

IN THE SUPREME COURT OF OHIO

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

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

Barbara A. Langhenry (0038838)
Director of Law
Linda L. Bickerstaff (0052101) (COUNSEL OF RECORD)
Assistant Director of Law
City of Cleveland Department of Law
205 W. St. Clair Avenue
Cleveland, Ohio 44113
(216) 664-4406
(216) 420-8299 (facsimile)
lbickerstaff@city.cleveland.oh.us

COUNSEL FOR AMICUS CURIAE,
THE CITY OF CLEVELAND

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REPLY TO APPELLEES' ARGUMENTS

The Tenth District's finding that no standard of review exists for the BTA to follow in considering administrative appeals from municipal boards of appeal simply cannot stand. Taxpayers' brief on this issue is, to say the least, nothing more than an effort to mislead, complicate and confuse the issue here where they clearly seem to concede that the standard of review from municipal boards of tax appeals ("municipal boards") to the Ohio Board of Tax Appeals ("BTA") should be the same standard that the BTA uses for appeals from the state Tax Commissioner but thereafter argues completely against this standard of review being applied to such appeals. *See* Brief of Appellees at 5.

Amici believes that the standard of review that the BTA uses in appeals from municipal boards should be the same as in appeals from the Tax Commissioner. While Taxpayers want to debate whether the BTA actually utilized that standard of review in this case, the only issue before the Court now is whether there is a standard of review in appeals from municipal boards to the BTA or whether the Tenth District is correct in finding that there is no standard of review and the BTA is free to make "its own adjudication of the appeal" with no deference to the municipal board decision. *See* Court of Appeals Decision at ¶24. (Appx. at 32-33.)

It would also be noted that Taxpayers at the very outset of their brief make the claim that "[t]he substantive determination that the exemption for pensions in the City of Shaker Heights municipal income tax ordinance includes Supplemental Executive Retirement Plans is final." Brief of Appellees at 1. If that were true then this appeal would be nothing more than an academic endeavor as the case would be moot. This is a self-serving pronouncement that means nothing and is wholly disingenuous.

A. There Is No Merit To Taxpayers' Claim That The Tenth District Did Not Find That No Standard Of Review Exists In Appeals From Municipal Boards To The BTA.

Taxpayers claim "the Court of Appeals [] [n]ever maintained that the absence of an express standard of review in R.C. 5717.011 means that no standard of review exists[.]" Brief of Appellees at 5. The Court of Appeals' Decision, however, speaks for itself.

In its decision, the Court of Appeals found (i) that "[R.C. 5717.011(C) does not set forth a standard of review;" (ii) that "[t]here is no provision in R.C. 5717.011(C) that suggests the BTA must give any deference to a [municipal] board [] decision;" (iii) and that "deference to a [municipal] board [] decision is illogical when the BTA hears evidence not presented to the [municipal] board []." Court of Appeals Decision at ¶¶22; 24. (Appx. at 31; 32-33.) The opinion is clear that the BTA was free to conduct its own adjudication of the appeal with no deference whatsoever to the municipal board.

B. Taxpayers Clearly Engage In Double-Talk Concerning The Proper Standard Of Review In Appeals From Municipal Boards To The BTA.

While Taxpayers *seem* to concede that the proper standard of review in appeals from municipal boards to the BTA is the same standard used in appeals from the state tax commissioner to the BTA, they clearly engage in double-talk. Otherwise, Taxpayers would not make all their different arguments claiming no deference is warranted.

The Court has been very clear as to the standard of review in appeals from the Tax Commissioner to the BTA: "The Tax Commissioner's findings are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful." *Hatchadorian v. Lindley*, 21 Ohio St.3d 66, 488 N.E.2d 145 (1986), paragraph one of the syllabus. Further, this

Court has previously found that “[t]his reasoning is applicable at the municipal level” as well. *Tetlak v. Village of Bratenahl*, 92 Ohio St.3d 46, 51-52, 748 N.E.2d 51, 56, 2001-Ohio-129.

One clear example of Taxpayers’ double talk concerns their observation that “[a] comparison of R.C. 5717.011 (governing appeals from [municipal boards] and R.C. 5717.011(C) (governing appeals from the Tax Commissioner) confirms that the municipal tax appeals was modeled after the state tax appeal.” See Brief of Appellees at 3. This is true. R. C. 5717.011(C) provides as follows:

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

(Appx. at 44.) Similarly, the last paragraph of R.C. 5717.02 reads:

The [BTA] may order the appeal to be heard upon the record and the evidence certified to it by the [state tax] 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.

(Appx. at 48). And Taxpayers are clearly right in their conclusion that “[t]he parallel structures of R.C. 5717.011 and R.C. 5717.02 strongly support *** apply[ing] the same standard of review in both types of appeals.” See Brief of Appellees at 3. However, while Taxpayers specifically recognize that “[b]oth appeal statutes require the convening of a hearing for taking additional evidence if any party so requests[,]” Taxpayers turn right around and claim that deference to a municipal board is illogical because the BTA may hear evidence not presented to the municipal board. See Brief of Appellees at 3. What is illogical is Taxpayers’ argument since the same can clearly be true in an appeal from the Tax Commissioner as well.

The Court, clearly, should not rely on this faulty premise as a basis for affirming the Court below.

C. The Proper Standard Of Review Is That The Municipal Board's Decision Is Presumptively Valid Absent A Showing That The Decision Is Clearly Unreasonable Or Unlawful.

If one agrees that the standard of review in appeals from municipal boards to the BTA is the same standard used in appeals from the state tax commissioner as Taxpayers claim they do, the proper standard of review is clear: the decision of the municipal board is presumptively valid absent a showing that the decision is clearly unreasonable or unlawful. The problem for Shaker and Amici in this case is that the BTA made no finding that the decision by the Shaker Board was *unlawful*. The BTA also made no finding that said decision was *unreasonable*. What then was the basis for the BTA to reverse the Shaker Board decision?

The dissent correctly explains that

the proper standard of review was not employed by the BTA which conducted a hearing with no deference to factual findings, or interpretation of Shaker Heights' city code by the Shaker Heights Board. The Shaker Heights Board's findings are required to be shown to be clearly unreasonable [or unlawful] for the BTA to draw a different conclusion. This includes the reading of Shaker Heights' Code of Ordinances [] which originally found [Taxpayer's] SERP not to be a pension and exempt from the municipal income tax.

Decision ¶144. (Appx. at 38-39.) Nowhere in Taxpayers' 27-page brief do they *ever* address the fact that the BTA made no findings that the decision of the Shaker Board was either unreasonable or unlawful although there is plenty of discussion about the BTA applying the correct standard of review. How that is possible without such a finding is unknown.

D. Taxpayers Wholly Ignore That Presumptively Valid Creates A Deferential Standard Against Which Challenges To Such Decisions Must Be Considered.

Taxpayers claim on page 5 of their brief that “the BTA does not defer to the [municipal] board either as to [] fact-finding or legal conclusions[.]” Of course, no authority whatsoever is given to support this claim. Taxpayers completely ignore the fact that presumptively valid decisions create a deferential standard against which challenges to such decisions must be considered. And the standard of review here is not just “presumptively valid” but presumptively valid *absent* a demonstration that the decision is clearly unreasonable or unlawful.

Taxpayers are right that this case involved “the interpretation of [a] Shaker Heights ordinance.” See Brief of Appellee at 8. The BTA was required to review the Shaker Board decision under a deferential standard of review. Unless the BTA finds that the Shaker Board’s interpretation of the ordinance is clearly unreasonable or unlawful, the BTA was required to let the Shaker Board decision stand.

E. The Court Must Reject All Of Taxpayers’ Rhetoric And Red Herrings As They Do Nothing But Confuse An Otherwise Straight-Forward Issue.

The Court accepted jurisdiction to hear this case and allowed the appeal on Shaker’s Proposition of Law No. II concerning the proper standard of review to apply in appeals from municipal boards to the BTA. That’s the only issue here.

Although Taxpayers give lip service to the fact that the same standard of review that applies to appeals from the Tax Commissioner to the BTA should apply here, they clearly would like the Court to adopt something other than that standard. Taxpayers’ countless excuses to do so must be rejected.

As noted earlier, one of Taxpayers' excuses is the fact that the BTA is authorized to accept additional evidence in appeals from municipal boards. However, as shown, the language in the statute dealing with appeals from the Tax Commissioner to the BTA is virtually the same and also allows the BTA to accept additional evidence. Moreover, common pleas courts can accept additional evidence in R.C. 2506.01 appeals. *Cincinnati Bell, Inc. v. Village of Glendale*, 42 Ohio St.2d 368, 370, 328 N.E.2d 808, 809 (1975) ("R.C. 2506.01 *** makes liberal provision for the introduction of new or additional evidence"). The fact that the BTA can receive additional evidence in an appeal from a municipal board to the BTA is no excuse to turn said appeal into a de novo appeal for the BTA with no deference to the municipal board.¹

Taxpayers are also mixing apples and oranges in trying to compare this Court's standard of review in an appeal from the BTA to it to the situation here with their claim that "[i]t would serve no purpose for the BTA to defer to the [municipal board] on legal questions when the Court does not defer to the BTA's legal conclusions." See Brief of Appellees at 3. The BTA is clearly not a "court" which has been conferred judicial authority under the Ohio Constitution but "a creature of statute [] limited to the powers with which it is invested." See *Steward v.*

¹ Amici would note that the BTA's current rules appear to attempt to limit the taking of new evidence as shown by the following:

(A) Appeals pending before the board will be decided upon the record developed before the lower tribunal *unless new evidence has become available since the lower tribunal's proceedings and the parties request a hearing in order to present the new evidence.* The board, as required by statute or at its discretion, may schedule an appeal for hearing and issue written notice thereof to the parties or their counsel of record by ordinary mail or electronic means.

OAC 5717-15 (emphasis added).

Evatt, 143 Ohio St. 547, 54 N.E.2d 159, paragraph one of the syllabus (1944). Like the municipal board, “the BTA is [only] a quasi-judicial body when discharging its adjudication duties.” *TBC Westlake, Inc. v. Hamilton Cty. Bd. of Revision*, 81 Ohio St.3 58, 1998-Ohio-445, 689 N.E.2d 32, 35. While the BTA has been given the authority to hear and determine tax appeals, it is not clothed with judicial power to declare what the law is or its construction.

And regarding Taxpayer’s claim that legal issues are to be determined de novo, Taxpayer also completely ignores the Court’s *Tetlak* decision. Although *Tetlak* was a R.C. 2506.01 appeal, it is instructive in this regard. The issue in that case was whether certain income constituted intangible income under former R.C. 718.01(F)(3) and therefore was preempted from municipal income tax. 92 Ohio St.3d at 47-48 748 N.E.2d at 53. Since this was a matter of statutory construction, the case presented a question of law. See *Lang v. Ohio Det. Of Job & Family Servs.*, 134 Ohio St.3d, 2012-Ohio-5366, 982 N.E.2d 636, ¶12 (“A question of statutory construction presents an issue of law”). Nevertheless, this Court clearly held in *Tetlak* that the findings of the municipal board were presumptively valid, absent a demonstration that those findings were clearly unreasonable or unlawful. 92 Ohio St.3d at 51-52, 748 N.E.2d at 56.

Taxpayers argue on page 7 of their brief that “[i]n 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 the evidence exists to negate the auditor’s valuation.” Again, Taxpayers are mixing apples and oranges. As Amici noted in its opening brief, the standard of review in appeals from county boards of review is substantially different than most administrative appeals. This is because the duty of the BTA upon an appeal from a decision of a board of revision is to “determine the

taxable value of property.” R.C. 5717.03(B). See Brief of Amici at 11-12. Taxpayers’ citation to this Court’s decision in *WCI Steel, Inc. v. Testa*, 129 Ohio St.3d 256, 2011-Ohio-3280, 951 N.E.2d 421 also does not assist them here. See Brief of Appellees at 6. It too is a valuation case but for purposes of the personal property tax. Said case is subject to the same reasoning applicable to the board of revision cases.

Taxpayers also argue on page 7 of their brief that the BTA was right not to “defer to the witnesses presented at the [Shaker Board] as to the intent of the Shaker Heights ordinance.” The presumptively valid standard of review however, is clearly applied to the decision of the municipal board not to witness testimony. This too is a spurious argument.

F. Deference Must Be Given To The Interpretation Reached By A Municipal Board Which Has Been Delegated With The Responsibility Of Hearing Taxpayer Appeals.

State law requires each municipal corporation which imposes an income tax to maintain a municipal board to hear the appeal of a taxpayer who may be aggrieved by a decision of the tax administrator. R.C. 718.11. (Appx. at 43.) The municipal board is required to hold a hearing on any such appeal. *Id.* The municipal board may affirm, reverse or modify all or part of the tax administrator’s decision and must issue a final decision within ninety days of hearing the appeal. *Id.* Either the taxpayer or tax administrator may appeal the decision of the municipal board to the BTA or to the court of common pleas. *Id.*; R.C. 5717.011(B). (Appx. at 44.)

Clearly, the municipal board is charged with hearing all appeals within the municipality. Any further appeal of the matter may be taken to either the BTA or the common pleas court. *Id.*

Moreover, this Court has historically held that actions of a board or agency are presumed valid as well. *Wheeling Steel Corporation v. Evatt*, 143 Ohio St. 71, 54 N.E.2d 132

(1944), paragraph 7 of the syllabus (“The action of an administrative officer or board within the limits of the jurisdiction conferred by law is presumed, in the absence of proof to the contrary, to be valid and to have been done in good faith and in the exercise of sound judgment”); *see, e.g., Cleveland v. Budget Comm.*, 50 Ohio St.2d 97, 99, 362 N.E. 2d 999 (1977) (reviewing court must presume that the decision of an administrative agency is valid and was reached in a sound manner). And this Court has consistently held that “if a statute [or ordinance] provides authority for an administrative agency to perform a specific act, but does not provide the details by which the act should be performed” when interpreting statutes “courts *** must give due deference to an administrative interpretation formulated by [the] agency that has accumulated substantial expertise” and “has been delegated the responsibility of implementing the legislative command.” *Frisch’s Restaurants, Inc. v. Ryan*, 121 Ohio St.3d 18, 2009-Ohio-2, 901 N.E.2d 777, ¶16 quoting *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282, 287, 289, 750 N.E.2d 130 (2001); *Swallow v. Indus. Comm.*, 36 Ohio St.3d 55, 521 N.E.2d 778.

Deference must be given to the interpretation reached by a municipal board which has been delegated the responsibility of hearing all appeals within the municipality. *See Jones Metal Products Co. v. Walker*, 29 Ohio St.2d 173, 181, 281 N.E.2d 1 (1972); *Ohio Bus Line Co. v. Bowers*, 1 Ohio App.2d 122, 126, 200 N.E.2d 688 (1st Dist. 1964). In addition to being delegated this responsibility, municipal boards will certainly have more familiarity with the intent of the municipality’s legislative authority as to the tax code than either the BTA or the common pleas court. A common pleas court may clearly not simply substitute its judgment for that of the municipal board in a R.C. 2506.01 appeal. *Dudukovich v. Lorain Metro Housing Authority*, 58

Ohio St.2d 202, 207, 398 N.E.2d 1113, 1117. The BTA certainly should not be allowed to do so either under the guise of a de novo review.

G. The Power To Levy Municipal Income Taxes Is Delegated By The Ohio Constitution Solely To Municipal Legislative Authorities—Not The Ohio General Assembly.

Article XVIII, Section 3 of the Ohio Constitution provides: “Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” Shaker Heights is a home rule jurisdiction that has claimed its constitutionally granted powers. The grant of home rule power to municipalities has long been understood to include the taxing power. *State ex rel. Zielonka v. Carrel*, 99 Ohio St. 220, 227, 124 N.E. 134, 136 (1919) (“there can be no doubt that the grant of authority to exercise all powers of local government includes the power of taxation”).

There is no doubt that the General Assembly can restrict or limit the municipal taxing power. This, however, does not mean that the grant of municipal legislative authority flows through the General Assembly. The municipal taxing power flows directly from the Ohio Constitution. *See Dies Electric Co. v. City of Akron*, 62 Ohio St. 2d 322, 328, 405 N.E.2d 1026 (1980) (the General Assembly’s “reservation does not authorize the legislature to annul or curtail the powers expressly granted by the constitution”).

Because the municipal taxing power is derived directly from the Ohio Constitution the General Assembly can never truly mandate uniformity in municipal income tax matters. A recent case that illustrates this point is *Gesler v. City of Worthington income Tax Board of Appeals*, 138 Ohio St.3d 76, 2013-Ohio 4986, 2 N.E.2d 1177 where the issue was whether the statutory definition of net profits set forth in R.C. 718.01(A)(7) or the definition of net profits

provided by city ordinance governed for purposes of the city's income tax. This Court found that the ordinance controlled notwithstanding the fact that it conflicted with state law. *Id.* at ¶¶18-19.

There is no uniformity of municipal income tax matters in terms of what municipal ordinances and/or tax codes provide. Each ordinance or code must be evaluated on its own merit. Further, state law clearly recognizes the fact that a municipal income tax issue is often governed by the municipal law of a particular municipality. This explains why R.C. 5717.011(D) dealing with appeals from municipal boards to the BTA provides: "If an issue being appealed under this section is addressed in a municipal corporation's ordinance or regulation, the tax administrator, upon the request of the board of tax appeals, shall provide a copy of the ordinance or regulation to the board of tax appeals." (Appx. at 44.)

Taxpayers' uniformity argument clearly lacks merit as well.

CONCLUSION

For the reasons set forth in this Reply Brief and its Merit Brief, Amicus Curiae, City of Cleveland, urge this Court to reverse the judgment of the Tenth District Court of Appeals and remand the matter back to the Board of Tax Appeals to apply the proper standard of review.

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

By: /s/ Linda L. Bickerstaff
Linda L. Bickerstaff, Esq., (0052101)
Assistant Director of Law

Counsel for Amicus Curiae,
The City of Cleveland

CERTIFICATE OF SERVICE

I certify that a copy of this Reply Brief of Amicus Curiae City of Cleveland in Support of Defendants-Appellants was served by via email transmittal and by regular U.S. mail on William Gruber, Esq., 3400 Lee Road, Shaker Heights, Ohio 44120, counsel for the City of Shaker Heights Income Tax Board of Review and Matthew Rubino; Amy Arrighi, Esq., 10107 Brecksville Road, Brecksville, Ohio 44141, counsel for the Regional Income Tax Agency; Christopher J. Swift, Esq. 3200 PNC Center, 1900 East Ninth Street, Cleveland, Ohio 44114-3458, counsel for William E. MacDonald III and Susan W. MacDonald; and Richard C. Farrin, Zaino Hall & Farrin LLC, 41 South High Street, Suite 3600, Columbus, Ohio 43215, Counsel for Amici Curiae, The Ohio Chamber of Commerce and The Ohio Society of Certified Public Accountants on this 24th day of November 2014.

/s/ Linda L. Bickerstaff

Linda L. Bickerstaff,
Assistant Director of Law

Counsel for Amicus Curiae,
The City of Cleveland