

APPELLANTS' MEMORANDUM IN OPPOSITION TO
APPELLEES' MOTION TO DISMISS

I. INTRODUCTION

New York Frozen Foods, Inc. and Affiliates (“Appellants”) respectfully ask this Court to deny the Appellees’ Motion to Dismiss this appeal. Appellants properly and timely appealed the March 20, 2015 Decision and Order of the Ohio Board of Tax Appeals (“BTA”) in the case of *New York Frozen Foods, Inc. and Affiliates v. Bedford Heights Income Tax Board of Review and City of Bedford Heights Income Tax Administrator, et al.*, BTA Case No. 2012-55, entered upon the BTA’s journal of proceedings on March 20, 2015, in response to Appellants’ Motion for Reconsideration of the BTA’s initial Decision and Order entered on March 9, 2015. Appellants’ Notice of Appeal was timely filed on the twenty-first day from that March 20, 2015 Decision and Order.

The BTA’s March 20, 2015 Decision and Order (See **Ex. A.**, attached hereto) vacated the March 9, 2015 Decision and Order of the BTA (See **Ex. B.**, attached hereto). In the March 20, 2015 Decision and Order, the BTA stated, “we hereby vacate our prior decision and order [the March 9, 2015 Decision and Order] and proceed to issue the present decision and order [the March 20, 2015 Decision and Order].” Furthermore, in the March 20, 2015 Decision and Order, the BTA substantively changed the BTA’s March 9, 2015 Decision and Order, which had stated that the BTA disagreed with one of the Appellants’ claimed errors, to state that the BTA agreed with Appellants on that issue.

The Appellees’ Motion to Dismiss ignores the facts and procedural history of this case, relies upon inapposite cases, misconstrues the holdings of several cases, and fails to consider this Court’s decision in *National Tube Co. v. Ayres*, 152 Ohio St. 255, 89 N.E.2d 129 (1949). In *National Tube Co. v. Ayres*, this Court held as follows: when the BTA vacates its decision prior to an appeal being instituted with respect to that decision and prior to the expiration of the thirty-day appeal period to

appeal that decision, and issues a new decision, the time for filing a notice of appeal runs from the entry of the new decision.

II. STATEMENT OF THE RELEVANT FACTS AND THE CASE

Appellants filed refund claims with the City of Bedford Heights Tax Administrator (City Administrator) for overpaid municipal net profits tax. Appellants had initially filed separate tax returns, and then later timely filed amended tax returns as a consolidated group. On July 22, 2011, in a very brief decision containing almost no legal analysis, the City Administrator denied the refunds to the Appellants “because the rules and regulations adopted by the city of Bedford Heights prohibited the filing of amended returns to change the method of filing.”

Appellants appealed the City Administrator’s decision to the City of Bedford Heights Income Tax Board of Review (“Bedford Heights Board”), which was comprised of the mayor, the council president, and the assistant law director. In a two-page opinion, the Bedford Heights Board upheld the City Administrator’s denial of the Appellants’ refund claims, based largely on reliance of administrative rules that were never adopted by the City of Bedford Heights City Council.

Appellants then appealed the decision of the Bedford Heights Board to the BTA. In its notice of appeal to the BTA, Appellant specified nine errors with respect to the Bedford Heights Board’s decision. One of those claimed errors addressed the difference in the meaning of the phrase “method of accounting or apportionment of net profits” as compared to the phrase “method of filing.” Appellants’ notice of appeal to the BTA stated that filing an amended return on a consolidated basis is not a “change in the method of accounting or apportionment of net profits” and therefore is not disallowed by the City’s ordinances and regulations.

On March 9, 2015, the BTA issued a Decision and Order, which addressed two of the Appellants’ nine specifications of error, and which effectively ignored the Appellants’ other seven

specifications of error. The BTA Decision and Order indicated that the BTA disagreed with Appellants' specification of error that amending a return from a separate return to a consolidated return was not a change to the "method of accounting or apportionment" as used in the City's rules and regulations. Specifically, the BTA wrote, "[a]ppellants argue that filing amended consolidated returns is not a 'change in the method of accounting or apportionment of net profits.' We disagree."¹ See March 9, 2015 BTA Decision and Order at 4.

On March 18, 2015, Appellants filed a Motion for Reconsideration of the March 9, 2015 BTA Decision and Order. On March 20, 2015, the BTA issued a new Decision and Order, in which the BTA wrote, in part, "we hereby vacate our prior decision and order and proceed to issue the present decision and order * * *." The March 20, 2015 Decision and Order changed the BTA's previous decision on a substantive issue. While the initial BTA Decision and Order stated that the BTA *disagreed* with Appellants' argument that filing amended consolidated returns is not a "change in the method of accounting or apportionment of net profits," the BTA vacated that decision and issued a new Decision and Order stating that the BTA *agreed* with Appellants' argument.

The BTA's March 20, 2015 Decision and Order vacating the March 9, 2015 Decision and Order occurred prior to the expiration of R.C. 5717.04's thirty-day deadline for the parties to file a notice of appeal to this Court and prior to any party filing a notice of appeal to this Court (or a court of appeals) with respect to the BTA's March 9, 2015 Decision and Order.

On April 10, 2015, Appellants timely appealed the BTA's March 20, 2015 Decision and Order to this Court.

On April 16, 2015, Appellees filed a Motion to Dismiss, contending that the time frame in which to appeal to this Court commenced from the vacated March 9, 2015 Decision and Order as

¹ The second error that the BTA appeared to address relates to an alleged unconstitutional delegation of legislative authority and a statutory construction analysis.

opposed to commencing from the newly-issued and substantively different March 20, 2015 Decision and Order, which vacated and rendered meaningless the March 9, 2015 Decision and Order.

III. LAW AND ARGUMENT

A. Appellants timely filed a notice of appeal with this Court and the BTA on the twenty-first day following the BTA's March 20, 2015 Decision and Order.

R.C. 5717.04 provides, in part, that an appeal from the BTA to this Court “shall be taken within thirty days after the date of the entry of the decision of the board on the journal of its proceedings, as provided by such section, by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board.”

Here, Appellants appealed the March 20, 2015 Decision and Order of the BTA. Appellants did not appeal the March 9, 2015 Decision and Order of the BTA, because that Decision and Order was vacated and rendered a nullity by the BTA's Decision and Order dated March 20, 2015.

B. The BTA's March 20, 2015 Decision and Order did not merely “purport” to vacate the March 9, 2015 Decision and Order. The BTA did vacate the March 9, 2015 Decision and Order which the BTA had the authority to do prior to the expiration of the thirty-day appeal period of R.C. 5717.04.

The BTA unquestionably has the ability to reconsider its decisions. As this Court stated in *National Tube Co. v. Ayres*, 152 Ohio St. 255, 262, 89 N.E.2d 129 (1949), “it has been a long established precedent in this state that boards such as the Board of Tax Appeals have control over their decisions until the actual institution of an appeal or the expiration of the time for appeal.” The principle that administrative tribunals such as the BTA and Boards of Revision have inherent authority to reconsider their own decisions was recently reaffirmed in *Meadows Dev, L.L.C., v. Champaign Cty. Bd. of Revision*, 124 Ohio St. 3d. 349, 2010-Ohio-249, 922 N.E.2d 209, ¶25. That authority includes the ability to vacate decisions previously issued by the BTA. *National Tube Co. v. Ayres*, at 262-263; *Tims v. Holland Furnace Co.*, 152 Ohio St. 469, 475, 90 N.E.2d 376, (1950).

In *National Tube Co. v. Ayres*, the relevant facts were as follows. The BTA's decision was issued on June 22, 1948. Fourteen days later, on July 6, 1948, the appellant filed a motion for rehearing with the BTA. On July 8, 1948, the BTA vacated and set aside its decision of June 22, 1948.² On July 21, 1948, the BTA entered its decision in the case, and the decision was identical to the first decision which had been vacated. On August 6, 1948, the appellant appealed the July 21, 1948 BTA decision to this Court.³ The appellee county auditor filed a motion to dismiss, contending that the notice of appeal was not filed within thirty days of the June 22, 1948 decision. This Court denied the county auditor's motion to dismiss, holding that the BTA had the authority to vacate the June 22, 1948 decision, and that the notice of appeal was timely because it was within thirty days of July 21, 1948, the date that the second decision and order was entered.

Here, the procedural history and timing is consistent with *National Tube Co. v. Ayres*. The BTA clearly and unambiguously vacated its March 9, 2015 Decision and Order and issued a new and substantively different March 20, 2015 Decision and Order, which is the decision that Appellants timely appealed to this Court. The BTA clearly had this authority under *National Tube Co. v. Ayres*.

The BTA's rules specifically authorize motions for reconsideration. Ohio Adm. Code 5717-1-12(D), indicates, in part, that "[m]otions for reconsideration of any decision of the board may be filed with the board only by a party or counsel of record in the proceedings before the board within thirty days of the date on which the decision was journalized."

² June 22, 1948 was less than thirty days before the BTA's vacating order on July 8, 1948.

³ August 6, 1948 was less than thirty days from July 21, 1948, but was greater than thirty days from June 22, 1948, the date of the initial decision that was vacated.

C. Vacating the March 9, 2015 BTA Decision and Order makes it a nullity, and the March 9, 2015 BTA Decision and Order could not have been appealed.

The generally accepted rule is that where a court, in the proper discharge of its judicial functions, vacates an order or judgment previously entered, the legal status is the same as if the order or judgment had never existed. *Tims*, paragraph four of the syllabus. Here, the BTA vacated its March 9, 2015 Decision and Order, thereby rendering it a nullity.⁴

D. Appellees misconstrue the difference between the BTA's issuance of a new Decision and Order on March 20, 2015 and the BTA's mere denial of a motion to reconsider.

Appellees contend that Appellants attempted to create a 32-day window to allegedly attempt to appeal a denial of a motion to reconsider. That is clearly wrong. The BTA vacated its initial Decision and Order and entered a new Decision and Order on March 20, 2015. Appellants' appeal is from the BTA Decision and Order entered on March 20, 2015.

This is not a situation where a motion for reconsideration was merely denied by the BTA. Where a motion for reconsideration is denied and the initial Decision and Order is not vacated, the thirty-day appeal period to appeal to this Court runs from the date of the entry of the BTA's Decision and Order.

That is not, however, the situation in this case. Here, the BTA vacated its March 9, 2015 Decision and Order and issued a new Decision and Order on March 20, 2015. The March 20, 2015 BTA decision is the decision that Appellants appealed to this Court; it was the only decision that existed to be appealed, since the March 9, 2015 Decision and Order became a nullity when the BTA vacated it. *Tims*, paragraph four of the syllabus.

⁴ Had Appellants appealed the March 9, 2015 Decision and Order, presumably Appellees would contend that the March 9, 2015 Decision and Order had been vacated and could not be appealed because it was a nullity.

E. When the BTA vacates a Decision and Order and issues a new Decision and Order, the appeal period prescribed by R.C. 5717.04 runs thirty-days from the entry of the BTA's Decision and Order.

Once the BTA vacated its March 9, 2015 Decision and Order, the legal status of that decision was the same as if it never existed – it is a nullity. *Id.* *Tims* followed the holding in *National Tube Co. v. Ayres* that where a decision has been vacated and a new decision is issued, the deadline to appeal begins to run from the date of the new Decision and Order. *Tims*, at 475.

Recently, in *Meadows Dev, L.L.C., v. Champaign Cty. Bd. of Revision.*, this Court stated a similar rule that applies equally here. In *Meadows*, a taxpayer filed a complaint with a county auditor regarding the true value of its real property, and the taxpayer participated at a hearing on the complaint at the local Board of Revision (“BOR”). The BOR then certified its first decision regarding the complaint to the taxpayer’s address. Fifteen days later, the BOR certified the decision again, this time, sending the second decision to the address set forth on the complaint as the address of the taxpayer’s agent--namely the law firm whose lawyer had participated at the BOR hearing on behalf of the taxpayer. Forty days after the first certification, but only 25 days after the second certification, the taxpayer filed an appeal from the BOR to the BTA.⁵ The school board (the opposing party) that participated at the BOR hearing filed a motion to dismiss the appeal as being untimely filed. The BTA agreed with the school board, holding in part that the BOR’s first mailing started the thirty-day appeal period to appeal to the BTA and that the notice of appeal to the BTA was untimely because it was filed forty days after the first decision. The taxpayer appealed the BTA’s dismissal to this Court, and this Court reversed the BTA. In *Meadows*, this Court addressed whether the first certification (which was a valid notification and which started the running of the

⁵ The deadline to appeal a decision from the BOR to the BTA is thirty days from the date of the mailing of the decision. See R.C. 5717.01.

30-day appeal period) made the second certification invalid. This Court held that the first certification did not preclude the second certification, finding:

“We hold that the first certification did not preclude the second certification. The BOR originally certified its decision on June 14, 2007, and then 15 days later recertified its decision. *** [T]he BOR still possessed authority to vacate or modify its decision as of the date of the second certification. Had the BOR issued a new and substantively different decision on that date, the proper certification of that modified decision would unquestionably have commenced the running of a new appeal period.

We hold that the same rationale extends to the situation where a board of revision certifies a substantively identical decision to a new address within the 30-day appeal period. Because the BOR modified its certification of the decision within the 30-day window for an appeal from the initial certification, and because no appeal had actually been instituted from the first certification, the second certification was valid and restarted the running of the 30-day appeal period.

Id., ¶ 24-26 (Emphasis added.)

This Court held that had the BOR issued a new and substantively different decision, it would have unquestionably commenced the running of a new appeal period. This Court also stated that even if the second decision had been substantively identical to the first decision, the same rationale would have extended to the substantively identical decision, thereby beginning a new thirty-day appeal period.

F. The BTA’s Decision and Order was substantively different regarding an issue that is critical to the resolution of the refund claims – whether a “method of filing” constitutes a method of accounting or apportionment of net profits.

The BTA’s March 9, 2015 Decision and Order contained the following language: “Appellants argue that filing amended consolidated returns is not a ‘change in the method of accounting or apportionment of net profits.’ We disagree.” The BTA’s March 9, 2015 statement that it disagreed with the Appellants’ alleged error on that issue could mean but one thing – that the BTA disagreed with Appellants’ argument on that issue. The BTA’s March 20, 2015 Decision and Order held just the opposite – that it agreed with Appellants’ argument on that issue. It is difficult to

conceive of a more substantive change in any decision than for the tribunal to change its conclusion from disagreement to agreement with a party's argument. This Court should not be confused when Appellees refer to the change as a mere "typographical error." The BTA changed its disagreement on an issue to agreement on an issue that is substantively relevant to the outcome of this case. Had the BTA not vacated its March 9, 2015 Decision and Order, Appellants would have appealed that Decision and Order and included the BTA's statement that it disagreed with Appellants' argument on the change in method of accounting or apportionment of net profits issue as an error complained of.

G. Appellees filed a cross-appeal to this Court regarding the change in the method of accounting or apportionment of net profits issue, which reveals their true belief that the issue is substantive.

Appellees argue that the BTA simply corrected a clerical error and that the change did not involve a substantive issue. That argument, however, is rebutted by the fact that, on April 17, 2015, Appellees filed a Cross-Appeal in which Appellees contend that the BTA acted unreasonably and unlawfully regarding the issue on which the BTA reversed itself in the March 20, 2015 Decision and Order. Clearly, Appellees consider the change by the BTA to be substantive, or they would not have appealed that issue.

H. Appellees cite cases that are lower level cases, that are inapposite, and that address different fact patterns; the BTA did not issue a nunc pro tunc decision here.

Appellees cite many cases that have no bearing whatsoever on the allegations in Appellees' Motion to Dismiss. Appellees cite to *Wells v. Wells*, 2d Dist. Montgomery No. 26145, 2014-Ohio-4619, a court of appeals decision where the initial thirty-day period to appeal to the next tribunal had expired *prior to* a litigant filing a motion to reconsider and therefore the filing of the motion to

reconsider could not possibly have caused the tribunal to vacate or issue a different decision within the thirty-day window, as occurred here.⁶

Appellees cite to other cases where a “re-issued” decision merely corrected clerical language that was totally irrelevant to the analysis of the contested issue. See for example, *State ex. rel. Rue v. Perry*, 8th Dist. Cuyahoga No. 87810, 2006-Ohio-5320 where the correction of the decision was limited solely to the listing of an incorrect date that a hearing took place, which had nothing to do with the outcome of the dispute. The court did not vacate its judgement entry. Rather, nearly six months later, the court issued a nunc pro tunc order that merely corrected a clerical error in the court’s judgment entry regarding the date of the hearing. The court indicated that the February 1, 2006 nunc pro tunc order could not be appealed because it was merely correcting a decision that had already become final by the expiration of the appeal period. Here, on the other hand, the earlier BTA decision of March 9, 2015 was vacated and substantively changed, well within the appeal period.

Appellees’ reliance on *N. Lake Aptmts. v. Bd. of Revision*, 8th Dist. Cuyahoga No. 41662, 1980 Ohio App. LEXIS 10314 is misplaced. In *N. Lake*, a party filed a motion for reconsideration on the deadline to appeal the adverse decision. The motion for reconsideration was denied on that same day. In *N. Lake*, the BTA did not vacate its prior decision and issue a new decision; the BTA merely denied the motion for reconsideration. The party attempted to appeal the denial of the motion for reconsideration. Thus, *N. Lake* is wholly inapposite to the instant case, in which the BTA vacated its initial decision and issued a new and substantively different Decision and Order.

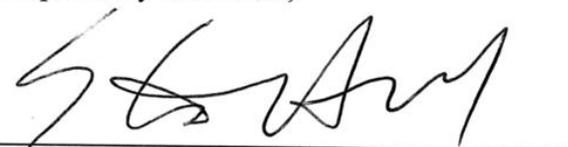
⁶ While certain exceptions apply, the general rule is that once the thirty-day appeal period has expired, the parties may not file a notice of appeal.

When the BTA vacated its March 9, 2015 Decision and Order, and entered a new Decision and Order, the March 9, 2015 decision was a nullity and the time for filing an appeal ran from the new decision entered on March 20, 2015. *Tims v. Holland Furnace Co, National Tube Co. v. Ayres*. Appellants timely filed an appeal to this Court from the BTA's March 20, 2015 Decision and Order.

IV. CONCLUSION

Appellees' Motion to Dismiss is without merit and should be denied by this Court. Appellants timely appealed the BTA's Decision and Order dated March 20, 2015.

Respectfully submitted,



Dated: April 22, 2015

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Exhibit A

OHIO BOARD OF TAX APPEALS

NEW YORK FROZEN FOODS, INC. AND
AFFILIATES, (et. al.),

CASE NO(S). 2012-55

Appellant(s),

(MUNICIPAL INCOME TAX)

vs.

DECISION AND ORDER

BEDFORD HEIGHTS INCOME TAX BOARD
OF REVIEW AND CITY OF BEDFORD
HEIGHTS INCOME TAX ADMINISTRATOR,
(et. al.),

Appellee(s).

APPEARANCES:

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Entered Friday, March 20, 2015

Mr. Williamson and Mr. Harbarger concur.

This matter is again considered by the Board of Tax Appeals upon appellants' motion for reconsideration. Appellants argue that this board failed to adequately respond to its arguments regarding the city's unconstitutional delegation of authority per its ordinances. Upon review of the motion, we find the request for reconsideration fails to meet the standard set forth in *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, and is therefore denied.

Appellant further notes a typographical error in this board's March 9, 2015 decision. Accordingly, we hereby vacate our prior decision and order and proceed to issue the present decision and order to correct the error. This matter is again pending upon appellants' appeal from a decision of the City of Bedford Heights Board of Review ("MBOA") in which it affirmed the decision of the Bedford Heights Tax Administrator rejecting appellants' amended net profits tax returns for 2005, 2006, and 2007. We proceed to consider the matter upon the notice of appeal, the transcript certified by the MBOA, the parties' briefs, and the exhibits jointly stipulated to by the parties.

The decision of the MBOA explains that appellants "timely filed its net profit tax returns, as a single filer, with the Regional Income Tax Agency (R.I.T.A.) for the 2005, 2006 and 2007 tax years. Subsequently, in March 2010, [appellants] sought to file amended returns as a 'consolidated filer' for the years 2005, 2006 and 2007. These 'consolidated returns' would have resulted in tax refunds to [appellants] in excess of \$698,000.00." MBOA Decision at 1. The returns were rejected by RITA. A hearing was held before the MBOA, where appellants argued that no portion of the city's ordinances prohibited the filings and that any inconsistent RITA regulation is in conflict with the relevant ordinance and therefore null and void. The MBOA affirmed the decision of RITA and the city's Tax Administrator, finding that "[taken] together Sections 1735.15 *** of the Bedford Heights Administrative Code and Section 5:06(A) of the R.I.T.A. Rules and Regulations are identical in effect," and that "[n]either permits a taxpayer to **change the method of accounting or the apportionment of net profits, nor the method of filing after the due date for filing the original return.**" Id. at 2 (emphasis sic).

Section 173.15(a) of the Bedford Heights Administrative Code ("BHAC") provides:

"Where necessary an amended return must be filed in order to report additional income and pay additional tax due, or claim a refund of tax overpaid, subject to the requirements, limitations, of both, contained in Sections 173.30 through 173.35. Such amended returns shall be on a form obtainable from the Tax Administrator. *A tax payer may not change the method of accounting or apportionment of net profits after the due date for filing the original return.*" (Emphasis added.)

The RITA Rules and Regulations, incorporated into the BHAC by Section 173.56, also contain a relevant, similar provision in Section 5:06(A):

"Where necessary, an amended return must be filed in order to report additional income and pay any additional tax due or claim a refund of tax overpaid subject to the requirements or limitations contained in the Ordinance. Such returns shall be clearly marked "Amended." A taxpayer may not change the method of accounting or the apportionment of net profits, *nor the method of filing (i.e., single or consolidated)*, after the due date for filing the original return. Amended returns cannot be filed after three (3) years from the original filing date." (Emphasis added.)

In its decision, the MBOA found that, taken together, these sections prohibit an attempt to change from a single filer to a consolidated filer, as such a change is a "change in the method of accounting or apportionment of net profits or the method of filing." On appeal, appellants argue that BHAC Section 173.15(a) does not prohibit timely filing an amended return on a consolidated basis; that filing on a consolidated basis is not a change in the method of accounting or apportionment of net profits; that RITA Rule 5:06(A) adds an additional prohibition to BHAC Section 173.15(a), i.e., a prohibition on changing the method of filing in an amended return, and is therefore inconsistent and invalid; that R.C. 718.06 requires the city to accept amended consolidated returns; and that the city's incorporation of RITA rules and regulations not in place when it adopted its relevant ordinances is an unconstitutional delegation of legislative authority.

We begin our review of this matter by noting that when 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. *City of Marion v. City of Marion Bd. of Review* (Aug. 10, 2007), BTA No. 2005-T-1464, unreported, appeal dismissed, 2008-Ohio-2496. See, also, *Tetlak v. Bratenahl* (2001), 92 Ohio St.3d 46, at 51. Cf. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121.

Appellants argue that filing amended consolidated returns is not a "change in the method of accounting or apportionment of net profits." We agree. Appellants point to the July 2009 change to RITA Rule 5:06(A), to additionally prohibit a change in the "method of filing (i.e., single or consolidated)" as clear support for

their argument that BHAC Section 173.15(a) did not include a change in the method of filing. Appellants argue that a change in the "method of accounting" encompasses only cash versus accrual accounting, citing to IRS Publication 538. Further, appellants argue that a change in the "method of apportionment" is already addressed by a separate ordinance that details a formula to be used to apportion net profits for tax purposes. In response, the appellees focus on the amount of refund claimed by appellants as a result of filing their amended consolidated returns, i.e., approximately \$700,000: "the mere fact that [appellants] claims entitlement to a refund of almost \$700,000 on net profits taxes that [they] had to pay when [they] filed on a single-filer basis shows that [appellants'] attempt to file amended consolidated returns constituted a prohibited 'change' in the 'method of accounting...of net profits.'" Appellees' Brief at 11. We do not find the amount claimed as a refund to be dispositive, or even telling, on this point.

What is more telling is the difference in the language of BHAC Section 173.15(a) and RITA Rule 5:06(A): because the RITA rule specifically added the language "nor the method of filing (i.e., single or consolidated)," it is clear that changing from single filing to consolidated filing is not the same as changing the method of accounting or apportionment, which were already prohibited by the rule. See, e.g., *Vought Industries, Inc. v. Tracy* (1995), 72 Ohio St.3d 261, 265-266; *Wardrop v. Middletown Income Tax Review Bd.*, Butler App. No. CA2007-09-235, 2008-Ohio-5298, at ¶24; *City of Heath v. Licking Cty. Regional Airport Authority* (1967), 16 Ohio Misc. 69, 78-79. We therefore find that appellants' filing of amended returns as a consolidated filer was not prohibited by BHAC Section 173.15(a).

This board must therefore determine whether appellants' amended returns were barred by RITA Rule 5:06(A). Appellants make several arguments regarding the rule's applicability. First, they argue that the city had not incorporated the version of RITA Rule 5:06(A) that contained the prohibition on filing an amended return that changed the method of filing, which was adopted in July 2009. BHAC Section 173.56 provides:

"(a) Effective January 1, 1996, there is hereby adopted for the purpose of establishing rules and regulations for the collection of municipal income taxes and the administration and enforcement of this chapter the Rules and Regulations of the Regional Income Tax Agency (R.I.T.A.), in the most current edition or update thereof, including all additions, deletions, and amendments made subsequent hereto, and the same are hereby incorporated herein as if fully set out at length save and except such portions as may be hereinafter added, modified, or deleted therein.

"(b) R.I.T.A.'s Rules and Regulations shall be in addition to any rules and regulations adopted and promulgated by the Tax Administration pursuant to authority granted under Section 173.04 herein. In any matter where a rule or regulation adopted and promulgated by the Tax Administrator conflicts with any of R.I.T.A.'s Rules and Regulations, the rule or regulation adopted and promulgated by the Tax Administrator shall prevail over and render null and void the R.I.T.A. rule or regulation with respect to the City of Bedford Heights."

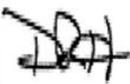
Appellants argue that the above ordinance could only adopt those RITA rules and regulations in effect at the time of its enactment – December 21, 2004, and not any changes made to the RITA rules and regulations thereafter. Therefore, appellants argue, the city did not adopt the version of RITA Rule 5:06(A) that prohibited changing the method of filing in an amended return.

Appellants further argue that the city could not adopt future changes in the RITA rules and regulations, citing appellate court cases relating to cities defining income for purposes of their own tax ordinances by referencing the federal definitions. In both these cases, the court found that the ordinances in question incorporated only those relevant portions of the internal revenue code that existed at the time the ordinance was passed, i.e., not subsequent amendments thereto. However, the Supreme Court, in *State v. Gill* (1992), 63 Ohio St.3d 53, noted the difference between incorporating law as it then existed and as it is subsequently amended:

"In 1964, Congress established a comprehensive food stamp program to aid in the fight against hunger and malnutrition. Section 2011 *et seq.*, Title 7, U.S. Code. R.C. 2913.46(A) became effective on July 1, 1983. Prior to this date, the federal food stamp law had been revised. It is clear to us that the General Assembly, by using the language 'as amended,' did not intend to adopt amendments to the federal law subsequent to the effective date of R.C. 2913.46(A), but, rather, the General Assembly simply intended to incorporate the federal food stamp law as it existed on the date R.C. 2913.46(A) was enacted. Given its common and plain meaning, the language 'as amended' does not anticipate amendments to the federal law after July 1, 1983. This is buttressed by the fact that had the General Assembly intended to incorporate the federal law subsequent to the enactment of R.C. 2913.46(A), it certainly knew how to do so. For example, R.C. 2915.01(AA) provides that the "'Internal Revenue Code" means the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C. 1, *as now or hereafter amended.*' (Emphasis added.) There is a notable distinction between the language used in R.C. 2915.01(AA) and in 2913.46(A). In utilizing the language 'as now or hereafter amended,' the General Assembly obviously intended to incorporate amendments subsequent to the time R.C. 2915.01(AA) was enacted." *Id.* at 55-56.

Based upon the foregoing case law and the language of the BHAC Section 173.56, we find that the City, in its most recent incorporation of RITA Rules and Regulations in December 2004, clearly incorporated the July 2009 change to RITA Rule 5:06(A) which prohibits changing the method of filing in an amended return. Accordingly, we find that the rule did bar appellants' filings. To the extent appellants make constitutional arguments regarding such incorporation, it is well established that this board is without jurisdiction to declare a given statute or ordinance to be unconstitutional. *S.S. Kresge Co. v. Bowers* (1960), 170 Ohio St. 405, paragraph one of the syllabus; *Herrick v. Kosydar* (1975), 44 Ohio St.2d 128, 130; *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St.3d 7, 8; *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229, paragraph one of the syllabus; *MCI Telecommunications Corp. v. Limbach* (1944), 68 Ohio St.3d 195, 198. Therefore, we acknowledge any such arguments, but make no findings in relation thereto.

Based upon the foregoing, we find that the MBOA did not err when it found that appellants' amended returns for tax years 2005, 2006, and 2007 were improper. Accordingly, we find that the decision of the City of Bedford Heights Board of Review must be, and hereby is, affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Mr. Harbarger		

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.



Kathleen M. Crowley, Board Secretary

Exhibit B

OHIO BOARD OF TAX APPEALS

NEW YORK FROZEN FOODS, INC. AND
AFFILIATES, (et. al.),

CASE NO(S). 2012-55

Appellant(s),

(MUNICIPAL INCOME TAX)

vs.

DECISION AND ORDER

BEDFORD HEIGHTS INCOME TAX BOARD
OF REVIEW AND CITY OF BEDFORD
HEIGHTS INCOME TAX ADMINISTRATOR,
(et. al.),

Appellee(s).

APPEARANCES:

For the Appellant(s)

- NEW YORK FROZEN FOODS, INC. AND AFFILIATES
Represented by:
STEPHEN K. HALL
ZAINO, HALL & FARRIN, LLC
41 SOUTH HIGH STREET, SUITE 3600
COLUMBUS, OH 43215

For the Appellee(s)

- BEDFORD HEIGHTS INCOME TAX BOARD OF REVIEW AND CITY OF
BEDFORD HEIGHTS INCOME TAX ADMINISTRATOR
Represented by:
JEFFREY J. LAUDERDALE
CALFEE, HALTER & GRISWOLD LLP
THE CALFEE BUILDING
1405 EAST SIXTH STREET
CLEVELAND, OH 44114

Entered Monday, March 9, 2015

Mr. Williamson and Mr. Harbarger concur.

Appellants appeal a decision of the City of Bedford Heights Board of Review ("MBOA") in which it affirmed the decision of the Bedford Heights Tax Administrator rejecting appellants' amended net profits tax returns for 2005, 2006, and 2007. We proceed to consider the matter upon the notice of appeal, the transcript certified by the MBOA, the parties' briefs, and the exhibits jointly stipulated to by the parties.

The decision of the MBOA explains that appellants "timely filed its net profit tax returns, as a single filer, with the Regional Income Tax Agency (R.I.T.A.) for the 2005, 2006 and 2007 tax years. Subsequently, in March 2010, [appellants] sought to file amended returns as a 'consolidated filer' for the years 2005, 2006 and 2007. These 'consolidated returns' would have resulted in tax refunds to [appellants] in excess of \$698,000.00." MBOA Decision at 1. The returns were rejected by RITA. A hearing was held before the MBOA, where appellants argued that no portion of the city's ordinances prohibited the filings and that any inconsistent RITA regulation is in conflict with the relevant ordinance and therefore null and void. The MBOA affirmed the decision of RITA and the city's Tax Administrator, finding that "[taken] together

Sections 1735.15 *** of the Bedford Heights Administrative Code and Section 5:06(A) of the R.I.T.A. Rules and Regulations are identical in effect," and that "[n]either permits a taxpayer to **change the method of accounting or the apportionment of net profits, nor the method of filing after the due date for filing the original return.**" Id. at 2 (emphasis sic).

Section 173.15(a) of the Bedford Heights Administrative Code ("BHAC") provides:

"Where necessary an amended return must be filed in order to report additional income and pay additional tax due, or claim a refund of tax overpaid, subject to the requirements, limitations, of both, contained in Sections 173.30 through 173.35. Such amended returns shall be on a form obtainable from the Tax Administrator. *A taxpayer may not change the method of accounting or apportionment of net profits after the due date for filing the original return.*" (Emphasis added.)

The RITA Rules and Regulations, incorporated into the BHAC by Section 173.56, also contain a relevant, similar provision in Section 5:06(A):

"Where necessary, an amended return must be filed in order to report additional income and pay any additional tax due or claim a refund of tax overpaid subject to the requirements or limitations contained in the Ordinance. Such returns shall be clearly marked "Amended." A taxpayer may not change the method of accounting or the apportionment of net profits, *nor the method of filing (i.e., single or consolidated)*, after the due date for filing the original return. Amended returns cannot be filed after three (3) years from the original filing date." (Emphasis added.)

In its decision, the MBOA found that, taken together, these sections prohibit an attempt to change from a single filer to a consolidated filer, as such a change is a "change in the method of accounting or apportionment of net profits or the method of filing." On appeal, appellants argue that BHAC Section 173.15(a) does not prohibit timely filing an amended return on a consolidated basis; that filing on a consolidated basis is not a change in the method of accounting or apportionment of net profits; that RITA Rule 5:06(A) adds an additional prohibition to BHAC Section 173.15(a), i.e., a prohibition on changing the method of filing in an amended return, and is therefore inconsistent and invalid; that R.C. 718.06 requires the city to accept amended consolidated returns; and that the city's incorporation of RITA rules and regulations not in place when it adopted its relevant ordinances is an unconstitutional delegation of legislative authority.

We begin our review of this matter by noting that when 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. *City of Marion v. City of Marion Bd. of Review* (Aug. 10, 2007), BTA No. 2005-T-1464, unreported, appeal dismissed, 2008-Ohio-2496. See, also, *Tetlak v. Bratenahl* (2001), 92 Ohio St.3d 46, at 51. Cf. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121.

Appellants argue that filing amended consolidated returns is not a "change in the method of accounting or apportionment of net profits." We disagree. Appellants point to the July 2009 change to RITA Rule 5:06(A), to additionally prohibit a change in the "method of filing (i.e., single or consolidated)" as clear support for their argument that BHAC Section 173.15(a) did not include a change in the method of filing. Appellants argue that a change in the "method of accounting" encompasses only cash versus accrual accounting, citing to IRS Publication 538. Further, appellants argue that a change in the "method of apportionment" is already addressed by a separate ordinance that details a formula to be used to apportion net profits for tax purposes. In response, the appellees focus on the amount of refund claimed by appellants as a result of filing their amended consolidated returns, i.e., approximately \$700,000: "the mere fact that [appellants] claims entitlement to a refund of almost \$700,000 on net profits taxes that [they] had to pay when [they] filed on a single-filer basis shows that [appellants'] attempt to file amended consolidated

returns constituted a prohibited 'change' in the 'method of accounting...of net profits.'" Appellees' Brief at 11. We do not find the amount claimed as a refund to be dispositive, or even telling, on this point.

What is more telling is the difference in the language of BHAC Section 173.15(a) and RITA Rule 5:06(A): because the RITA rule specifically added the language "nor the method of filing (i.e., single or consolidated)," it is clear that changing from single filing to consolidated filing is not the same as changing the method of accounting or apportionment, which were already prohibited by the rule. See, e.g., *Vought Industries, Inc. v. Tracy* (1995), 72 Ohio St.3d 261, 265-266; *Wardrop v. Middletown Income Tax Review Bd.*, Butler App. No. CA2007-09-235, 2008-Ohio-5298, at ¶24; *City of Heath v. Licking Cty. Regional Airport Authority* (1967), 16 Ohio Misc. 69, 78-79. We therefore find that appellants' filing of amended returns as a consolidated filer was not prohibited by BHAC Section 173.15(a).

This board must therefore determine whether appellants' amended returns were barred by RITA Rule 5:06(A). Appellants make several arguments regarding the rule's applicability. First, they argue that the city had not incorporated the version of RITA Rule 5:06(A) that contained the prohibition on filing an amended return that changed the method of filing, which was adopted in July 2009. BHAC Section 173.56 provides:

"(a) Effective January 1, 1996, there is hereby adopted for the purpose of establishing rules and regulations for the collection of municipal income taxes and the administration and enforcement of this chapter the Rules and Regulations of the Regional Income Tax Agency (R.I.T.A.), in the most current edition or update thereof, including all additions, deletions, and amendments made subsequent hereto, and the same are hereby incorporated herein as if fully set out at length save and except such portions as may be hereinafter added, modified, or deleted therein.

"(b) R.I.T.A.'s Rules and Regulations shall be in addition to any rules and regulations adopted and promulgated by the Tax Administration pursuant to authority granted under Section 173.04 herein. In any matter where a rule or regulation adopted and promulgated by the Tax Administrator conflicts with any of R.I.T.A.'s Rules and Regulations, the rule or regulation adopted and promulgated by the Tax Administrator shall prevail over and render null and void the R.I.T.A. rule or regulation with respect to the City of Bedford Heights."

Appellants argue that the above ordinance could only adopt those RITA rules and regulations in effect at the time of its enactment – December 21, 2004, and not any changes made to the RITA rules and regulations thereafter. Therefore, appellants argue, the city did not adopt the version of RITA Rule 5:06(A) that prohibited changing the method of filing in an amended return.

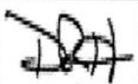
Appellants further argue that the city could not adopt future changes in the RITA rules and regulations, citing appellate court cases relating to cities defining income for purposes of their own tax ordinances by referencing the federal definitions. In both these cases, the court found that the ordinances in question incorporated only those relevant portions of the internal revenue code that existed at the time the ordinance was passed, i.e., not subsequent amendments thereto. However, the Supreme Court, in *State v. Gill* (1992), 63 Ohio St.3d 53, noted the difference between incorporating law as it then existed and as it is subsequently amended:

"In 1964, Congress established a comprehensive food stamp program to aid in the fight against hunger and malnutrition. Section 2011 *et seq.*, Title 7, U.S.Code. R.C. 2913.46(A) became effective on July 1, 1983. Prior to this date, the federal food stamp law had been revised. It is clear to us that the General Assembly, by using the language 'as amended,' did not intend to adopt amendments to the federal law subsequent to the effective date of R.C. 2913.46(A), but, rather, the General Assembly simply intended to incorporate the federal food stamp law as it existed on the date R.C. 2913.46(A) was enacted. Given its common and plain meaning, the

language 'as amended' does not anticipate amendments to the federal law after July 1, 1983. This is buttressed by the fact that had the General Assembly intended to incorporate the federal law subsequent to the enactment of R.C. 2913.46(A), it certainly knew how to do so. For example, R.C. 2915.01(AA) provides that the "'Internal Revenue Code" means the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C. 1, *as now or hereafter amended.*' (Emphasis added.) There is a notable distinction between the language used in R.C. 2915.01(AA) and in 2913.46(A). In utilizing the language 'as now or hereafter amended,' the General Assembly obviously intended to incorporate amendments subsequent to the time R.C. 2915.01(AA) was enacted." *Id.* at 55-56.

Based upon the foregoing case law and the language of the BHAC Section 173.56, we find that the City, in its most recent incorporation of RITA Rules and Regulations in December 2004, clearly incorporated the July 2009 change to RITA Rule 5:06(A) which prohibits changing the method of filing in an amended return. Accordingly, we find that the rule did bar appellants' filings. To the extent appellants make constitutional arguments regarding such incorporation, it is well established that this board is without jurisdiction to declare a given statute or ordinance to be unconstitutional. *S.S. Kresge Co. v. Bowers* (1960), 170 Ohio St. 405, paragraph one of the syllabus; *Herrick v. Kosydar* (1975), 44 Ohio St.2d 128, 130; *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St.3d 7, 8; *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229, paragraph one of the syllabus; *MCI Telecommunications Corp. v. Limbach* (1944), 68 Ohio St.3d 195, 198. Therefore, we acknowledge any such arguments, but make no findings in relation thereto.

Based upon the foregoing, we find that the MBOA did not err when it found that appellants' amended returns for tax years 2005, 2006, and 2007 were improper. Accordingly, we find that the decision of the City of Bedford Heights Board of Review must be, and hereby is, affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Mr. Harbarger		

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.



Kathleen M. Crowley, Board Secretary

CERTIFICATE OF SERVICE

I hereby certify that Appellants' Memorandum in Opposition of Appellees Motion to Dismiss was filed via hand delivery with the Ohio Supreme Court and was served via electronic mail and via Certified Mail, Return Receipt Requested, to counsel for all parties to the proceedings before the Ohio Board of Tax Appeals on the 22nd day of April, 2015.

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ADMINISTRATOR, ET AL.



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