

ORIGINAL

IN THE SUPREME COURT OF OHIO

HUNTER T. HILLENMEYER)	Case No: 2014-0235
)	
Plaintiff-Appellant,)	
)	On Appeal from the
vs.)	Ohio Board of Tax Appeals
)	
CITY OF CLEVELAND BOARD)	
OF REVIEW,)	Ohio Board of Tax Appeals
)	Case No. 2009-3688
and)	
)	
NASSIM M. LYNCH)	
)	
Defendants-Appellees.)	

APPELLEES' RESPONSE TO BRIEF OF AMICUS CURIAE STATE OF OHIO

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APPELLEES' RESPONSE TO BRIEF OF AMICUS CURIAE STATE OF OHIO

Pursuant to this Court's journal entry dated July 24, 2014, the Ohio Attorney General filed an amicus brief on August 25, 2014 addressing Appellant-Taxpayer's fourth proposition of law which challenges the validity of R.C. 718.011 under the Equal Protection Clause. *See* Order dated July 24, 2014. In his brief, the Attorney General urges that R.C. 718.011, which exempts nonresident professional athletes and professional entertainers from the occasional entrant rule, is not unconstitutional since (among other reasons) "the State has a rational interest in allowing cities to collect from significant revenue sources with administrative efficiency" and "a legitimate interest in matching public benefits and burdens." Brief of Amicus at 2. In the order inviting the Attorney General to file an amicus brief, this Court also granted leave to the parties to respond and Appellees respond as follows:

- A. Even Proposed Federal Legislation Similar To R.C. 718.011 Permits States To Tax Professional Athletes And Entertainers Where Others May Not Be Taxed.

The Attorney General rightly concludes that it is "perfectly rational" that the General Assembly allows cities to tax "easy-to-identify, high-end source[s] of revenue" earned by professional athletes and entertainers "without also taking on the administrative task of requiring every other occasional entrant to file paperwork illustrating whether they earned enough income during their short sojourn for that income to be worth taxing." *Id.* (Emphasis original.) The Attorney General is also right that "fairness calls for imposing a taxing burden commensurate with the public goods and services that one receives in return"—"while other occasional entrants might receive the benefits of basic public safety," "professional athletes and their events incur much *larger* public burdens relating to police protection and traffic and crowd control, among other public services." *Id.* at 2-3 (emphasis original). The Attorney

General's position conclusions are clearly supported by the fact that even proposed federal legislation similar to R.C. 718.011 dealing with how states can tax nonresidents carves out an exception for nonresident professional athletes and entertainers likely for those very same reasons.

1. The Mobile Workforce State Income Tax Simplification Act of 2013 Would Also Exclude Professional Athletes And Entertainers.

The United States Congress is currently considering companion legislation dealing with how states tax nonresident taxpayers. Both pieces of legislation are titled the "Mobile Workforce State Income Tax Simplification Act of 2013" (collectively the "Act") H.R. 1129, 113th Cong. (2013); S. 1645, 113th Cong. (2013).¹ Variations of the Act has been introduced, died and reintroduced several times since it was first introduced in 2007.² One constant however has been that in each piece of legislation a carve-out for professional athletes has existed. The proposed legislation would require a minimum of 30 days in-state to trigger income tax liability for nonresidents and to impose withholding requirements on employers to withhold and remit tax on income earned.³ The Bill states (in part) that:

No part of the wages or other remuneration earned by an employee who performs employment duties in more than one State shall be subject to income tax in any State other than—

- (1) the State of the employee's residence; and

¹ Appellees raised and discussed the proposed federal legislation in briefing below. See Hearing Brief of Appellees filed with the Board of Tax Appeals at 18; see Tax Administrators' Hearing Brief filed with the Cleveland Board of Review at 17.

² See H.R. 1864, 112th Cong. (2011); H.R. 2110, 111th Cong. (2009); and H.R. 3359, 110th Cong. (2007).

³ In the original legislation, a minimum of 60 days in-state was required. See H.R. 3359, 110th Cong. (2007).

(2) the State within which the employee is present and performing duties for more than 30 days during the calendar year in which the wages or other remuneration is earned.

Section 2(a), H.R. 1129. Under the Act, the term “employee” would be defined by the state where services are performed, except that “employee” shall not include professional athletes, professional entertainers or certain public figures all defined under the Act. Section 2(d)(2)-(5);(10), H.R. 1129.⁴

That proposed federal legislation similar to R.C. 718.011 would allow nonresident professional athletes and entertainers to be taxed in situations where other nonresidents may not be taxed, clearly shows that federal legislators (like the Ohio General Assembly) rightly conclude that a rational basis for the classification exists.

2. The Multistate Tax Commission’s Model Statute Addressing The Federal Legislation Excludes Professional Athletes And Entertainers As Well.

The Multistate Tax Commission (“Commission”) is an “intergovernmental state tax agency” created by the Multistate Tax Compact in 1967. <http://www.mtc.gov/The-Commission> (last viewed Sept 7, 2014). Composed of 47 states including Ohio, one of the primary purposes of the Commission is to promote uniformity in state tax laws although its actions do not have the force of law and member states are not bound by its recommendations.

<http://www.mtc.gov/The-Commission/Member-States> (last viewed Sept 7, 2014);

<http://www.mtc.gov/The-Commission/Multistate-Tax-Compact> (last viewed Sept 7, 2014).

⁴ The full text of the House version of the Act is available at <http://www.gpo.gov/fdsys/pkg/BILLS-113hr1129if/pdf/BILLS-113hr1129ih.pdf> (last viewed Sept. 12, 2014); while the full text of the Senate version is available at <http://www.gpo.gov/fdsys/pkg/BILLS-113s1645is/pdf/BILLS-113s1645is.pdf> (last viewed Sept 12, 2014).

The Commission has drafted a model workforce withholding and individual income tax statute addressing the proposed federal legislation and it too carves-out an exception for professional athletes and entertainers. <http://www.mtc.gov/Adopted-Uniformity-Recommendations> (last viewed Sept 7, 2014). Under the Commission's statute, the threshold for taxing and withholding is 20-days versus the 30-day threshold set forth in the proposed federal legislation. As to income tax liability, the model statute states, in part, that:

(1) Compensation subject to withholding pursuant to [cite the state withholding tax], without regard to [cite the withholding tax exception (below)], that is received by a nonresident for employment duties performed in this state, shall be excluded from state source income if:

(a) the nonresident has no other income from sources within this state for the tax year in which the compensation was received;

(b) the nonresident is present in this state to perform employment duties for not more than 20 days during the tax year in which the compensation is received ***; and

(c) the nonresident's state of residence provides a substantially similar exclusion or does not impose an individual income tax.

(2) This section shall not apply to compensation received by:

(a) a person who is a professional athlete or member of a professional athletic team;

(b) a professional entertainer who performs services in the professional performing arts ***.

Id.

That the Multistate Tax Commission's model statute also excludes professional athletes and entertainers signals that it too believes a rational basis exist for taxing nonresident professional athletes and entertainers where other taxpayers may not be taxed.

3. The Council On State Taxation Properly Notes That Professional Athletes And Entertainers Are Exempted To Minimize Revenue Dislocations.

The Council on State Taxation (“COST”) is a “nonprofit trade association consisting of more than 600 multistate corporations engaged in interstate and international business.”

<http://cost.org/> (last viewed Sept 9, 2014). This well-recognized state tax organization has supported the proposed federal legislation and published “The Mobile Workforce State Income Tax Simplification Act Frequently Asked Questions.”

http://cost.org/uploadedFiles/Featured_News/Mobile%20Workforce%20FAQ%2003%2014.pdf

(last viewed Sept 9, 2014). One such question deals with professional athletes and entertainers. The question and answer state as follows:

Why are athletes, entertainers and certain public figures excluded from the protections of this legislation?

The purpose of exempting certain individuals, such as professional athletes and professional entertainers, from the protections generally afforded by prospective federal legislation is to minimize revenue dislocations among the states. Given their high profiles and public calendars, there is currently a relatively high degree of compliance for these individuals with state nonresident personal income tax laws.

Id.

As COST states “minimiz[ing] revenue dislocations among the states” is a reason that professional athletes and entertainers are excluded from the proposed federal legislation. The Attorney General is also right that the Ohio General Assembly could easily have found that allowing Ohio municipalities to collect significant revenue from easily identifiable sources while maintaining cost is rationally-related to the legitimate governmental interest of raising revenue.

4. The American Institute Of Certified Public Accountants Also Supports The Attorney General's Position On Administrative Ease In Tax Collection.

Like COST, the American Institute of Certified Public Accounts ("AICPA") is pushing for passage of the proposed federal legislation.⁵ The AICPA publishes "The Tax Adviser" that (among other things) "explains federal tax issues to tax practitioners."

<http://www.aicpa.org/PUBLICATIONS/TAXADVISER/Pages/TheTaxAdviser.aspx> (last viewed Sept 9, 2014). One article discussed the proposed federal legislation, referring to taxpayers covered by it as "road warriors." "The Mobile Workforce Bill: Addressing "Road Warrior Compliance."

http://www.aicpa.org/publication/taxadviser/2012/december/pages/yesnowitz_salt_dec12.aspx (republished April 2, 2014) (last viewed Sept 9, 2014). As to professional athletes, it states:

Generally, these road warriors repeatedly earn significant amounts of money in each of the places where they work. Accordingly, they (and their employers) may be better able than those in more-ordinary occupations to deal with the filing and withholding requirements for nonresident income. In addition, the revenue loss from not allowing nonresident states to tax this type of income could be significant.

Id.

The AICPA seems to clearly support the Attorney General's position that these are "high-revenue sources that are administratively easy to access" as compared to attempting to tax all other occasional entrants. Amicus Brief at 12.

⁵ According to its website, the AICPA is "the world's largest member association representing the accounting profession, with more than 400,000 members in 128 countries[.]" <http://www.aicpa.org/About/Pages/About.aspx> (last viewed Sept 9, 2014).

CONCLUSION

The Ohio Attorney General is right that R.C. 718.011 does not violate the Equal Protection Clause of either the U.S. Constitution or the Ohio Constitution. For the reasons set forth herein and in Appellees' other briefs and in the brief of amicus curiae the State of Ohio, this Court should affirm the decision of the Board of Tax Appeals and find against Taxpayer on all of his constitutional assertions and claims.

Respectfully submitted,
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A copy of the foregoing Appellees' Reply To Brief Of Amicus Curiae State Of Ohio was served by regular U.S. mail on Counsel for Amicus Curiae State of Ohio, Michael Dewine, Eric E. Murphy, Michael J. Hendershot, Stephen P. Carney, Daniel W. Fausey and David D. Ebersole, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215 and Appellant's counsel, Stephen W. Kidder, Esq., Hemenway & Barnes LLP, 60 State Street, Boston, MA 02109-1899 and Richard C. Farrin, Esq., Zaino Hall & Farrin LLC, 41 South High Street – Suite 3600, Columbus, Ohio 43215 on this 22nd day of September 2014.



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