

## 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,
v.	:	Tenth Appellate District
	:	
City of Shaker Heights Income Tax	:	Court of Appeals
Board of Review, et al.,	:	Case No. 13AP-71
	:	
Appellants.	:	

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### BRIEF OF APPELLEES

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## BRIEF OF APPELLEES

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### **I. Introduction**

The sole issue in this case is the appropriate standard of review to be used by the Ohio Board of Tax Appeals (“BTA”) when reviewing a decision of the municipal board of appeals (“MBOA”) concerning a municipal income tax matter. The substantive determination that the exemption for pensions in the City of Shaker Heights municipal income tax ordinance includes Supplemental Executive Retirement Plans is final.

The BTA appropriately applied the same standard of review for the appeal from a MBOA that the BTA routinely uses for appeals from the Ohio Tax Commissioner. Under that standard, the one appealing the decision bears the burden of proof; the BTA makes findings of fact based on all of the evidence, including the MBOA transcript and evidence first introduced at the BTA; and the BTA addresses legal questions de novo.

A majority of the Franklin County Court of Appeals (Judges Klatt and O’Grady) affirmed the standard of review employed by the BTA. The majority found that the MBOA was not

entitled to deference. Judge Tyack dissented in part on the basis that the BTA should have deferred to the MBOA, while nevertheless agreeing that the BTA should use the same standard of review for appeals from a MBOA as that used for appeals from the Ohio Tax Commissioner. *MacDonald v. City of Shaker Hts. Income Tax Bd. of Review*, 10th Dist. No. 13AP-71, 2014-Ohio-708, ¶ 39 (hereafter “Court of Appeals Decision”). The majority of the Court of Appeals was correct. R.C. 5717.011 and the case law cannot support the conclusion that the BTA should defer to the fact-finding or reasoning of the MBOA.

Appellants actually go much further than the dissent below and argue for a standard of review so deferential that it would require the BTA to act as a rubber stamp of the MBOA’s decision. Nothing in Appellants’ arguments accommodate any meaningful consideration by the BTA as to whether the decision of MBOA was legal or reasonable. Appellants argue for nothing less than total deference, which would require the BTA to shirk the statutory obligation of review given to it by the General Assembly.

The arguments of the Amicus City of Cleveland mirror those of the Appellants. The responses herein to Appellants’ arguments thus encompass the responses to Amicus.

## **II. Statement of Facts**

No material dispute exists between the parties as to the facts.

## **III. Law and Argument**

In A Proceeding Under R.C. 5717.011, The Board of Tax Appeals Applies The Same Standard of Review Employed In Appeals From Decisions of the Ohio Tax Commissioner. The Board of Tax Appeals Does Not Accord Deference To The Municipal Boards.

### **A. State Law Established Municipal Boards Of Appeal.**

R.C. 718.11 provides for the establishment of MBOAs. MBOAs exist to provide a local forum for disputes regarding municipal taxes. Beginning with the 2004 tax year, R.C. 5717.011

gives an option to both the taxpayer and the taxing authority to appeal an adverse decision of the MBOA either to the court of common pleas or the BTA.

A comparison of R.C. 5717.011 (governing appeals from the MBOA) and R.C. 5717.02 (governing appeals from the Tax Commissioner) confirms that the municipal tax appeal was modeled after the state tax appeal. Both appeal statutes require the convening of a hearing for taking additional evidence if any party so requests. The relevant language of the two statutes reads as follows:

<u><b>R.C. 5717.011(D)</b></u>	<u><b>R.C. 5717.02(E)</b></u>
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.	The board may order the appeal to be heard upon the record and the evidence certified to it by the commissioner or director, but upon the application of any interested party the board shall order the hearing of additional evidence, and it may make such investigation concerning the appeal as it considers proper.

The reference to the “administrator” in R.C. 5717.011 refers to the local tax administrator who normally staffs the MBOAs. The parallel structures of R.C. 5717.011 and R.C. 5717.02 strongly support the BTA’s decision to apply the same standard of review in both types of appeals.

Under the language of the controlling statute, R.C. 5717.011, the parties (and that would include a tax administrator appealing a decision from the MBOA) unquestionably can submit additional evidence. All three members of the Court of Appeals agreed that R.C. 5717.011 authorizes the BTA to accept additional evidence. The majority of the Court of Appeals was correct when concluding that “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.” *Court of Appeals Decision ¶ 24.*

**B. The BTA Applied The Standard Of Review For Appeals From Final Determinations Of The Ohio Tax Commissioner To Appeals From The MBOA While Also Acknowledging The Standard For Appeals Under R.C. Chapter 2506.**

Appellants repeatedly insist that the BTA applied no standard of review in this appeal. That conclusion is untenable in the face of the BTA's explanation of the standard actually applied. In formulating the standard of review, the BTA explicitly incorporated (1) the standard of review of state tax cases that come to the BTA from the Ohio Tax Commissioner, and (2) the standard of review applicable to appeals of municipal tax matters to the common pleas courts. The BTA stated the following as its standard of review at *MacDonald v. City of Shaker Hts. Income Tax Bd. Of Review* (December 28, 2012), BTA No. 2008-K-1883, unreported, Slip Op. 4-5:

Initially, we acknowledge the standard by which our review is to be conducted. Although the Supreme Court has not yet considered an appeal filed pursuant to R.C. 5717.011,<sup>1</sup> it has reviewed similar appeals taken from municipal boards of appeal to common pleas courts pursuant to R.C. 2506.01, commenting in *Tetlak v. Bratenahl* (2001), 92 Ohio St.3d 46, as to the burden borne by an appellant:

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

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<sup>1</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.).

The BTA then applied the articulated standard of review to this appeal.

Appellants are wrong when maintaining that no standard of review is applicable on appeals to the BTA from the MBOA. Neither the BTA nor the Court of Appeals nor Appellees have ever maintained that the absence of an express standard of review in R.C. 5717.011 means that no standard of review exists or, as the Appellants insist, that the BTA can apply any standard of review it wishes.

A striking disconnect exists between the BTA's express statements that it afforded a presumption of validity to the MBOA's decision and the repeated argument by Appellants that the BTA failed to recognize the presumptive validity of the MBOA decision. The presumption of correctness or presumption of validity was applied by the BTA imposing the burden of proof on the MacDonalds. Appellants, however, are confusing the placement of the burden of proof on the one challenging the MBOA's decision with the very different concept of a deferential review. Under the doctrine of "presumption of validity" as it has been applied in hundreds of tax cases, the burden of proof is on the appellant but the BTA does not defer to the taxing authority or tax review board either as to the fact-finding or legal conclusions of either lower administrative agency.

**C. The BTA Correctly Applied The Standard Of Review Traditionally Used In Tax Appeals And Approved By This Court.**

The BTA correctly applied the same standard of review for appeals to the MBOA that it uses for Tax Commissioner cases. This Court implicitly concurred with the use of the same

standard of review when reviewing a municipal income tax decision of the BTA in a recent decision in the following terms:

*Standard of Review*

{¶ 10} Pursuant to R.C. 5717.04, this court reviews a decision of the BTA to determine whether it is reasonable and lawful. We will uphold the BTA's determination of fact if the record contains reliable and probative evidence supporting its determination. *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954, ¶ 14. Moreover, the court's review of a question of law is not deferential but de novo. *Akron Centre Plaza, L.L.C. v. Summit Cty. Bd. Of Revision*, 128 Ohio St.3d 145, 2010-Ohio-5035, 942 N.E.2d 1054, ¶ 10. Thus, we will affirm a decision of the BTA only if it correctly applies the law. *HIN, L.L.C v. Cuyahoga Cty. Bd. of Revision*, 124 Ohio St.3d 481, 2010-Ohio-687, 923N.E.2d 1144, ¶ 13.

*Gesler v. Worthington Income Tax Bd. Of Appeals*, 138 Ohio St.3d 76, 2013-Ohio-4986. In *Gesler*, this Court was describing its own standard of review and not that of the BTA. The Court's expression of the standard of review in appeals originating in the MBOA, however, is wholly consistent with the recognition that the BTA is the principal fact-finder and does not simply rubber stamp the decision of the MBOA.

In *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, ¶ 14, the Court reaffirmed that the "BTA is responsible for determining factual issues and, if the record contains reliable and probative support of these BTA determinations' this court will affirm them" (quoting *Am. Nat'l Can Co v. Tracy*, 72 Ohio St.3d 150, 152, 648 N.E.2d 483). This Court consistently has given the BTA wide discretion in determining the weight of the evidence and the credibility of witnesses. *Apple Group Ltd. v. Medina Cty. Bd. of Revision*, 139 Ohio St.3d 434, 2014-Ohio-2381, ¶ 34. In fact, this Court consistently has recognized the BTA as the primary trier of facts in tax cases. In *WCI Steel, Inc. v. Testa*, 129 Ohio St.3d 256, 2011-Ohio-3280, the issue was whether the BTA could consider an appraisal that had not been presented during the

administrative hearing at the Tax Appeals Division of the Ohio Tax Department. The Court permitted the BTA to consider the appraisal in recognition that the BTA “is statutorily authorized to conduct full administrative appeals in which the parties are entitled to produce evidence in addition to that considered by the Tax Commissioner.” *Id.* ¶ 35 (quotation omitted).

In appeals from the boards of revision with respect to property valuations, the Court has insisted that the BTA independently value the subject property and not simply defer to the county auditor or board of revision, provided that evidence exists to negate the auditor’s valuation. If the BTA defers to the auditor instead of determining the independent value, the Court will reverse the decision. *See Apple Group, supra* ¶ 19. In the case of appeals from the Tax Commissioner, nothing in the case law suggests deference even though the BTA maintains that the burden of proof is on the one challenging the Tax Commissioner’s final determination.

As to questions of law, this Court’s own standard of review also recognizes that legal issues are heard *de novo* and not under an abuse of discretion standard. The Court repeatedly has affirmed that the Court does not defer to the BTA on legal questions. *See Satullo, supra* ¶ 14. It would serve no purpose for the BTA to defer to the MBOA on legal questions when the Court does not defer to the BTA’s legal conclusions. While Appellants do not confront the issue directly, it must follow that under Appellant’s rationale that this Court is also expected to defer to the MBOA on legal issues. This conclusion cannot be the law as it would render the appellate process virtually meaningless.

Nor should the BTA or this Court defer to the witnesses presented at the MBOA as to the intent of the Shaker Heights ordinance. Neither of the two witnesses for the Regional Income Tax Authority (“RITA”) who testified at the MBOA had specific knowledge of circumstances surrounding the adoption of the ordinance. Instead, two individuals were called to support the

desired construction of the ordinance. Mark Taranto was an employee and Assistant Director of RITA, an entity separate from the City. The second witness was James Neusser, former Tax Commissioner of Akron, and a special adviser to RITA. Each witness testified as to his own personal opinions.

RITA was first engaged as the “tax administrator” of Shaker Heights long after the original enactment of the ordinance in question. No foundation was made at the MBOA hearing that the two witnesses had any particular knowledge of the enactment or background of the ordinance. As a result, no basis exists to find that any deference should have been given to their personal interpretations of the ordinance.

The BTA was correct to apply the ordinance as written rather than accepting the reinterpretation given by a taxing administrator. In fact, Appellants’ reliance on a taxing official or on an organization like RITA, which is separate from the City of Shaker Heights, as the authority for its interpretation of the ordinance is a stunning admission that no recognized basis exists for that interpretation. Moreover, RITA’s policy-making in seeking to impose this reinterpretation of the ordinance reflected a total lack of transparency for affected taxpayers. Appellants’ reliance on such an internal policy of RITA cannot support the argument that the BTA should have given deference to this interpretation.

Importantly, neither the BTA nor the Court of Appeals found any persuasive force to RITA’s interpretation. Nothing in this record comes close to providing a basis for this Court to defer to RITA or a former Akron Tax Commissioner for the interpretation of the Shaker Heights ordinance.

In its decision below, the BTA declined to accept the effort of Shaker Heights to revise the ordinance through administrative interpretation. The BTA properly recognized that a city tax

administrator “cannot add to or exceed the plain language of the ordinance,” BTA Slip Op. at 10-11, Appellants’ Appendix at 32-33 (citing *Ransom & Randolph Co. v. Evatt*, 142 Ohio St. 398, 407-08 (1944), and *City of Cincinnati v. De Golyer*, 26 Ohio App.2d 178, 181-82 (1969), *aff’d*, 25 Ohio St.2d 101 (1971)).

The BTA also cited one of its earlier decisions that aptly illustrates the principle that the language of the municipal ordinance should not be frustrated by an inconsistent position asserted by a tax administrator. *Ladd v. City of Oregon* (Mar. 29, 2011), BTA No. 2008-K-2371, unreported. In *Ladd*, the BTA rejected the effort of a city tax department and municipal board of appeals to establish an arbitrary mileage test to limit the term “metropolitan area” so as to limit the allowable deduction for work-related travel expenses for travel within the “metropolitan area.” As the BTA found in *Ladd*, and is true here, tax statutes must be applied as written and not as the taxing authority might wish those statutes to be interpreted.

Deference to an agency sometimes is premised on the principle that it would achieve uniformity of interpretation. Deference to decisions of MBOAs, however, would work strongly against uniformity. Permitting six hundred municipalities with differing interpretations to independently interpret a common word in an ordinance must lead to non-uniformity. The decision of the General Assembly to allow appeals to be brought to the BTA, conversely, shows that the General Assembly sought the expertise of the BTA to foster uniformity of interpretation.

Because the BTA (1) can take additional evidence pursuant to the last paragraph of R.C. 5717.011, (2) is required to make findings of fact that will be upheld on appeal if reasonable and lawful, and (3) can examine legal issues de novo, no basis exists to require the BTA to defer to the MBOA.

**D. This Appeal Is Controlled By R.C. 5717.011 And Not R.C. Chapter 2506.**

Appellants assert that there is some importance to the fact that appeals from MBOAs can be taken to a court of common pleas or to the BTA. This choice by the General Assembly, however, is not relevant to the issue presented. The appeal under R.C. 5717.011 can be different than an appeal under R.C. Chapter 2506. Moreover, R.C. 5717.011 specifically contemplates that either the taxpayer or taxing authority can utilize the alternative. The Court of Appeals addressed Appellants' argument that it was "illogical" to permit two avenues for appeal by observing that "[i]t 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." *Court of Appeals Decision* ¶ 25.

The State of Ohio is supreme not only in the scheme of municipal taxation but in the choice of the agencies to enforce it. *State ex. rel. City of Toledo v. Cooper*, 97 Ohio St. 86, 97, 119 N.E. 253 (1917). The method of review for determinations of the municipal taxing authorities is within the prerogative of the Ohio General Assembly. Appellants can provide no principled basis to disregard the appeal process spelled out in R.C. 5717.011.

R.C. 2506.01(B) expressly provides that the appeal set forth is in addition to all other rights of appeal. The General Assembly is charged with the knowledge that the alternative proceeding in R.C. Chapter 2506 had a standard of review that is not duplicated in the statute for appeals to the BTA under R.C. Chapter 5717.

These alternate appeal avenues do not mean that the BTA is bound by the standard of review imposed on the courts of common pleas. As a matter of statutory construction, the specific legislative enactment controls over the general. In *City of Cincinnati v. Thomas Soft Ice Cream, Inc.*, 52 Ohio St.2d 76, 369 N.E.2d 778 (1977), this Court applied the statute of limitations under R.C. 718.06 relevant to municipal income tax as the specific provision that

should control over the general statute of limitations of R.C. 2901.13. Likewise, R.C. Chapter 2506, which covers all manner of administrative appeals, is a general appeals statute while appeals to the BTA under R.C. 5717.011 are limited to tax matters. Accordingly, the specific tax appeal standards should be applied as written and not be read with a gloss from a different statute (R.C. 2506.04) designed to deal with many different types of appeals.

Furthermore, the fact that the BTA is empowered to take additional evidence shows the standard of review imposed on the court of common pleas should not be imposed on the BTA. The majority of the Court of Appeals was correct when concluding that “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.” *Court of Appeals Decision* ¶ 24.

The taking of additional evidence is a defining feature of the appeal rights set up in R.C. 5717.011 because the BTA is required to hold a hearing upon request. A legislative decision to require the state tax tribunal focusing solely on tax matters to conduct a hearing while limiting those circumstances when additional evidence will be received by the court of general jurisdiction is rational and should not be disturbed.

The General Assembly reasonably provided taxpayers and taxing authorities alternative avenues for appeals from MBOAs, and these alternatives do not interfere with the proper administration of the tax. Appellants fail to confront that a taxing authority also could take advantage of the opportunity to appeal to the BTA and to present additional evidence, should the taxing authority conclude that additional evidence would be appropriate once the MBOA announces its decision. On appeal to this Court, Appellants did not challenge the statutory provision permitting the taking of additional evidence. On brief, however, Appellants seemingly renew the argument that no hearing should have been held at the BTA. The requirement of a

hearing upon request, however, is explicit in the statute and that issue is not properly before the Court.

Further, at least two significant differences exist between the two avenues of appeal (common pleas versus BTA). These differences support different procedures as well as potentially different standards of review in the two types of appeals:

First, the BTA has statewide jurisdiction so that its decisions can influence the application of municipal income tax issues to all Ohioans. This opportunity for uniformity is particularly significant because the various municipal income tax ordinances exhibit common, if not identical, provisions. For example, the pension exemption appears in several ordinances. This commonality among the many ordinances as well as the uniformity requirements enforced through R.C. Chapter 718 means that the BTA's decisions will promote both greater uniformity and more opportunities to deal with these common issues compared with decisions of the local common pleas courts.

Second, all of the decisions of the BTA are available at its website.<sup>2</sup> In contrast, common pleas court decisions are decidedly less available to taxpayers.

**E. The Standard Of Review Under R.C. 2506.04 For Appeals To The Common Pleas Court Is Not As Deferential As The Appellants Suggest.**

Appellants' argument that the BTA should be required to use the same standard of review as the common pleas court is misplaced. Appellants premise their arguments on the faulty assumption that unlike the BTA, the common pleas courts defer to the local municipalities. A review of the statutory jurisdiction of the common pleas courts on the review of agency determinations contradicts Appellants' conclusions about the standard of review at the common

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<sup>2</sup> See <http://bta.ohio.gov/>.

pleas court level. R.C. 2506.04 does not create a deferential standard in the manner advanced by Appellants.

Appellants argue in essence that because the review of the MBOA is an appeal, a standard of review used by courts of appeal to review decisions from a court of common pleas is appropriate. For this proposition, they cite *AT&T Communications of Ohio, Inc. v. Lynch*, 132 Ohio St.3d 92, 2012-Ohio-1975. The *AT&T Communications* decision, however, does not address the standard of review. The argument that any review labeled an appeal must use the standard of review used at the court of appeals level was rejected squarely by this Court. *In re Timken Mercy Med. Ctr.*, 61 Ohio St.3d 81, 572 N.E.2d 673 (1991). In *Timken Mercy*, the appellant objected to the conduct of a hearing at the Certificate of Need Review Board (“CON Board”) and insisted that the CON Board could not conduct a de novo hearing because the proceeding before the CON Board was an appeal. This Court, however, responded that the fact that the proceeding was an appeal does not define the standard of review and did not mean that the CON Board should apply an abuse of discretion standard in reviewing the decision of the Ohio Department of Health. Instead, the CON Board was required to weigh the evidence and make a determination. While the *Timken Mercy* appeal was considered pursuant to R.C. Chapter 119, the standard of review is instructive for R.C. Chapter 2506 proceedings.

In the context of R.C. Chapter 2506 proceedings, the standard of review for appeals to the common pleas court is very different from the standard of review for appeals from the common pleas court to a court of appeals. In the appeal at the common pleas court, the court weighs the evidence. The common pleas court cannot blatantly substitute its judgment for the agency but the common pleas court applies a preponderance of the evidence standard to determine whether the decision of the agency is correct. *Dukovich v. Lorain Metro. Hous. Auth.*, 58 Ohio St.2d 202,

207, 389 N.E.2d 1113 (1979). The fact that the standard of review requires a determination based on the **preponderance** of the evidence shows that the common pleas court applies a standard that is nowhere near as deferential as suggested by Appellants.

In a recent decision, this Court reaffirmed the differences between the standard of review for appeals to a common pleas court in contrast to the appeal to the court of appeals from the common pleas court in the following terms:

#### *Standard of Review*

{¶ 13} In an R.C. 2506.01 administrative appeal, the common pleas court considers the whole record and determines whether the administrative order is "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence." R.C. 2506.04. *See also Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 735 N.E.2d 433 (2000). The court weighs the evidence to determine whether a preponderance of reliable, probative, and substantial evidence supports the administrative decision, and if it does, the court may not substitute its judgment for that of the board. *Dukovich v. Lorain Metro. Housing Auth.*, 58 Ohio St.2d 202, 207, 389 N.E.2d 1113 (1979). If it does not, the court may reverse, vacate, or modify the administrative decision. *Id.*; R.C. 2506.04.

{¶ 14} The court of appeals' standard of review under R.C. Chapter 2506 is more limited. *Henley* at 147, citing *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34, 465 N.E.2d 848 (1984). The court of appeals reviews the common pleas court's judgment only on questions of law and does not have the same extensive authority to weigh the evidence. *Id.* at 147, quoting *Kisil* at 34, fn. 4. Within the ambit of questions of law for appellate-court review is whether the common pleas court abused its discretion. *Kisil* at 34, fn. 4. The court of appeals must affirm unless it finds, as a matter of law, that the trial court's decision is not supported by a preponderance of reliable, probative, and substantial evidence. *Id.* at 34.

*City of Independence v. Office of the Cuyahoga Cty. Executive*, 2014-Ohio-4650, \_\_\_\_ Ohio St.3d \_\_\_\_\_. These cases establish that the common pleas court does not defer to the MBOA as the court of appeals defers to the common pleas court. Thus, the Appellants not only seek

improperly to inject the R.C. Chapter 2506 standard of review into BTA proceedings governed by R.C. 5717.011, but Appellants further improperly seek to apply a deferential appellate standard to appeals at a stage of the proceedings where such a standard is inappropriate. Another fundamental error by Appellants is that their argument about “deference” fails to distinguish between the review of factual matters and legal issues. Appellants never confront this distinction and improperly conflate the differing standards for the review of facts and law.

Legal issues are to be determined de novo by the court of common pleas in R.C. Chapter 2506 appeals. The BTA also hears legal issues de novo. Appellants present no authority for arguing other than a de novo review of legal issues by either the BTA or the common pleas court. Mixed questions of fact and law and the application of law to the facts are also reviewed de novo.

Factual issues were not in dispute in this matter. The only issue in the underlying case was the meaning of the word “pension” in the ordinance. Much of the testimony presented at the BTA was to provide the common understanding of the word “pension.” The conclusion that the common meaning of the word “pension” includes a Supplemental Executive Retirement Plan (“SERP”) has never been challenged at any point in this proceeding. The BTA processed the common meaning of the word “pension,” considered dictionary definitions, and referenced pensions in federal tax statutes and other sources to determine the proper legal interpretation of “pension” in the Shaker Heights ordinance.

The interpretation of an ordinance is necessarily a legal question. “The necessity of considering the facts or the evidence to determine whether a legislative act applies to a particular case does not turn the issue of statutory interpretation to a question of fact.” *Independence, supra* ¶ 18, citing *Henley, supra* at 148. The BTA and the Court of Appeals properly considered

the common understanding of an undefined word, as a matter of law. *See* R.C. 1.42. The dissenting opinion at the Court of Appeals improperly suggested that the definition of “pension” is a factual and not a legal question. *Court of Appeals Decision ¶ 46.*

Even if there were factual issues present here, the review of the facts by a court of common pleas would not have been as deferential as suggested by Appellants. Instead, the common pleas court reviews the entire record and determines whether the evidence, by the preponderance of the evidence, supports the conclusion reached by the MBOA. R.C. 2506.04. The common pleas court thus does not defer to the fact-finding of a local agency in a manner similar to which an appellate court defers to the trial court or the BTA.

No support exists for the conclusion that courts of common pleas are charged with merely examining whether the MBOA proceedings were conducted in an orderly manner. The court of common pleas must evaluate the entire record that has been made both at the agency below and at hearing at the common pleas court. The common pleas court does not confine its review to the manner of the decision-making of the MBOA.

The Appellants allege that the BTA did not consider the evidence adduced at the MBOA. To the contrary, the BTA did review the record and stated as much in its decision. BTA Slip. Op. at p. 2. (Appellants’ Appendix at 24). The fact that the BTA reached a conclusion that is different than that reached by the MBOA does not mean that the BTA failed to properly consider the entire record, including the transcript certified to the BTA by the MBOA.

**F. The BTA Should Not Defer To The MBOAs.**

**1. Deference Is Not Normally Applied In An Appeal From One Agency To Another.**

Appellants present no support for the proposition that one administrative board should defer to a second administrative board from which an appeal can be made. To the contrary, in

*Bloch v. Glander*, 151 Ohio St. 381, 86 N.E.2d 318 (1949), this Court found that unlike appeals from agencies to courts, no presumption should be accorded by one agency to another agency's finding on appeal. Only the highest level of administrative review should be entitled to deference with respect to fact-finding. Further, whatever deference a court of general jurisdiction would accord an agency possessing specialized knowledge, the factors supporting such deference do not support deference from one tax administrative board to another tax-specific board.

The lack of deference (much less great deference) in appeals to an administrative agency from another administrative agency is not affected when the lower administrative agency is a board rather than an agency with a single director. The key element is that the BTA is not a court, but an administrative agency with specialized expertise. Moreover, the BTA itself is statutorily charged with fact-finding. The BTA cannot meet its fact-finding obligation if it is deferring to the lower administrative board.

The fact that the MBOA is a local agency whose decisions are appealed to a state board does not create a condition for deference, especially because taxes are at issue. As addressed further below, taxes are understood to impact the entire state, even when a single ordinance is at issue. Moreover, the conclusion that no deference is warranted is compelling because the local MBOAs lack (1) independence, (2) tax expertise, and (3) a requirement of formality in their processes.

**2. MBOAs Are Not Required To Be Independent From The Local Taxing Authority.**

The General Assembly did not mandate that the members of the MBOAs are required to possess independence from the municipal taxing authority. In contrast, the BTA is independent of both the MBOAs and the Ohio Tax Commissioner. *See* R.C. 5703.02.

In operation, the MBOAs across the state reflect varying degrees of independence and some MBOAs are perceived to have little independence. Many MBOAs utilize city employees, including the municipality's own finance personnel and elected officials, who have a demonstrable stake in the outcome. When the members of a tribunal have a stake in the proceedings, their determinations are not accorded deference on appeal. In the case of the review of the decisions of boards of revision (principally determining real property values for tax purposes), this Court specifically referenced the stake of the members of the board of revision (the county auditor, county treasurer and president of the county commission, *see* R.C. 5715.02) and concluded that the possible conflict of interest was addressed by the appeal de novo to the BTA or common pleas court. *See Alliance Towers, Ltd. v. Stark Cty. Bd. of Revision*, 37 Ohio St.3d 16, 25, 523 N.E.2d 826 (1988).

The panel of the MBOA for this appeal consisted of an Assistant City Attorney, the President of City Council and a member of the public appointed by the Mayor of Shaker Heights. The City Attorney, now as advocate on appeal, is arguing for the grant of deference to his own decision below. In other municipalities, the MBOA may consist of the city treasurer or city auditor. The lack of MBOA independence supports the decision of the majority of the Court of Appeals to accord no deference to determinations of the MBOA.

**3. The General Assembly Imposed No Requirement Of Expertise For Those Serving On The MBOAs.**

The General Assembly did not mandate that the members of the MBOA were required to possess expertise in tax matters. *See* R.C. 718.11. Nothing in the statutes limits designees to those who would normally be required to develop tax expertise. Members of the BTA, on the other hand, must have tax expertise. R.C. 5703.03.

The Shaker Heights MBOA, like that of many municipalities, is only rarely presented with opportunities to hear appeals. As a result, it has not developed any expertise through any recurring exposure to tax issues. It is noteworthy that the rules for the operation of the Shaker Heights MBOA were first approved little more than one month before the hearing in question. Brief of Appellants at 2. Even now, these rules do not appear on the City's website. Even after the establishment of these rules, the Shaker Heights MBOA has had very few, if any, opportunities even to convene, and thus little opportunity to obtain experience with municipal tax matters. In contrast, the BTA has had the opportunity to obtain expertise with cases addressing municipal income tax issues arising from all over the state.

The lack of a statutory requirement of tax expertise by members of the MBOAs and the absence of expertise in practice both support according no deference to the MBOAs' decisions by the BTA.

#### **4. The MBOAs Need Not Conduct Formal Hearings.**

The General Assembly did not require that MBOA hearings be formal in R.C. 718.11. In recognition that the hearing is not intended to be formal, the taxpayer is permitted to be represented by a certified public accountant or other representative and need not be represented by an attorney at law. The fact that hearings under R.C. 718.11 are confidential is another indication that the General Assembly did not intend the MBOA proceeding to be the record hearing.

The actual degree of formality in hearings before MBOAs differs among the approximately 600 taxing municipalities in Ohio. The formality of the MacDonalds' hearing does not mean that all proceedings throughout the state, whether formal or informal, should be accorded deference. A more formal setting for the hearing on one occasion in one municipality

does not convert MBOA hearings across the state into something other than what is provided for by statute.

Furthermore, it would not be necessary or even appropriate to have formal hearings in all cases for taxpayers that seek a review of the decisions of municipal taxing authorities. The informality of the MBOA serves the interests of good tax administration by allowing a municipal income taxpayer to have an opportunity to present a case to local elected officials and members of the local community. The informal review, however, argues against treating the local MBOA hearing as being the record hearing, as Appellants argue.

The hearing at the BTA is a composite of the transcript made at the MBOA and the new evidence heard at the BTA, which is as the General Assembly intended. The BTA is required to consider the record certified by the MBOA. Contrary to the wholly unsupported allegations of Appellants, every indication exists that the BTA properly considered the Record made at the MBOA in this appeal.

Appellants also assert that MBOAs will abdicate their role in deciding taxpayer disputes if MBOA decisions are not subject to great deference. This argument is wholly misplaced. That argument flouts the intent of the state statute by which the General Assembly requires the institution of MBOAs. Pursuant to R.C. 718.11 and R.C. 5717.011, taxpayers are entitled to a review by the local board. In some instances, that review will end the dispute. In others, either the taxpayer or the taxing authority can choose to have an appeal heard in their local common pleas court or by the BTA.

A similar argument to that made by the Appellants was rejected in *Timken Mercy Med. Ctr., supra*. In that case, the Department of Health made a determination denying a request for a certificate of need for an open heart hospital unit at Timken Mercy. The CON Board reversed

the Department of Health and approved the request. On appeal to the court of common pleas, that court conducted a hearing and thereafter affirmed the order of the CON Board. The court of common pleas refused to find that the initial determination of the Department of Health would become unimportant if the CON Board could consider the evidence and come to a conclusion different than that of the Department of Health. In support of the conclusion that an initial proceeding can be important despite not being the final word, this Court relied on factors that resonate in this case. These factors include that the lower administrative agency is given the first opportunity to make the decision, the one appealing the decision has the burden of proof, and the higher level agency cannot ignore the agency's fact-finding below.

**5. The Insertion Of A Local Tax Review Board Between The Local Tax Administrator And The BTA Does Not Diminish The Role Of The BTA.**

In response to the observation that the BTA applied the identical standard of review for appeals from the MBOA and the State Tax Commissioner, Appellants maintain that the MBOA should be accorded more deference than the Tax Commissioner simply because the MBOA is a board as opposed to a single administrator. Appellants cite no authority for this position. Appellants' proposal that a board of individuals should be afforded more deference than an individual lacks merit for several reasons: (1) the MBOA is not independent of the tax administrator; (2) its members need not have tax expertise; and (3) it need not provide a formal hearing. In short, the MBOAs operate in a manner contrary to situations in which deference may be accorded. Therefore, the fact that MBOA decisions are not made by an individual does not support a conclusion that they should be afforded deference.

The closest comparable examples of tax review boards considering appeals from taxing authorities are the eighty-eight county boards of revision, which have multiple members, that review the real-property tax value decisions, property classification issues (*e.g.* whether property

qualifies as agricultural property entitled to a special valuation) and other determinations of the county auditors. In the case of a valuation dispute, the auditor sets the value for tax purposes. The taxpayer or taxing authority files a complaint challenging the valuation or other decision of the county auditor to the county board of revision. Once the board of revision makes the decision, the taxpayer can appeal from that decision to either the local common pleas court or the BTA while the school district or other public entity can appeal the decision of the board of revision only to the BTA.

For appeals from the boards of revision, the BTA accords the decisions of the boards of revision no presumptive validity. *Amsdell v. Cuyahoga Cty. Bd. of Revision*, 69 Ohio St.3d 572, 574, 635 N.E.2d 11 (1994). Like the county auditor, county treasurer and member of the county commission who comprise the county boards of revision, the members of the MBOA—membership requirements for which vary by municipality—generally have an interest in the outcomes of the cases that places those members at odds with the role of impartial adjudicators. *See R.R.Z. Assocs. v. Cuyahoga Cty. Bd. of Revision*, 38 Ohio St.3d 198, 200, 527 N.E.2d 874 (1988). To afford the MBOAs deference, much less great deference, would be at odds with the standard of review used in the comparable context of appeals from the boards of revision.

In the current appeal, the MacDonalds are not challenging the imposition of the burden of proof through the presumption of correctness because that is the burden that was applied by the BTA and met by the MacDonalds making the issue moot in this case. In the alternative, however, it would be appropriate to conclude, that the BTA should **not** have imposed the burden of proof on the MacDonalds for the appeal from the MBOA. Instead, the BTA should have

treated the appeal as similar to an appeal from a board of revision for no which such presumptive validity attaches.

**G. The BTA Should Not Be Limited In Its Review By Requiring Deference To The Local Officials.**

A principal reason for expanding the jurisdiction of the BTA to municipal income tax cases is to achieve uniformity in municipal income tax interpretation. This uniformity will be lost if the BTA must defer to each of the approximately 600 taxing municipalities.

A very practical issue arises when requiring deference to multiple administrators proposing differing interpretations of the identical word used in multiple ordinances. In this case, for example, the word “pension” appears in many ordinances. It is difficult to conceive how the BTA serves its statutory function and simultaneously defers to multiple interpretations of the single word based on the assertions of individual taxing authorities.

**H. Municipal Income Tax Issues Are Different Than The Considerations Of Zoning And Other Exercises Of Police Power.**

Appellants have cited to zoning, and other strictly local police power cases in support of their claim that local determinations should be accorded extraordinary deference. In contrast to the police power, the Ohio Constitution provides specifically that the General Assembly can restrict the municipalities in matters of local taxation. In this respect, municipal income tax issues are very different than considerations of the exercise of the police power under the Home Rule provisions. Application of non-tax, strictly local, police power provisions are simply not subject to the same oversight by the Ohio General Assembly as tax issues.

Pursuant to Article XIII, Section 6 of the Ohio Constitution, the General Assembly shall restrict the power of taxation of the municipalities. This provision was not repealed when the Home Rule provisions were added in 1912. *See* Article XVIII and in particular, Article XVIII, section 7. To the contrary, section 13 of the same Article XVIII was added as part of the Home

Rule amendments to reaffirm that laws may be passed to limit the power of municipalities to levy taxes.

The Constitution of the State of Ohio thus recognizes that the tax policies of the municipalities have effects outside each municipality. *Cooper, supra* at 92 (observing that a tax provision can affect other subdivisions of Ohio as well as the municipality in question). If each municipality can unilaterally declare its own tax policy on issues that affect taxpayers in multiple municipalities, then the constitutionally required oversight by the General Assembly is severely undermined. Moreover, this search for uniformity by state legislative oversight can be achieved without invading the sovereignty of the municipalities in local tax matters. The General Assembly cannot dictate how the municipalities can spend the tax revenue, whether to impose an income tax (*see Gesler, supra*) or the choice among permissible taxes (*e.g.* income versus property taxes). To allow each municipality to separately define the word “pension,” however, would severely undercut the authority of the General Assembly to hold municipal income taxes to a uniform standard by transferring the establishment of state tax policy from the Ohio General Assembly to the individual municipalities.

**I. The Standard Of Review Employed By The BTA In Tax Cases Reflects The Assignment Of The Burden Of Proof And Not A Limited, Deferential Review.**

The proper standard of review to be applied by the BTA in reviewing MBOA decisions properly can be viewed as the assignment of the burden of proof. The BTA’s standard of review is not the limited standard of review that an appeals court or this court would apply to fact-finding of the BTA, which is deferential so long as the BTA’s determination is supported by reliable and probative evidence. *Satullo, supra* ¶ 14. In the context of an appeal of real-property tax values to the court of common pleas, this Court described the tax appeal as providing a **decision de novo but not an original action or trial de novo.** *Black v. Bd. of Revision of*

*Cuyahoga Cty.*, 16 Ohio St.3d 11, 14, 475 N.E.2d 1264 (1985). Likewise, the BTA is required to provide a de novo decision while not free to disregard the proceedings at the MBOA. The concept of a deferential review, on the other hand, is wholly incompatible with the BTA's obligation to make factual findings and determine the appeal.

When appealing the decision of the MBOA, either the taxpayer or the taxing authority bears the burden of proof to show that the decision of the MBOA is unreasonable or unlawful. Absent meeting that burden, the decision of the MBOA should be affirmed. The assignment of the burden of proof upon the one challenging the decision of the MBOA, however, does not thereby create a deferential standard of review.

In *Tetlak v. Village of Bratenahl*, 92 Ohio St.3d 46, 2001-Ohio-129, the Court described the meaning of the presumptively valid standard and the requirement that the determination must be shown to be "clearly unreasonable or unlawful" in terms of an allocation of the burden of proof. *Id.* at 51-52. This Court's decision in *Tetlak* is entirely consistent with decades of tax cases in which the BTA or the common pleas court require the one challenging the taxing authority to shoulder the burden of proof while not requiring the BTA or common pleas court to use a deferential standard of review.

Likewise, nothing in the allocation of the burden of proof deprives either the common pleas court or the BTA of the authority to decide legal issues. No requirement exists in either the statutes or case law that supports a deferential review on legal questions beyond the obligation to affirm the decision of the taxing authority (MBOA or Tax Commissioner) absent the one appealing the decision meeting the burden of proof.

#### **IV. Conclusion**

The creation of a deferential standard of review in tax cases would be a very significant departure from both the manner in which tax matters have been reviewed by the BTA and the

manner in which municipal tax issues have been considered by common pleas courts for many decades. The General Assembly determined that local municipal income tax issues should be heard in the same manner as state income and other tax issues. The General Assembly operated within its Constitutional prerogative when making that determination. The BTA does not defer to the local MBOA on the latter's finding of facts or conclusions of law. The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We certify that a copy of this Merit Brief of Appellees was served this 4th day of November 2014 by electronic mail and first class U.S. Mail, postage prepaid, upon the following:

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## APPENDIX

### **1.42 Common, technical or particular terms.**

Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

Effective Date: 01-03-1972

### **2506.01 Appeal from decisions of agency of political subdivisions.**

(A) Except as otherwise provided in sections 2506.05 to 2506.08 of the Revised Code, and except as modified by this section and sections 2506.02 to 2506.04 of the Revised Code, every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505. of the Revised Code.

(B) The appeal provided in this section is in addition to any other remedy of appeal provided by law.

(C) As used in this chapter, "final order, adjudication, or decision" means an order, adjudication, or decision that determines rights, duties, privileges, benefits, or legal relationships of a person, but does not include any order, adjudication, or decision from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority if a right to a hearing on such appeal is provided, or any order, adjudication, or decision that is issued preliminary to or as a result of a criminal proceeding.

### **5717.02 Appeal from final determination by tax commissioner or county auditor - procedure - hearing.**

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

redetermination is required by law to be given. Appeals from a decision of the tax commissioner or county auditor concerning an application for a property tax exemption may be taken to the board of tax appeals by the applicant or by a school district that filed a statement concerning that application under division (C) of section 5715.27 of the Revised Code. Appeals from a redetermination by the director of job and family services under section 5733.42 of the Revised Code may be taken by the person to which the notice of the redetermination is required by law to be given under that section.

(B) The appeals shall be taken by the filing of a notice of appeal with the board, and with the tax commissioner if the tax commissioner's action is the subject of the appeal, with the county auditor if the county auditor's action is the subject of the appeal, with the director of development services if that director's action is the subject of the appeal, or with the director of job and family services if that director's action is the subject of the appeal. The notice of appeal shall be filed within sixty days after service of the notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner, property tax exemption determination by the commissioner or the county auditor, or redetermination by the director has been given as provided in section 5703.37, 5709.64, 5709.66, or 5733.42 of the Revised Code. The notice of appeal may be filed in person or by certified mail, express mail, facsimile transmission, electronic transmission or by authorized delivery service. 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. 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 to it and incorporated in it by reference a true copy of the notice sent by the commissioner, county auditor, or director to the taxpayer, enterprise, or other person of the final determination or redetermination complained of, but failure to attach a copy of that notice and to incorporate it by reference in the notice of appeal does not invalidate the appeal.

(C) A notice of appeal shall contain a short and plain statement of the claimed errors in the determination or redetermination of the tax commissioner, county auditor, or director 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, the tax commissioner, county auditor, or the director, as appropriate, shall certify to the board a transcript of the record of the proceedings before the commissioner, auditor, or director, together with all evidence considered by the commissioner, auditor, or director in connection with the proceedings. Those appeals or applications may be heard by the board at its office in Columbus or in the county where the appellant resides, or it

may cause its examiners to conduct the hearings and to report to it their findings for affirmation or rejection.

(E) The board may order the appeal to be heard upon the record and the evidence certified to it by the commissioner, county auditor, or director, but upon the application of any interested party the board shall order the hearing of additional evidence, and it may make an investigation concerning the appeal that it considers proper. An appeal may proceed pursuant to section 5703.021 of the Revised Code on the small claims docket if the appeal qualifies under that section.

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

Amended by 129th General Assembly File No.64, HB 225, §1, eff. 3/22/2012.

Effective Date: 09-06-2002

**5703.02 [Effective Until 10/11/2015] Board of tax appeals - powers and duties.**

There is hereby created the board of tax appeals, which shall exercise the following powers and perform the following duties:

(A) Exercise the authority provided by law to hear and determine all appeals of questions of law and fact arising under the tax laws of this state in appeals from decisions, orders, determinations, or actions of any tax administrative agency established by the law of this state, including but not limited to appeals from:

(1) Actions of county budget commissions;

(2) Decisions of county boards of revision;

(3) Actions of any assessing officer or other public official under the tax laws of this state;

(4) Final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by him;

(5) Adoption and promulgation of rules of the tax commissioner.

(B) Appoint a secretary of the board of tax appeals, who shall serve in the unclassified civil service at the pleasure of the board, and any other employees as are necessary in the exercise of the powers and the performance of the duties and functions that the board is by law authorized and required to exercise, and prescribe the duties of all employees, and to fix their compensation as provided by law;

(C) Maintain a journal, which shall be open to public inspection and in which the secretary shall keep a record of all of the proceedings and the vote of each of its members upon every action taken by it;

(D) Adopt and promulgate, in the manner provided by section 5703.14 of the Revised Code, and enforce all rules relating to the procedure of the board in hearing appeals it has the authority or duty to hear, and to the procedure of officers or employees whom the board may appoint; provided that section 5703.13 of the Revised Code shall apply to and govern the procedure of the board.

Effective Date: 03-17-1989

**5703.03 Appointment of members of board of tax appeals - terms of office.**

The board of tax appeals shall be composed of three members, not more than two of whom shall be affiliated with the same political party. The governor, with the advice and consent of the senate, shall appoint three members of the board of tax appeals. At least two members of the board shall have been admitted to practice as attorneys at law in this state and have, for a total of six years preceding their appointments, engaged in the practice of Ohio tax law in this state.

Each of the members of the board shall give bond, conditioned according to law, payable to the state in the penal sum of five thousand dollars, with surety to be approved by the governor. The bond shall be filed in the office of the secretary of state.

Terms of office shall be for six years, commencing on the ninth day of February and ending on the eighth day of February. Each member shall hold office from the date of his appointment until the end of the term for which he was appointed. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall hold office for the remainder of the unexpired term. Any member shall continue in office subsequent to the expiration date of his term until his successor takes office, or until a period of sixty days has elapsed, whichever occurs first.

Each employee of the board shall devote his entire time to the duties of his office and shall not hold any position of trust or profit or engage in any occupation, employment, or business interfering with or inconsistent with his duty as an employee. No member or employee shall serve on or under any committee of any political party.

Each member of the board, the secretary, and attorney examiners of the board may, for his purposes of the laws relating to taxation, administer oaths, certify to official acts, issue subpoenas, compel the attendance of witnesses, and the production of books, accounts, papers, records, documents, and testimony. In the case of disobedience or refusal on the part of any person to comply with a subpoena issued under this section, and upon the request of the board of tax appeals, the attorney general or the prosecuting attorney of any county shall take appropriate action on behalf of the board for the purpose of enforcing the subpoena or for imposition of sanctions for violation of the subpoena, or both, as requested by the board.

Effective Date: 03-17-1989

**5715.02 Members of county board of revision - hearing board - quorum - power to administer oaths.**

The county treasurer, county auditor, and a member of the board of county commissioners selected by the board of county commissioners shall constitute the county board of revision, or they may provide for one or more hearing boards when they deem the creation of such to be necessary to the expeditious hearing of valuation complaints. Each such official may appoint one qualified employee from the official's office to serve in the official's place and stead on each such board for the purpose of hearing complaints as to the value of real property only, each such hearing board has the same authority to hear and decide complaints and sign the journal as the board of revision, and shall proceed in the manner provided for the board of revision by sections 5715.08 to 5715.20 of the Revised Code. Any decision by a hearing board shall be the decision of the board of revision.

A majority of a county board of revision or hearing board shall constitute a quorum to hear and determine any complaint, and any vacancy shall not impair the right of the remaining members of such board, whether elected officials or appointees, to exercise all the powers thereof so long as a majority remains.

Each member of a county board of revision or hearing board may administer oaths.

Amended by 128th General Assembly File No.9, HB 1, §101.01, eff. 10/16/2009.

Effective Date: 11-19-1969

**5717.02 Appeal from final determination by tax commissioner or county auditor - procedure - hearing.**

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

(B) The appeals shall be taken by the filing of a notice of appeal with the board, and with the tax commissioner if the tax commissioner's action is the subject of the appeal, with the county auditor if the county auditor's action is the subject of the appeal, with the director of development services if that director's action is the subject of the appeal, or with the director of job and family services if that director's action is the subject of the appeal. The notice of appeal shall be filed within sixty days after service of the notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner, property tax exemption determination by the commissioner or the county auditor, or redetermination by the director has been given as provided in section 5703.37, 5709.64, 5709.66, or 5733.42 of the Revised Code. The notice of appeal may be filed in person or by certified mail, express mail, facsimile transmission, electronic transmission or by authorized delivery service. 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. 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 to it and incorporated in it by reference a true copy of the notice sent by the commissioner, county auditor, or director to the taxpayer, enterprise, or other person of the final determination or redetermination complained of, but failure to attach a copy of that notice and to incorporate it by reference in the notice of appeal does not invalidate the appeal.

(C) A notice of appeal shall contain a short and plain statement of the claimed errors in the determination or redetermination of the tax commissioner, county auditor, or director 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, the tax commissioner, county auditor, or the director, as appropriate, shall certify to the board a transcript of the record of the proceedings before the commissioner, auditor, or director, together with all evidence considered by the commissioner, auditor, or director in connection with the proceedings. Those appeals or applications may be heard by the board at its office in Columbus or in the county where the appellant resides, or it may cause its examiners to conduct the hearings and to report to it their findings for affirmation or rejection.

(E) The board may order the appeal to be heard upon the record and the evidence certified to it by the commissioner, county auditor, or director, but upon the application of any interested party the board shall order the hearing of additional evidence, and it may make an investigation concerning the appeal that it considers proper. An appeal may proceed pursuant to section

5703.021 of the Revised Code on the small claims docket if the appeal qualifies under that section.

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

Amended by 129th General Assembly File No.64, HB 225, §1, eff. 3/22/2012.

Effective Date: 09-06-2002

**OHIO BOARD OF TAX APPEALS**

David A. Ladd,	)	CASE NO. 2008-K-2371
	)	
Appellant,	)	(MUNICIPAL INCOME TAX)
	)	
vs.	)	DECISION AND ORDER
	)	
City of Oregon and City of Oregon Income	)	
Tax Board of Review,	)	
	)	
Appellees.	)	

APPEARANCES:

For the Appellant - David A. Ladd, pro se  
12293 County Road K  
Wauseon, Ohio 43567

For the Appellees - Paul Goldberg  
Law Director  
City of Oregon  
5330 Seaman Road  
Oregon, Ohio 43616

Entered **MAR 29 2011**

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

Through the present appeal, appellant challenges a decision of the city of Oregon Income Tax Board of Review (“MBOA”)<sup>1</sup> denying his claimed deduction for certain expenses listed on federal form 2106-EZ, entitled “Unreimbursed Employee Business Expenses.” We proceed to consider this matter upon appellant’s notice of appeal, the transcript (“S.T.”) certified pursuant to R.C. 5717.11, the hearing conducted before this board, and the written argument submitted by the parties.

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<sup>1</sup> Although the city of Oregon has established a “board of review” for purposes of providing a forum for considering income tax appeals challenges, R.C. 718.11 and 5717.011 refer to such an entity as a “municipal board of appeal.” Accordingly, for consistency, we shall refer to an entity issuing decisions under R.C. 718.11 as a municipal board of appeal (“MBOA”), regardless of the actual name selected by the municipality.

Appellant, a resident of the city of Wauseon, Ohio, testified that he works as a union millwright and has no permanent employer or worksite. On a monthly basis, he telephones a union hall job call list to ascertain the availability and location of employment. During tax year 2007, appellant performed work for two employers, i.e., Gem Industrial Inc. and Washington Group International, on projects located in the city of Oregon and as a result was required to file an income tax return in the city of Oregon. S.T., Attachments A and C. On his city income tax return, appellant claimed deduction for unreimbursed business expenses which he calculated using the federal form 2106 that had been attached to his federal tax form 1040, Schedule A. Id. Through a separate statement, appellant also set forth the manner by which he computed the amount of his unreimbursed business expense attributable to the city of Oregon. S.T., Attachment C. Through a May 7, 2008 letter, Oregon's tax department advised appellant that because his resident city was considered part of the "metropolitan area" of Oregon, his mileage was deemed a nondeductible commuting expense and therefore his reported form 2106 expense was disallowed. S.T., Attachment B.

Appellant appealed to the MBOA, arguing that Wauseon is outside the Oregon metropolitan area. In its decision, the MBOA commented as follows:

"In its discussion, the Board referred back to a similar case from July 23, 2008, which also dealt with 2106 expenses. At the heart of both cases is the fact that the IRS refers to 'metropolitan area' without ever giving a concise definition of what the term actually means. One of the results of the July case was the agreement by Board members that Oregon would define its 'metropolitan area' as 'any location within 60 miles from the site where work is being performed, to be arrived at by entering the home address and work address in the computer program, Mapquest, and choosing the "Shortest Distance" option for routing.'

“By applying this definition to Mr. Ladd’s situation, the distance was found to be approximately 43 miles, which meets Oregon’s definition of ‘metropolitan area’.

“Using this criterion, the Board unanimously agreed that since Mr. Ladd lives within the 60-mile guideline established in the July 23<sup>rd</sup> ruling, his mileage would qualify as ‘commuting’ and therefore would not be allowed as a deductible expense.” S.T., Attachment G.

From the preceding decision, appellant appealed to this board, maintaining that the definition of metropolitan area adopted by the city of Oregon is inconsistent with federal publications, unrepresentative of traffic patterns in the area, and inconsistent with definitions adopted by other municipalities in northwestern Ohio. Initially, we refer to the decision in *Cincinnati Bell Tel. Co. v. Cincinnati* (1998), 81 Ohio St.3d 599, wherein the court described the authority of municipalities to impose an income tax:

“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, \*\*\*.” *Id.* at 602. (Parallel citations omitted.)

In this context, R.C. 718.01 provides in pertinent part:

“(A) As used in this chapter:

“\*\*\*

“(4) ‘Form 2106’ means internal revenue service form 2106 filed by a taxpayer pursuant to the Internal Revenue Code.

“\*\*\*

“Nothing in this chapter shall be construed as limiting or removing the ability of any municipal corporation to administer, audit, and enforce the provisions of its municipal income tax.

“\*\*\*

“(F) If an individual’s taxable income includes income against which the taxpayer has taken a deduction for federal income tax purposes as reportable on the taxpayer’s form 2106, and against which a like deduction has not been allowed by the municipal corporation, the municipal corporation shall deduct from the taxpayer’s taxable income an amount equal to the deduction shown on such form allowable against such income, to the extent not otherwise so allowed as a deduction by the municipal corporation.”

Internal Revenue Service Publication 463 offers guidance regarding those ordinary and necessary business expenses which may be included among those itemized deductions on an individual’s federal income tax return using federal form 2106. With regard to business transportation expenses, this publication states, in pertinent part:

“**No regular place of work.** If you have no regular place of work but ordinarily work in the metropolitan area where you live, you can deduct daily transportation costs between home and a temporary work site outside that metropolitan area.

“Generally, a metropolitan area includes the area within the city limits and the suburbs that are considered part of that metropolitan area.

“You cannot deduct daily transportation costs between your home and temporary work sites within your metropolitan area. These are nondeductible commuting expenses.” Id. at 14.

Pursuant to Oregon’s Income Tax Code 193.03(a)(2), a tax is imposed on the salaries, wages, and other compensation of nonresidents for work done or services performed or rendered in the city of Oregon. Ex. 4. Oregon Income Tax Code 193.031 expressly exempts from taxation certain sources of income, providing in pertinent part:

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

“\*\*\*

“(1) The amount of unreimbursed employee business expenses (2106 Expenses) the employee computed as an itemized deduction after reduction by 2% of the employee’s AGI on his federal tax return. Taxpayer must furnish copy of the Form 2106 and Schedule ‘A’ of Form 1040 as filed with IRS. This deduction must be allocated first to the municipality where the employment occurred and credit will be given for any tax paid to the municipality of employment IAW Section 193.15.” Id.; S.T., Attachment I.

Patricia Wast, commissioner of taxation for the city of Oregon since 2002, testified during this board’s hearing that a large part of the city of Oregon’s tax base is industrial and, as a result, significant construction is ongoing. She indicated that in 2007, several companies engaged in very large construction projects, resulting in hundreds of construction workers being hired on a temporary basis to perform work on these projects. Although the city’s historic practice had been to accept reported form 2106 expenses, due to an increase for tax year 2007 of reported form 2106 expenses by nonresident income tax return filers, the city elected to undertake a more critical examination of such claims. Wast testified that because the IRS did not provide a clear definition of what may be considered a

“metropolitan area,” the city looked to several sources to create its own definition, e.g., Webster’s dictionary, the census bureau, Wikipedia, and ultimately adopted a “rule of thumb” that approximately sixty miles would be an hour’s drive and travel within that distance would be a reasonable commute. Wast testified that this “rule” had been applied in another appeal previously appealed to the MBOA and that it had been approved. Apparently the case to which Wast referred, included within the transcript, is a redacted decision which reads as follows:

“The Board members concluded that:

“(1) Due to the fact that [redacted] works in the construction business and gets his work assignments from the union hall, he has no regular job location. The IRS is clear in stating that the union hall is not considered to be the employer.

“(2) The IRS language on ‘metropolitan area’ leaves it open to multiple interpretations. It was agreed that Oregon shall define its ‘metropolitan area’ as ‘any location within 60 miles from the site where work is being performed, to be arrived at by entering the home address and work address into the computer program, Mapquest, and choosing the ‘Shortest Distance’ option for routing. If the result is greater than 60 miles, area lodging is considered reasonable and will be included as a 2106 deduction, along with meals (either using actual receipts or the standard daily rate for the area), as well as roundtrip mileage from the individual’s home to the hotel. Mileage from the hotel to the worksite and back is considered commuting mileage and will not be included in the 2106 deduction.” S.T., Attachment F.

The city of Oregon, apparently in reliance upon the preceding decision, although unclear when or in what manner, memorialized the MBOA’s acceptance of the proffered “rule of thumb,” referencing it in a document appearing in the transcript. S.T., Attachment C.

While the parties assert the utility of their respective definitions of a “metropolitan area,” each recognizing the lack of clarity and the validity of the other’s position, we conclude the city’s informal adoption of a “rule of thumb” constitutes an improper

restriction upon the terms set forth in the city's code. 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 App.2d 178, 181-182, affirmed (1971), 25 Ohio St.2d 101.”). Cf. *Strongsville Bd. of Edn. v. Wilkins*, 108 Ohio St.3d 115, 2006-Ohio-248; *City of Heath v. Licking Cty. Regional Airport Authority* (1967), 16 Ohio Misc. 69. Wast admitted it was only after the city saw an increase in form 2106 expense claims that it adopted, in an apparently informal manner, a “rule of thumb” that served to place further conditions upon the city’s code provisions so as to deny appellant’s claimed deductions which would have been previously deemed acceptable.

Under these circumstances, we find appellant’s arguments well taken and it is the decision and order of this board that the decision of the Oregon Tax Board of Review must be, and hereby is, reversed.

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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 M ter, Board Secretary