First Level Administrative Appeal for Taxpayers.**

Ohio law requires the establishment of local MBOAs as the first level of appeal from decisions of local income tax administrators. R.C. 718.11. This is analogous to the establishment of many local administrative appeals panels to hear appeals from the decisions of other local administrators, including boards of zoning appeals and boards of building appeals. Local quasi-judicial appeals panels are a means for local governments to give their citizens the ability to be heard in a convenient forum by a panel of local people who conduct fact-finding, and apply local law to their findings of fact, in order to make determinations that provide a check on local government administrators. Local appeals panels presumably have or accumulate expertise and experience in hearing local factual situations and interpreting local law. As the Dissent found in the Court of Appeals decision below: "It is the MBOA not the BTA that has the expertise in the municipalities own taxing ordinances." Decision at ¶41 (Appx. 19-20).

This Court has held that to be considered a quasi-judicial proceeding the proceeding must resemble a court proceeding in that an exercise of discretion is employed in adjudicating the rights and duties of parties with conflicting interests. *Union Title Co. v. State Bd. of Edn.*, 51 Ohio St.3d 189, 190-191, 555 N.E.2d 931 (1990). This Court has also determined that, to be considered a quasi-judicial proceeding, there must be a requirement for notice, hearing and an opportunity for the introduction of evidence. *State ex rel. McArthur v. DeSouza*, 65 Ohio St.3d 25, 27, 599 N.E.2d 268 (1992) citing *M.J. Kelley Co. v. Cleveland*, 32 Ohio St.2d 150, 290 N.E. 2d 562 (1972). In all respects, proceedings before MBOAs are quasi-judicial in nature as there is a notice requirement,

a hearing requirement and the opportunity to introduce evidence, just as in the proceeding before the City's MBOA in this case.

Although the General Assembly's interest in local income tax boards is relatively recent, such appeals boards have been in existence and considering and ruling on local income tax issues and appeals for a long time. Taxing municipalities maintained municipal income tax boards of review long before their establishment was required by the General Assembly. The City's MBOA was established in 1966, by Sections 111.2501, 111.2502 and 111.2503 of the City's Ordinances. (Appx. 54.)

In 2000, the General Assembly first required that municipalities with an income tax create MBOAs, and established the right of taxpayers to appeal to local MBOAs. (R.C. 718.11, which was enacted by H.B. 477). R.C. 718.11 requires that every municipality imposing a municipal income tax "shall maintain a board to hear appeals." That statute provides specific guidance on the appeal procedure at the local level, requiring, inter alia, that local MBOAs comply with the following directives:

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 decision on the appeal within ninety days after the board's final hearing on the appeal, and send notice of its decision by ordinary mail to the petitioner within fifteen days after issuing the decision.

Each board of appeal created pursuant to this section shall adopt rules governing its procedures and shall keep a record of its transactions.

R.C. 718.11 (Appx. 47.)

The act of the General Assembly in requiring the establishment of MBOAs as a first level of appeal by taxpayers from decisions of local tax administrators, and the statutory directives like those above, indicate an express intention of the legislature to provide a full and fair hearing process at the local level, and that these proceedings at the local level are quasi-judicial. Thus, in determining the intent of the legislature as to the standard of review to be applied by the BTA in appeals from the local MBOAs, this express intention must be given great weight, particularly in the absence of any express standard of review given to the BTA by the statute. The only logical conclusion as to how the BTA must handle appeals from the local MBOAs, if the legislature's express intent is considered, is that the BTA should apply the same standard as does the common pleas court in a R.C. Chapter 2506 appeal from an MBOA. There is no logical or reasonable basis to conclude that the legislature intended that the state should provide a second level of appeal for local taxpayers that repeats and ignores the full and fair quasi-judicial administrative process required at the local level.

In this case, the City provided a full and fair quasi-judicial administrative hearing process, in complying with R.C. 718.11 in Appellees' appeal. The court of appeals agreed that the City's MBOA afforded the parties "the opportunity to call witnesses, submit evidence, and argue their respective positions." Decision at ¶7 (Appx. 9.). Appellees raised no objection to the City's MBOA concerning the conduct of the hearing or any part of the process. Thus, the City's MBOA provided Appellee taxpayers a full, fair and thorough process in compliance with Ohio law.

**C. Appeals from Local MBOAs Provide a Second Level of Appeal for Taxpayers or Administrators.**

When the General Assembly first required municipalities with an income tax to establish a local quasi-judicial administrative appeals panel, appeals from the MBOAs, like appeals from most other local quasi-judicial administrative appeals panels, came exclusively under R.C. Chapter 2506, which meant appeals were taken exclusively to the county common pleas courts. The BTA first acquired concurrent jurisdiction with county common pleas courts over appeals from local MBOAs in 2003, for tax years beginning January 1, 2004 (R.C. 5717.011, which was enacted by H.B. 95). With the addition of the right to appeal to the BTA, the General Assembly added no new express standard of review in the statute for the BTA to apply, which creates a logical presumption that they intended, or established by implication, that the BTA should apply the same legal standard as the common pleas courts had been applying all along to appeals from local MBOAs.

R.C. 5717.011 now provides that appeals from an MBOA may be taken either to the BTA or to a court of common pleas. An appeal from the City's MBOA to common pleas court falls under R.C. Chapter 2506, and R.C. 2506.03 provides a detailed procedure for an appeal to that court. A common pleas court's review of an administrative record under R.C. Chapter 2506 is neither a trial de novo nor an appeal on questions of law only, but a hybrid review in which the court must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof. In its review, the common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, but the findings of the agency are not conclusive. *HCMC, Inc. v. Ohio Dept. of Job & Family Servs.*, 179 Ohio App. 3d 707, 2008-Ohio-6223, 2008 WL 5064951 (10th Dist.).

R.C. 5717.011 is not as clear in its description of the procedure to be followed in an appeal to the BTA from a MBOA. The only explicit directions in the statute are:

(1) that 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”;

(2) that 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”;

(3) that the BTA “may order the appeal to be heard upon the record and the evidence certified to it by the administrator”; and

(4) that “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.”

R.C. 5717.011(D). (Appx. 48-49.)

This authority granted to the BTA is slightly different from that given to courts of common pleas in Chapter 2506 appeals, which provides:

- (1) that “the court shall be confined to the transcript filed under section 2506.02 of the Revised Code unless it appears, on the face of that transcript or by affidavit filed by the appellant” that the local administrative board failed to follow a strict set of procedural due process requirements listed in the statute; and
- (2) that if the local board fails to follow each item on this list of requirements, then the court, like the BTA, also must “hear the appeal upon the transcript *and additional evidence* as may be introduced by any party.”

R.C. 2506.03. (Appx. 50.) (Emphasis added.)

The Court of Appeals majority considered the differences between the Chapter 2506 appeal process to the common pleas court, and the R.C. 5717.011(D) appeal to the BTA, to be so great that it showed the General Assembly's intent not to apply the standard of review required in Chapter 2506 appeals in the BTA appeals. But the Dissent, more logically, considered that the lack of any "guidance...as to the standard of review" in R.C. Chapter 5717, meant that the court must look for a standard of review, and the intent of the General Assembly, by considering similar appeals from the Ohio Tax Commissioner to the BTA, and from MBOAs to common pleas courts under Chapter 2506. Decision at ¶34 (Appx. 17.).

In appeals from decisions of the Ohio Tax Commissioner, the Dissenting opinion says, "the tax commissioner's findings 'are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful.'" Decision at ¶35 (Appx. 17.) But the argument that deference should be afforded to the MBOA decision by the BTA is even stronger than is the argument that the BTA owes deference to the decisions of the Ohio Tax Commissioner. Those latter appeals are appeals from a single administrator, not from an appeals panel, like an MBOA. Under R.C. 718.11, an MBOA is a quasi-judicial body that must follow specifically mandated procedures and its powers to decide appeals is circumscribed by the statute.

The Dissent was correct in its conclusion that the lack of any "guidance...as to the standard of review" in R.C. Chapter 5717, means that the court must look for a standard of review, and the intent of the General Assembly, by considering similar types of appeals. There are many reasons, which are explored below, why this Court should require that the BTA apply the same reasonable standard of review as do common pleas courts under R.C. Chapter 2506. See for example, *Bosher, et al v. City of Euclid Income Tax Board of Review, et al.* (8th Dist. Cuyahoga County), 2002 Ohio 2671; 2002 Ohio App. LEXIS 2673, at p. 3. Thus, the BTA should uphold a decision of an MBOA

unless it finds that the “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. (Appx. 51.)

**D. The Standard of Review that the BTA Should be Required to Apply in Appeals from MBOAs Can be Found in the Express Intentions of the General Assembly and in the Implications of Allowing the BTA to Ignore the Decisions and Procedures of MBOAs.**

It is clear that, while R.C. 5717.011 gives some direction on the *procedure* the BTA is to follow in appeals from a MBOA, the statute provides no legal *standard of review*. To find whether there is such a legal standard, either express or implied, it is necessary to look at the overall intent and structure of the process that leads up to the BTA. The intent of the General Assembly is initially expressed in the statutory requirement that municipalities provide a MBOA as a local, quasi-judicial, administrative procedure for income tax appeals as a first step prior to an appeal to court or the BTA. Yet, the Court of Appeals failed to consider or give any weight to the General Assembly’s MBOA requirement and the procedures and legal standards in R.C. 718.11.

It is logical that in giving appellants the choice of venue in an appeal from a MBOA, the General Assembly did not intend that, even if the procedure is different, that the legal standard of review should be totally different. The fact that the legislature has required municipalities to create an MBOA to hear income tax appeals suggests that the legislature intended that the MBOA procedure should be fair and full, not a process that would be superseded entirely by an appeal to the BTA. Nor is it logical that a taxpayer or tax administrator, unhappy with a MBOA decision, should have the choice to appeal either to common pleas court, where the court must give deference to the MBOA, or to the BTA, which has no such requirement and is likely to hold a hearing *de novo*. But that is what the majority of the Court of Appeals said was within the BTA’s authority

to do when it decided that there is no standard of review for the BTA, other than its decisions may not be “unreasonable or unlawful.” Decision at ¶1 (Appx. 8.).

While R.C. 5717.011 provides no express legal standard of review for the BTA to follow in reviewing decisions of MBOAs, this Court should not, as the Court of Appeals did, interpret that failure as an intent by the General Assembly to provide the BTA with the authority to determine any standard of review that it desires, when the standard of review applied to decisions of quasi-judicial administrative agencies and bodies, including MBOAs, is well-established in R.C. 2506.04 as well as in years of case law. As this Court has held, “[a] familiar principle of statutory construction \*\*\* is that a statute should not be construed to impair pre-existing law in the absence of an explicit legislative statement to the contrary.” *Schrader Equitable Life Assur. Soc. of the United States*, 20 Ohio St.3d 41, at 44, 485 N.E.2d 1031 (1985). As previously stated, decisions of MBOAs, as quasi-judicial bodies, are presumptively valid, with the standard of review for decisions of MBOAs clearly set out in R.C. 2506.04. As R.C. 5717.011 contains no language to the contrary, it should not be interpreted to divest MBOAs of the presumption of validity in their decisions or to eliminate the standard of review established for MBOAs under R.C. 2506.04.

In addition, the language of R.C. 5717.011(D) itself contains an ambiguity that, at least, indicates a built-in vagueness that requires that the Court should look outside the statute in order to determine how to find the “standard of review” that the General Assembly failed to include. As shown above, in R.C. 5717.011(D) it states, first, that “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.” This shows the importance of the MBOA process and decision in the appeal to the BTA, and it is the same process that occurs in a Chapter 2506 appeal from the MBOA to common pleas court.

Yet when R.C. 5717.011(D) arrives at the sentence containing the mandate that the BTA hold an evidentiary hearing if a party asks to introduce additional evidence, it states that the BTA “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.” (Appx. 48.) (Emphasis added.) But it is not the “administrator” that certifies the record of the MBOA to the BTA, rather it is the MBOA. The “administrator” is the party from whom the taxpayer appeals to the MBOA, and is, therefore, a party appellee before the MBOA. (In this case, Matthew J. Rubino and RITA are the Administrators for the City, and they were appellees before the MBOA and the BTA, and appellants before the Court of Appeals and this Court). R.C. 718.11 describes these different roles, including the following:

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.

(Appx. 47.) (Emphasis added.)

The term “administrator” in R.C. 5717.011 can only be intended to mean the “tax administrator,” which is defined in R.C. 5717.011(A) to have the “same meaning as in section 718.01 of the Revised Code.” R.C. 718.01 defines “Tax Administrator” as follows:

The individual charged with direct responsibility for administration of a tax on income levied by a municipal corporation and includes:

- (a) The central collection agency and the regional income tax agency and their successors in interest, and other entities organized to perform functions similar to those performed by the central collection agency and the regional income tax agency;
- (b) A municipal corporation acting as the agent of another municipal corporation; and
- (c) Persons retained by a municipal corporation to administer a tax levied by the municipal corporation, but only if the municipal corporation does not compensate the person in whole or in part on a contingency basis.

R.C. 718.01(A)(10). (Emphasis added.)

Thus, while the intent of the General Assembly is clear that the BTA may decide appeals based on the record below if no party asks to introduce additional evidence, it is less clear that the General Assembly was contemplating appeals from an MBOA to the BTA when it mentions the record of the “administrator” in describing, albeit briefly, the BTA’s hearing process in MBOA appeals. This ambiguity is a flaw that appears to contemplate only appeals directly from a Tax Administrator to the BTA, without the intervening process of a MBOA. An appeal directly from a local administrator to the BTA might justify a hearing de novo. But this ambiguity, on top of the statutory mandates for the MBOA hearing process as the first level of appeal for a taxpayer and the certification of a complete record before the MBOA to the BTA, as well as language allowing the BTA decision to be based solely on the record of the MBOA if no party asks to introduce more evidence, all indicate that the General Assembly could hardly have intended that in appeals from a MBOA to the BTA there should be a hearing de novo and no deference to the MBOA decision.

Furthermore, in the interpretation of the statutory language allowing appeals from a MBOA to the BTA, and what, if any, standard of review should be applied in such appeals, this Court should also consider the practical impact of the Court of Appeals decision and the standard of review applied by the BTA in this case. The real impact is that having two different legal standards in appeals from MBOAs results in the statutory language allowing appeals to common pleas court being rendered meaningless. Any party that loses in an appeal to the local MBOA would have no reason, considering the law, to appeal to common pleas court. No legal counsel could recommend going to a forum that is bound to give deference to the MBOA decision the client just lost, rather than a forum where it is likely the client will have a hearing de novo and a second chance at arguing the client’s case without deference to the MBOA. In practical terms it means all appeals from

MBOAs will go to the BTA, and the choice of venues contained in R.C. 5717.011(B) will be without effect. This cannot be the intent of the General Assembly, nor is it a logical interpretation of the law.

The practical impact of allowing the BTA to hold a hearing de novo and give no deference to the MBOA decision and process would also be to effectively nullify the MBOA appeals process, and leave the statutory language in R.C. 718.11 with little import. There is no reason to have a local appeals process if the State's appeal board may essentially ignore the local appeals board's process and decision, and substitute its own process and decision for that of the local board. While there would still be such a process, even if the BTA could ignore it, because Ohio law would still mandate it, local governments would have no reason to provide anything more than the bare minimum procedure.

For the BTA to fail to give great deference to the decision of the MBOA gives a clear message to every local tax appeals board that it is not worth their time and resources to provide a substantial hearing opportunity to appellant taxpayers. To the contrary, no municipality could justify to its citizens the time and expense of providing such a hearing process. It would make more sense for the local board to go through the motions, provide a superficial hearing with no pre-hearing process, no court reporter, no witnesses or evidence for the municipality, no cross examination of witnesses, and no briefs, and let the State's BTA bear the burden of a more thorough hearing process. The burden on the State's resources and ability to efficiently manage appeals from local boards as well as other duties of the BTA would certainly be significant and likely negative. It would also clearly be contrary to the intent of the General Assembly in establishing a two-tier procedure for local income tax appeals.

**E. The BTA Failed to Consider the Decision of the City's MBOA Presumptively Valid, or to Make Any Finding that the Decision of the City's MBOA was Clearly Unlawful, Arbitrary, Capricious, Unreasonable or Unsupported by the Preponderance of Substantial, Reliable and Probative Evidence.**

As the Dissent in the Court of Appeals found, the BTA gave no deference to the decision of the City's MBOA. The BTA did not even address the reasonableness of the MBOA's findings of fact and conclusions of law "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." Decision at ¶45 (Appx. 21.)

The majority of the Court approved of the BTA's failure to address the MBOA's findings of fact and conclusions of law, finding that the BTA could essentially create its own standard of review. This the BTA did, by concluding that "we need look no further than the terms of National City's (the taxpayer's employer's) SERP to discern its purpose; i.e., 'to provide for the payment of certain pension...benefits.....'" BTA Decision, at 11 (Appx. 33.) The BTA concluded that since the taxpayer's employer defined the taxpayer's deferred compensation plan (the SERP) as a "pension," and the City's ordinance does not define "pension," the BTA could find that the employer's definition should apply. The majority of the court of appeals considered that interpretation of the City's tax ordinance to be a "finding of fact" by the BTA, rather than a conclusion of law, and allowed the finding to stand as not being clearly "unreasonable or unlawful." Thus, the majority has found that the BTA has absolute discretion in appeals from MBOAs to interpret local tax ordinances de novo, as long as the interpretation is not clearly unreasonable or unlawful.

The Court of Appeals majority erred in upholding the BTA's usurpation of the MBOA process and quasi-judicial role in taxpayer appeals. The Court erroneously set a precedent allowing the BTA to conduct hearings de novo in appeals from MBOAs, and failing to consider the decision

of the MBOA presumptively valid absent a demonstration that the decision was clearly unreasonable or unlawful.

**Conclusion**

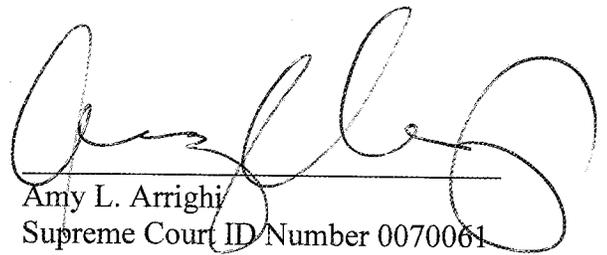
Wherefore, the Appellants ask this Court to find that the Court of Appeals erred in failing to find that the Ohio Board of Tax Appeals (BTA) must consider the decisions of MBOAs presumptively valid and that a decision of a MBOA should not be overturned unless the BTA finds, considering all of the evidence, that the decision is unlawful, arbitrary, capricious, unreasonable or unsupported by the preponderance of substantial, reliable and probative evidence.

Respectfully submitted,



William M. Ondrey Gruber  
Supreme Court ID Number 0005950  
Director of Law, City of Shaker Heights  
3400 Lee Road  
Shaker Heights, OH 44120  
Telephone: 216.491.1445  
Facsimile: 216.491.1447  
Email: william.gruber@shakeronline.com

Attorney for Appellants  
City of Shaker Heights and Matthew Rubino



Amy L. Arrighi  
Supreme Court ID Number 0070061  
Regional Income Tax Agency  
10107 Brecksville Road  
Brecksville, OH 44141  
Telephone: 440.526.0900  
Facsimile: 440.922.3515  
aarighi@ritaohio.com

Attorney for Appellant  
Regional Income Tax Agency

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Joint Merit Brief submitted by the Appellants City of Shaker Heights, Matthew J. Rubino and the Regional Income Tax Agency, was filed with the Ohio Supreme Court and served on the following parties/amicus curiae and/or counsel of record, this 15th day of September 2014.

Christopher J. Swift  
3200 National City Center  
1900 East Ninth Street  
Cleveland, OH 441143485

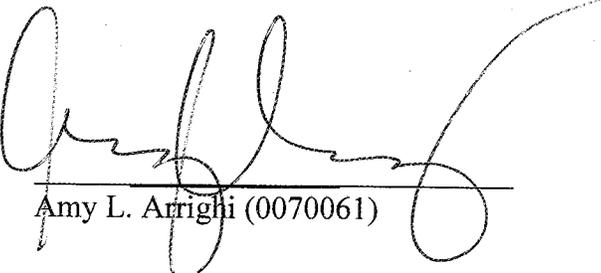
Attorney for the Appellees,  
William E. MacDonald, III and  
Susan W. MacDonald

Edward J. Bernert  
Baker & Hostetler LLP  
Capital Square, Suite 2100  
65 East State St.  
Columbus, OH 43215

Attorney for the Appellees,  
William E. MacDonald, III and  
Susan W. MacDonald

Linda L. Bickerstaff  
Assistant Director of Law  
City of Cleveland, Ohio  
205 W. St. Clair Avenue  
Cleveland, OH 44113

For the Amicus Curiae,  
City of Cleveland



Amy L. Arrighi (0070061)

---

# APPENDIX

---

IN THE SUPREME COURT OF OHIO

14-0574

William E. MacDonald, III, et al.,

Case No. \_\_\_\_\_

Appellants-Appellees,

On Appeal from the Franklin  
County Court of Appeals,  
Tenth Appellate District

v.

City of Shaker Heights Income Tax  
Board of Review, et al.,

Court of Appeals  
Case No. 13AP-71

Appellees-Appellants.

---

JOINT NOTICE OF APPEAL OF APPELLANTS, CITY OF SHAKER HEIGHTS,  
MATTHEW RUBINO, TAX ADMINISTRATOR AND  
REGIONAL INCOME TAX AGENCY

---

William M. Ondrey Gruber (0005950)  
Counsel of Record  
City of Shaker Heights, Ohio  
3400 Lee Road  
Shaker Heights, OH 44120  
(216) 491-1445  
Fax: (216) 491-1447  
[william.gruber@shakeronline.com](mailto:william.gruber@shakeronline.com)

Christopher J. Swift (0025763)  
Baker & Hostetler, LLP  
1900 East Ninth Street  
Cleveland, OH 44114  
(216) 861-7461  
Fax: (216) 696-0740  
[cswift@bakerlaw.com](mailto:cswift@bakerlaw.com)

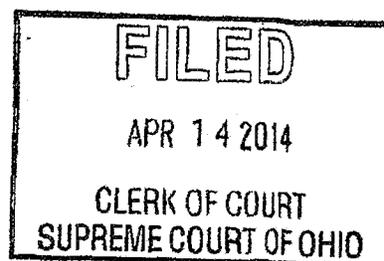
*Attorney for Appellants,  
City of Shaker Heights and  
Matthew Rubino*

Edward J. Bernert (0025808)  
Baker & Hostetler, LLP  
Capital Square, Suite 2100  
65 East State Street  
Columbus, OH 43215  
(614) 462-2687  
Fax: (614) 462-2616  
[ebernert@bakerlaw.com](mailto:ebernert@bakerlaw.com)

Amy L. Arrighi (0070061)  
Counsel of Record  
Regional Income Tax Agency  
10107 Brecksville Road  
Brecksville, OH 44141  
(440) 922-3201  
Fax: (440) 922-3515  
[aarrighi@ritaohio.com](mailto:aarrighi@ritaohio.com)

*Attorneys for Appellees,  
William E. MacDonald, III and  
Susan MacDonald*

*Attorney for Appellant,  
Regional Income Tax Agency*



Barbara A. Langhenry (0038838)  
Director of Law  
Linda L. Bickerstaff (0052101)  
Assistant Director of Law  
Counsel of Record  
City of Cleveland, Ohio  
205 W. St. Clair Avenue  
Cleveland, OH 44113  
(216) 664-2070  
Fax: (216) 420-8299  
[lbickerstaff@cityofcleveland.oh.us](mailto:lbickerstaff@cityofcleveland.oh.us)

*Attorney for Amicus Curiae,  
City of Cleveland*

Shana F. Marbury (0072840)  
Counsel of Record  
Greater Cleveland Partnership  
1240 Huron Road  
Suite 300  
Cleveland, OH 44115  
(216) 592-2249  
Fax: (216) 687-6788  
[smarbury@gspartnership.com](mailto:smarbury@gspartnership.com)

*Attorney for Amicus Curiae,  
Greater Cleveland Partnership*

Linda Woggon (0059082)  
Counsel of Record  
Ohio Chamber of Commerce  
230 East Town Street  
Columbus, OH 43215  
(614) 228-4201  
Fax: (614) 228-6403  
[lwoggon@ohiochamber.com](mailto:lwoggon@ohiochamber.com)

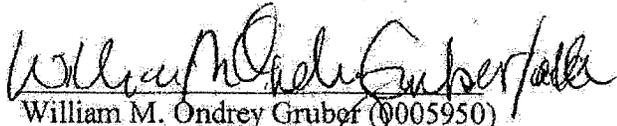
*Attorney for Amicus Curiae,  
Ohio Chamber of Commerce*

**Joint Notice of Appeal of Appellants, City of Shaker Heights, Robert Baker and  
Regional Income Tax Agency**

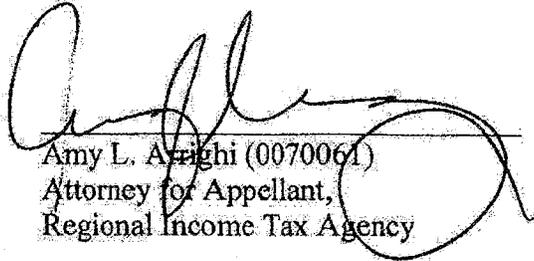
Appellants, City of Shaker Heights, Matthew Rubino<sup>1</sup> and Regional Income Tax Agency,  
hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin  
County Court of Appeals, Tenth District, entered in Court of Appeals Case No. 13AP-71 on  
February 27, 2014.

This case is one of public or great general concern.

Respectfully submitted,



William M. Ondrey Gruber (0005950)  
Attorney for Appellants,  
City of Shaker Heights and Matthew Rubino



Amy L. Arrighi (0070061)  
Attorney for Appellant,  
Regional Income Tax Agency

---

<sup>1</sup> The original Appellant, Robert Baker, has retired from the City of Shaker Heights. Matthew Rubino has assumed the role of Finance Director and Tax Administrator with the City of Shaker Heights.

CERTIFICATE OF SERVICE

We certify that a copy of this Joint Notice of Appeal was served this 14<sup>th</sup> day of April 2014 by electronic mail and first class U.S. Mail, postage prepaid, upon the following:

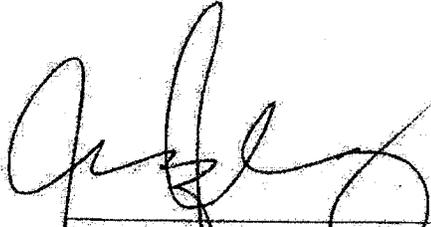
Christopher J. Swift  
Baker & Hostetler, LLP  
1900 East Ninth Street  
Cleveland, OH 44114  
[cswift@bakerlaw.com](mailto:cswift@bakerlaw.com)  
*Attorney for Appellees,  
William E. MacDonald, III and  
Susan MacDonald*

Linda Woggon  
Ohio Chamber of Commerce  
230 East Town Street  
Columbus, OH 43215  
[lwoggon@ohiochamber.com](mailto:lwoggon@ohiochamber.com)  
*Attorney for Amicus Curiae,  
Ohio Chamber of Commerce*

Edward J. Bemert  
Baker & Hostetler, LLP  
Capital Square, Suite 2100  
65 East State Street  
Columbus, OH 43215  
[ebemert@bakerlaw.com](mailto:ebemert@bakerlaw.com)  
*Attorney for Appellees,  
William E. MacDonald, III and  
Susan MacDonald*

Shana F. Marbury  
Greater Cleveland Partnership  
1240 Huron Road  
Suite 300  
Cleveland, OH 44114  
[smarbury@gspartnership.com](mailto:smarbury@gspartnership.com)  
*Attorney for Amicus Curiae,  
Greater Cleveland Partnership*

Barbara A. Langhenry  
Director of Law  
Linda L. Bickerstaff  
Assistant Director of Law  
Counsel of Record  
City of Cleveland, Ohio  
205 W. St. Clair Avenue  
[lbickerstaff@cityofcleveland.oh.us](mailto:lbickerstaff@cityofcleveland.oh.us)  
*Attorney for Amicus Curiae,  
City of Cleveland*

  
Amy L. Arighi (0070061)  
On Behalf of Joint Appellants

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

William E. MacDonald, III, et al.,

Appellants-Appellees,

v.

City of Shaker Heights Income Tax  
Board of Review et al.,

Appellees-Appellants.

No. 13AP-71

(BTA No. 2008-K-1883)

(REGULAR CALENDAR)

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

Franklin County Ohio Court of Appeals Clerk of Courts- 2014 Feb 27 4:11 PM-13AP000071

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

*William A. Klatt*  


/s/ Judge William A. Klatt

Electronically signed on 2014-Feb-27 page 2 of 2

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

William E. MacDonald, III, et al.,  
Appellants-Appellees,

v.

City of Shaker Heights Income Tax  
Board of Review et al.,  
Appellees-Appellants.

No. 13AP-71  
(BTA No. 2008-K-1883)

(REGULAR CALENDAR)

---

DECISION

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 entitled "Medicare, wages and tips," and totaled \$14,566,611. The MacDonalds calculated their 2006 city income tax liability based upon the amount reported in box 18 of MacDonalds' form W-2, entitled "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

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

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).

{¶ 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 did not reflect payments received by MacDonald in 2006, appellants contend that the SERP 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 is a pension and, therefore, that amount must be deducted from the MacDonalds' income in 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

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 MacDonald's 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.

**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.

{¶ 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.<sup>1</sup> 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 which totaled \$14,566,611. Mr. and Mrs. MacDonald filed their 2006 city income tax return with Shaker Heights, calculating their tax liability on the amount reported in Box 18 of

<sup>1</sup> 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.

MacDonald's W-2 form which totaled \$5,459,597.84. It is not disputed that the SERP is a nonqualified deferred compensation 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. MacDonald appealed to the Shaker Heights Income Tax Board of Review ("Shaker Heights Board") 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. The MacDonalds appealed to the BTA, which reversed and found that the SERP payments constitute 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.

{¶ 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.

{¶ 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.

{¶ 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 analogous 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* emphasizes 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

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 attributable to his SERP was not a pension but rather an amount 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." 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, was actually recognized as due and owing, though as yet unpaid and, thus, is income subject to the City's income tax.

[MacDonald] chose to use that "income" to purchase a joint 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.

{¶ 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.

---

**OHIO BOARD OF TAX APPEALS**

William E. MacDonald, III, and Susan W. )  
MacDonald, )  
 )  
Appellants, )  
 )  
vs. )  
 )  
City of Shaker Heights, Robert Baker, Tax )  
Administrator, and Regional Income Tax )  
Agency, )  
 )  
Appellees. )

CASE NO. 2008-K-1883  
(MUNICIPAL INCOME TAX)  
DECISION AND ORDER

**APPEARANCES:**

For the Appellants - Baker & Hostetler, LLP  
Christopher J. Swift  
3200 National City Center  
1900 East Ninth Street  
Cleveland, Ohio 44114-3485

For the Appellees City of Shaker Heights and Tax Administrator - Margaret Anne Cannon  
Director of Law  
William M. Ondrey Gruber  
Chief Counsel  
3400 Lee Road  
Shaker Heights, Ohio 44120

For the Appellee Regional Income Tax Authority - Amy L. Arrighi  
Chief Legal Counsel  
10107 Brecksville Road  
Brecksville, Ohio 44141

For the Amicus Curiae City of Cleveland Urging Affirmance - Robert J. Triozzi  
Director of Law  
Linda L. Bickerstaff  
Assistant Director of Law  
205 W. Saint Clair Avenue  
Cleveland, Ohio 44113

For the Amicus Curiae Greater Cleveland Partnership Urging Reversal - Shana F. Marbury  
The Higbee Building  
100 Public Square, Suite 210  
Cleveland, Ohio 44113

Entered **DEC 28 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”,<sup>1</sup> which affirmed an adjustment effected by the city’s tax administrator, in this instance the Regional Income Tax Agency (“RITA”),<sup>2</sup> 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.<sup>3</sup>

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

<sup>1</sup> 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”).

<sup>2</sup> 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.

<sup>3</sup> 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,<sup>4</sup> 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.

---

<sup>4</sup> 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.<sup>5</sup>

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,<sup>6</sup> it has reviewed similar appeals taken from municipal boards of appeal to common pleas courts pursuant to R.C. 2506.01, commenting in *Tellak 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, \*\*\*."

<sup>5</sup> 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.

<sup>6</sup> 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),<sup>7</sup> 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.”<sup>8</sup>

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

<sup>7</sup> 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.

<sup>8</sup> 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,<sup>9</sup> dictionaries,<sup>10</sup> 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

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

<sup>10</sup> 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 (9<sup>th</sup> 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,<sup>11</sup> 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

---

<sup>11</sup> 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

Footnote contd.

\_\_\_\_\_ 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.

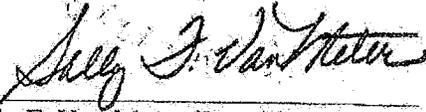
App.2d 178, 181-182, affirmed (1971), 25 Ohio St.2d 101.”). Although we reach a different outcome based upon the language employed, consistent with the approach adopted by the court in *Wardrop*,<sup>12</sup> we need look no further than the terms of National City’s SERP to discern its purpose, i.e., “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.

---

<sup>12</sup> 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.)

COPY



SHAKER HEIGHTS

INCOME TAX BOARD OF REVIEW  
CITY OF SHAKER HEIGHTS, OHIO

William E. MacDonald, III,  
Susan W. MacDonald,

Appellants,

v.

Regional Income Tax Agency,  
On behalf of Robert Baker,  
Tax Administrator,

Appellee.

DECISION

ISSUED: AUGUST 8, 2008

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.

CITY OF SHAKER HEIGHTS | INCOME TAX BOARD OF REVIEW

3400 LEE ROAD | SHAKER HEIGHTS, OH 44120 | TEL 216.481.1440 | FAX 216.491.1447 | WEB shakeronline.com | Ohio Relay 711

## 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-filled 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-filled Exhibits of the parties are admitted into evidence without objection:
  - A. Appellants' Exhibits A - 1, 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)<sup>1</sup> 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<sup>2</sup>.

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.

---

<sup>1</sup> 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.

<sup>2</sup> 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.

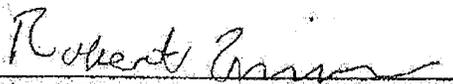
B. is not a pension payment, and is not proceeds from a pension, as those terms are used in Section 111.901 C.O.

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.)

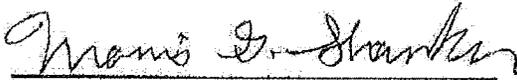
Wherefore, this Board finds that by a preponderance of the evidence and law, the amount included in Box 5 of Appellant's 2006 Form W-2 related to his SERP is taxable by the City as income, and is not exempt from taxation under Section 111.901 C.O. or any other law, and that Appellants' appeal to this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

Approved this 8<sup>th</sup> day of August, 2008.

  
Robert Zimmerman, Chairperson

  
Margaret Anne Cannon, Member

---

  
Morris Shanker, Member

## **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.

**Cite as R.C. § 718.11**

**History.** Effective Date: 09-26-2003

## **5717.011 Filing of notice of appeal.**

(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, and subject to section 5703.021 of the Revised Code with respect to appeals assigned to the small claims docket, 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. An appeal filed with a court of common pleas is governed by the Rules of Civil Procedure and other rules of practice and procedure applicable to civil actions. For an appeal filed with the board of tax appeals, the notice of appeal may be filed in person or by certified mail, express mail, facsimile transmission, electronic transmission, or by 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 with the board. If notice of appeal is filed by facsimile transmission or electronic transmission, the date and time the notice is received by the board shall be the date and time reflected on a timestamp provided by the board's electronic system, and the appeal shall be considered filed with the board on the date reflected on that timestamp. Any timestamp provided by another computer system or electronic submission device shall not affect the time and date the notice is received by the board. 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, 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) A notice of appeal for an appeal filed with the board of tax appeals shall contain a short and plain statement of the claimed errors in the decision of the municipal board of appeal showing that the appellant is entitled to relief and a demand for the relief to which the appellant claims to be entitled. An appellant may amend the notice of appeal once as a matter of course within sixty days after the certification of the transcript. Otherwise, an appellant may amend the notice of appeal only after receiving leave of the board or the written consent of each adverse party. Leave of the board shall be freely given when justice so requires.

(D) 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. An appeal may proceed pursuant to section 5703.021 of the Revised Code on the small claims docket if the appeals qualifies under that section.

(E) 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.

**Cite as R.C. § 5717.011**

**History.** Amended by 130th General Assembly File No. 37, HB 138, §1, eff. 10/11/2013.

Effective Date: 09-26-2003

### **2506.03 Hearing.**

(A) The hearing of an appeal taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code shall proceed as in the trial of a civil action, but the court shall be confined to the transcript filed under section 2506.02 of the Revised Code unless it appears, on the face of that transcript or by affidavit filed by the appellant, that one of the following applies:

- (1) The transcript does not contain a report of all evidence admitted or proffered by the appellant.
- (2) The appellant was not permitted to appear and be heard in person, or by the appellant's attorney, in opposition to the final order, adjudication, or decision, and to do any of the following:
  - (a) Present the appellant's position, arguments, and contentions;
  - (b) Offer and examine witnesses and present evidence in support;
  - (c) Cross-examine witnesses purporting to refute the appellant's position, arguments, and contentions;
  - (d) Offer evidence to refute evidence and testimony offered in opposition to the appellant's position, arguments, and contentions;
  - (e) Proffer any such evidence into the record, if the admission of it is denied by the officer or body appealed from.
- (3) The testimony adduced was not given under oath.
- (4) The appellant was unable to present evidence by reason of a lack of the power of subpoena by the officer or body appealed from, or the refusal, after request, of that officer or body to afford the appellant opportunity to use the power of subpoena when possessed by the officer or body.
- (5) The officer or body failed to file with the transcript conclusions of fact supporting the final order, adjudication, or decision.

(B) If any circumstance described in divisions (A)(1) to (5) of this section applies, the court shall hear the appeal upon the transcript and additional evidence as may be introduced by any party. At the hearing, any party may call, as if on cross-examination, any witness who previously gave testimony in opposition to that party.

**Cite as R.C. § 2506.03**

**History.** Effective Date: 03-17-1987; 08-17-2006

**2506.04 Order, adjudication, or decision of court.**

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.

**Cite as R.C. § 2506.04**

**History.** Effective Date: 03-17-1987; 08-17-2006

**DEFINITIONS****111.0301 DEFINITIONS GENERALLY.**

For the purposes of this chapter, the terms, phrases, words and their derivatives shall have the meanings given in the next succeeding sections of this chapter. The singular shall include the plural, and the masculine shall include the feminine and the neuter.  
(Ord. 66-135. Enacted 12-27-66.)

**111.0302 ADMINISTRATOR.**

"Administrator" means the Director of Finance who shall administer and enforce the provisions of the City of Shaker Heights Income Tax.  
(Ord. 66-135. Enacted 12-27-66.)

**111.0303 ASSOCIATION.**

"Association" means any partnership, limited partnership, or any other form of unincorporated enterprise, owned by two (2) or more persons.  
(Ord. 66-135. Enacted 12-27-66.)

**111.0304 BOARD OF REVIEW.**

"Board of Review" means the Board created by and constituted as provided in Section 111.2501.  
(Ord. 66-135. Enacted 12-27-66.)

**111.0305 BUSINESS.**

"Business" means any enterprise, activity, profession, or undertaking of any nature conducted for profit or ordinarily conducted for profit, whether by an individual, partnership, association, corporation, or any other entity, excluding however all nonprofit corporations which are exempt from the payment of Federal Income Tax.  
(Ord. 66-135. Enacted 12-27-66.)

**111.0306 CORPORATION.**

"Corporation" means a corporation or joint stock association organized under the laws of the United States, the State of Ohio, or any other state, territory, or foreign country or dependency.  
(Ord. 66-135. Enacted 12-27-66.)

**111.0307 EMPLOYEE.**

"Employee" means one who works for wages, salary, commission or other type of compensation in the service of an employer.  
(Ord. 66-135. Enacted 12-27-66.)

**111.0308 EMPLOYER.**

"Employer" means an individual, partnership, association, corporation, governmental body, unit or agency, or any other entity, whether or not organized for profit, who or that employs one or more persons on a salary, wage, commission or other basis of compensation.  
(Ord. 66-135. Enacted 12-27-66.)

**111.0309 FISCAL YEAR.**

"Fiscal year" means an accounting period of twelve (12) months or less ending on any day other than December 31.  
(Ord. 66-135. Enacted 12-27-66.)

**111.2308 REFUSAL TO PRODUCE RECORDS.**

The refusal to produce books, papers, records and Federal income tax returns, or the refusal to submit to such examination by any employer or persons subject or presumed to be subject to the tax or by any officer, agent or employee of a person subject to the tax or required to withhold tax or the failure of any person to comply with the provisions of this chapter or with an order or subpoena of the Administrator authorized hereby shall be deemed a violation of this chapter, punishable as provided in Section 111.1505.

(Ord. 66-135. Enacted 12-27-66.)

**111.2309 CONFIDENTIAL NATURE OF INFORMATION.**

(a) Any information gained as the result of any returns, investigations, hearings or verifications required or authorized by this chapter shall be confidential except for official purposes, or in accordance with proper judicial order, or where the taxpayer has signed a written waiver allowing the Tax Administrator to release non-financial information dealing strictly with questions of residency. Any person divulging such information in violation of this section, shall, upon conviction thereof, be deemed guilty of a first degree misdemeanor and shall be punished as provided in Section 101.99 of the Administrative Code. Each disclosure shall constitute a separate offense.

(b) In addition to the above penalty, any employee of the City who violates the provisions of this section relative to the disclosure of confidential information shall be guilty of an offense punishable by immediate dismissal.

(Ord. 00-50. Enacted 7-24-00.)

**111.2310 TAXPAYER REQUIRED TO RETAIN RECORDS.**

Every taxpayer shall retain all records necessary to compute his tax liability for a period of five (5) years from the date his return is filed, or the withholding taxes are paid.

(Ord. 66-135. Enacted 12-27-66.)

**111.2311 AUTHORITY TO CONTRACT FOR CENTRAL COLLECTION FACILITIES.**

The City of Shaker Heights having already entered into an agreement for the establishment of a Regional Council of Governments pursuant to Ordinance No. 71-45, which Council has organized a municipal tax collection agency known as "Regional Income Tax Agency", the Board of Trustees of such Regional Income Tax Agency is authorized to administer and enforce the provisions of this chapter as the agent of the City of Shaker Heights, and the duties and authority of the Administrator hereunder may be performed by the Board of Trustees of such agency through the Administrator of such agency. Provided, however, the Administrator of the agency shall have no authority to abate penalties or interest provided for in Sections 111.1501 and 111.1502.

(Ord. 66-135. Enacted 12-27-66; Ord. 71-125. Amended 11-22-71.)

**BOARD OF REVIEW****111.2501 BOARD OF REVIEW ESTABLISHED.**

A Board of Review, consisting of the Mayor or a person designated by him, the Director of Law or an Assistant Director of Law designated by him, and a member of Council to be elected by that body, is hereby created. The Board shall select, each year for a one-year term, one of its members to serve as Chairman and one to serve as Secretary. A majority of the members of the Board shall constitute a quorum. The Board shall adopt its own procedural rules and shall keep a record of its transactions. Any hearing by the Board may be conducted privately and the provisions of Section 111.2309 with reference to the confidential character of information required to be disclosed by this chapter shall apply to such matters as may be heard before the Board on appeal.

(Ord. 66-135. Enacted 12-27-66.)

**111.2502 DUTY TO APPROVE REGULATIONS AND TO HEAR APPEALS.**

All rules and regulations and amendments or changes thereto, which are adopted by the Administrator under the authority conferred by this chapter, shall be approved by the Board of Review before the same become effective. The Board shall hear and pass on appeals from any ruling or decision of the Administrator and, at the request of the taxpayer or Administrator, is empowered to substitute alternate methods of allocation.

(Ord. 66-135. Enacted 12-27-66.)

**111.2503 RIGHT OF APPEAL.**

Any person dissatisfied with any ruling or decision of the Administrator which is made under the authority conferred by this chapter may appeal therefrom to the Board of Review within thirty (30) days from the announcement of such ruling or decision by the Administrator, and the Board shall, on hearing, have jurisdiction to affirm, reverse or modify any such ruling, decision or any part thereof.

(Ord. 66-135. Enacted 12-27-66.)

**OTHER PROVISIONS****111.2701 DECLARATION OF LEGISLATIVE INTENT.**

If any sentence, clause, section or part of this chapter, or any tax against any individual, or any of the several groups specified herein is found to be unconstitutional, illegal or invalid such unconstitutionality, illegality or invalidity shall affect only such clause, sentence, section or part of this chapter and shall not affect or impair any of the remaining provisions, sentences, clauses, sections or other parts of this chapter. It is hereby declared to be the intention of Council of the City of Shaker Heights that this chapter would have been adopted had such unconstitutional, illegal or invalid sentence, clause, section or part thereof not been included herein.

(Ord. 66-135. Enacted 12-27-66.)