

ORIGINAL

IN THE SUPREME COURT OF OHIO

HUNTER T. HILLENMEYER)	
)	CASE NO. 14-0235
Appellant,)	
v.)	
)	On Appeal from the Ohio Board of Tax
CITY OF CLEVELAND BOARD OF)	Appeals
REVIEW and NASSIM LYNCH,)	
CLEVELAND TAX ADMINISTRATOR)	Board of Tax Appeals Case No. 2009-3688
)	
Appellees.)	

**MEMORANDUM OF APPELLANT HUNTER T. HILLENMEYER IN
OPPOSITION TO APPELLEES' MOTION FOR RECONSIDERAION OF DECISION
ON THE MERITS**

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MEMORANDUM IN OPPOSITION

Appellees the City of Cleveland Board of Review and Nassim Lynch (together, the “Tax Administrator”) have moved this Court to reconsider its unanimous decision issued on April 30, 2015, holding that the City of Cleveland’s use of the games-played method of taxing professional athletes violates the Due Process Clause of the United States Constitution. In its motion for reconsideration, the Tax Administrator simply reiterates the arguments that were presented in its briefing on the merits, and that were addressed and rejected by this Court in its decision. Accordingly, the motion should be denied.

The Tax Administrator’s motion for reconsideration should be denied first and foremost because it is simply a reargument of the case. Supreme Court Practice Rule 18.02 cautions that “[a] motion for reconsideration shall not constitute a reargument of the case” Yet that is precisely what the Tax Administrator has done here. Each of the points raised in the Tax Administrator’s motion is simply a truncated version of the arguments advanced in its brief on the merits. The Tax Administrator’s motion cites to the same cases and other authorities as did its brief. And all of the Tax Administrator’s arguments have already been addressed and rejected by this Court in its unanimous, 20-page decision on the merits. The Tax Administrator does not make any new arguments or identify any arguments that the Court failed to address. It is just asking the Court to change its holding. Each of the rearguments in the motion for reconsideration should be rejected, again, for the same reasons set forth in the Court’s decision.

The Tax Administrator’s first argument for reconsideration simply repeats its argument that an apportionment method may be based on any measurement so long as it is reasonable. *See* Appellees’ Br. 11–13 (making same argument). Contrary to the Tax Administrator’s claim, however, this Court’s rejection of the games-played method does not conflict with any Supreme

Court authority. The Court’s rejection of the games-played method on the ground that it results in extraterritorial taxation is consistent with and compelled by Supreme Court precedent. *See Hillenmeyer v. Cleveland Bd. of Rev.*, Slip Opinion No. 2015-Ohio-1623, ¶¶ 41–43 (citing *Shaffer v. Carter*, 252 U.S. 37, 49, 40 S.Ct. 221, 64 L.Ed. 445 (1920)). Nor did this Court adopt a single, constitutionally-mandated method of apportionment. The Court rejected the games-played method because it results in extraterritorial taxation, and it recognized that the duty days method – which was the only other method discussed in the parties’ briefs – is consistent with due process. *Id.* ¶ 53. The Court was careful to observe that “other computation methods might also provide due process,” but that Cleveland had “not suggested any method of alternate relief.” *Id.*

The Tax Administrator’s second and third arguments – that the games-played method does not result in a tax out of all proportion with the business transacted in Cleveland and does not lead to a grossly distorted result – rely on the faulty premise that players are paid only for playing in games. This is the same justification that the Tax Administrator advanced in its brief on the merits and has asserted throughout this litigation. *See, e.g.*, Appellees’ Br. 13 (arguing that “players are paid to play” and that the Court should uphold the games-played method “[u]nless that premise is a fiction”). After a thorough review of the evidence, this Court squarely rejected the premise that players are paid only for playing in games, and instead recognized that players are also compensated for attending practice, team meetings, and training camp, and for performing other services for their employer. *Id.* ¶¶ 11–14 (reviewing evidence); ¶ 39 (concluding that “[t]he games-played method reaches income for work that was performed outside of Cleveland”). The Tax Administrator identifies no flaw in this Court’s analysis.

The Tax Administrator's fourth argument is that this Court erred in concluding that the business-income apportionment cases relied on by the Tax Administrator did not support upholding the games-played method. Although the Supreme Court has recognized that "the complications and uncertainties in allocating income of a multi-state business to the several states" sometimes necessitate the use of formula apportionment, it has nevertheless steadfastly held that "a State may not tax value earned outside its borders." *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 777–778, 112 S. Ct. 2251, 119 L.Ed.2d 533 (1992). Moreover, as this Court recognized, "[c]ompensation invokes a simpler rule: compensation must be allocated to the place where the employee performed the work." *Hillenmeyer*, Slip Opinion No. 2015-Ohio-1623, ¶ 45. Because this case concerned only the taxation of employee wages, the Court correctly determined that corporate-income apportionment cases cited by the Tax Administrator did not support Cleveland's use of the games-played method.

In its fifth and sixth arguments for reconsideration, the Tax Administrator bizarrely faults the Court for basing its decision on the evidence presented below – namely, Hillenmeyer's employment contract and affidavits from Hillenmeyer and his employer, the Chicago Bears. Hillenmeyer's employment contract, however, is what defines the terms of his employment, including the services he is required to perform for his employer. This Court has consistently looked to similar evidence to determine what portion of a professional athlete's income is subject to taxation. *See Hume v. Limbach*, 61 Ohio St.3d 387, 389, 575 N.E.2d 150 (1991) (looking to player contract to determine services he was compensated for). The fact that slight variations in the number of duty days from player to player or year to year will affect the amount of income Cleveland can tax does nothing to distinguish professional athletes from all other nonresident employees who work in Cleveland for only part of the tax year. Nor has the duty day method

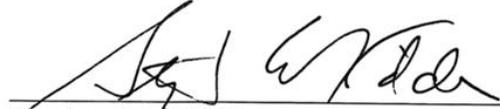
resulted in parade of horrors imagined by the Tax Administrator in every other jurisdiction that utilizes it. *Cf.* Motion for Reconsideration 3 (speculating that NFL players might attempt to claim that they have 365 duty days per year). In short, there was no error in this Court's conclusion that Cleveland's authority to tax is determined in part by the player contract and other evidence regarding the services Hillenmeyer was compensated for by his employer.

Finally, the Tax Administrator again argues that Hillenmeyer waived all of his constitutional claims by appealing from the Cleveland Board of Review to the Ohio Board of Tax Appeals ("BTA") rather than the Court of Common Pleas. This Court considered and squarely rejected this argument, holding that "constitutional issues may be raised before the BTA for later determination by the courts on appeal," and that "[i]n such cases, the BTA serves as the forum for presentation of evidence so that a record is available for the court deciding those issues on appeal." *Hillenmeyer*, Slip Opinion No. 2015-Ohio-1623, ¶ 25 (citing *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 232, 520 N.E.2d 188 (1988)). As the Court recognized, R.C. 5717.011 provides taxpayers with the "right" to choose either forum "and imposes no restrictions on [his] doing so." *Id.* Indeed, this Court has routinely decided constitutional questions where they arise via this very same route. *See, e.g., Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 181 (deciding constitutional issues after they were raised in an appeal from Tax Commissioner to BTA); *GTE North, Inc. v. Zaino*, 96 Ohio St.3d 9, 2002-Ohio-2984, 770 N.E.2d 65 (same).

CONCLUSION

For the reasons set forth above, the Court should deny Appellees' motion for reconsideration of the decision on the merits.

Respectfully submitted,



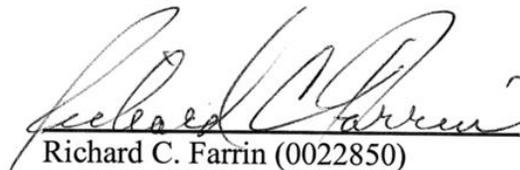
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum of Appellant Hunter T. Hillenmeyer in Opposition to Appellees' Motion for Reconsideration of Decision on the Merits was served on Linda L. Bickerstaff, Assistant Director of Law, City of Cleveland Department of Law, 205 West St. Clair Avenue, Cleveland, Ohio 41133, Counsel of Record for Appellees, by regular U.S. Mail, postage prepaid, on this 21st day of May, 2015.


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