ORIGINAL

In The Supreme Court of Ohio

NEW YORK FROZEN FOODS, INC. AND AFFILIATES,	:	
Appellants/Cross-Appellees,	:	Case No. 15-0575
v.	:	On Appeal from the Ohio Board of Tax Appeals
BEDFORD HEIGHTS INCOME TAX	:	BTA Case No. 2012-55
BOARD OF REVIEW AND CITY OF BEDFORD HEIGHTS INCOME TAX ADMINISTRATOR, ET AL.,	:	
Appellees/Cross-Appellants.	:	

MERIT BRIEF OF APPELLANTS/CROSS-APPELLEES NEW YORK FROZEN FOODS, INC. AND AFFILIATES

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FILED
JUL 31 2015
CLERK OF COURT
SUPREME COURT OF OHIO

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STATEMENT OF FACTS

A. The nature of the case

This case arises out of municipal income tax refund claims filed by New York Frozen Foods Inc. and Affiliates ("NYFF" or "Appellants") with the City of Bedford Heights ("Bedford Heights" or "the City") for the 2005, 2006 and 2007 Bedford Heights tax years ("Tax Years"). The refunds were claimed on amended returns filed by Appellants on a consolidated basis. Reporting on a consolidated basis resulted in a lower overall tax than filing on a separate basis. The City denied the refund claims solely on the City's position that consolidated returns may only be filed as original returns and may not be filed as amended returns, notwithstanding that no provision of Bedford Heights' law or the Ohio Revised Code contains such a constraint and notwithstanding that R.C. 718.06 requires municipalities to accept consolidated returns.

B. Appellants' net profits tax return filings and refund claims

For each of the federal income tax years 2005, 2006, and 2007, Appellants timely filed a consolidated tax return for federal income tax purposes, including all members of its affiliated group, pursuant to Internal Revenue Code ("I.R.C.") Sections 1501 through 1505. (Supp. 1, Stip. ¶1.)

For each of the Tax Years 2005, 2006, and 2007, New York Frozen Foods, Inc., a member of Appellants' federal consolidated group, timely filed initial City of Bedford Heights net profits tax returns and timely paid the Bedford Heights net profits tax indicated thereon. (Supp. 1, Stip. ¶2.)

On March 9, 2010, the Appellants that were included in the timely filed federal consolidated tax returns for the federal income tax years 2005, 2006, and 2007 filed

amended City of Bedford Heights net profits tax returns on a consolidated basis for each of the Tax Years 2005, 2006, and 2007, requesting a refund of a portion of the City of Bedford Heights net profits tax paid with the original returns for those Tax Years 2005, 2006, and 2007. (Supp. 1-2, Stip. ¶5.) The amended returns filed by Appellants claimed, in total, refunds of $698,294 in City of Bedford Heights net profits tax, plus interest. The tax amount of $698,294 represents a portion of the amount of the City of Bedford Heights net profits tax paid, in the aggregate, by Appellants for the Tax Years 2005, 2006, and 2007. (Supp. 2, Stip. ¶6.)

C. Administrative proceedings below

On July 22, 2011, the City Tax Administrator issued a Decision of the Tax Administrator, which denied the refund claims on the basis that the "rules and regulations adopted by the City of Bedford Heights prohibited the filing of amended returns to change the method of filing." (Appx. 21.) The Decision of the Tax Administrator does not contain any analysis of the Bedford Heights Ordinances. The Decision does not contain a single citation to any Bedford Heights Ordinance or any citation to the specific "rules and regulations" the City Tax Administrator purportedly relied upon to deny the refund claims at issue. (Appx. 21.) The Decision also contains no reference to R.C. 718.06.

On August 1, 2011, Appellants timely filed an appeal with the Bedford Heights Municipal Board of Appeal ("Bedford Heights Board") from the Decision of the Tax Administrator. (Supp. 9-12, Bedford Board Record.)[1] In its appeal to the Bedford Heights Board, Appellants asserted that the denial of the refund claims made on an

[1] The record of the proceedings before the Bedford Heights Board of Appeal will be referred to herein as "Bedford Board Record."

amended basis was contrary to R.C. 718.06 and Bedford Heights Ordinance Section 173.15(a), and that to the extent that any Bedford Heights rule purported to prohibit the filing of consolidated returns on an amended basis the rule was invalid as in conflict with R.C. 718.06 and Bedford Heights Ordinance Section 173.15(a). On September 19, 2011, the Bedford Heights Board held a hearing regarding the appeal of the Decision of the Tax Administrator. (Supp. 9-12, Bedford Board Record.)[2]

On November 9, 2011, the Bedford Heights Board issued a two-page final decision in which it affirmed the July 22, 2011 Decision of the City Tax Administrator. (Appx. 19-20.) The two-page decision states, in part, that "[t]aken together, Sections 173.15, 173.32, of the Bedford Heights Administrative Code and Section 5:06(A) of the R.I.T.A. Rules and Regulations are identical in effect. Neither permits a taxpayer to change the method of accounting or apportionment of net profits, nor the method of filing after the due date for filing the original return."[3] (Appx. 20.) The Bedford Heights Board's final decision does not reference R.C. 718.06 or provide any analysis of R.C. 718.06.

Appellants timely appealed the final decision of the Bedford Heights Board to the Ohio Board of Tax Appeals ("BTA") on January 6, 2012, pursuant to R.C. 5717.011. In its notice of appeal to the BTA, Appellant specified several errors with respect to the Bedford Heights Board's decision. In summary, the errors alleged included assertions that the Bedford Heights Ordinances did not contain a prohibition on filing consolidated

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[2] A court reporter was not present at the hearing held before the Bedford Heights Board of Appeal on September 19, 2011. At such hearing, however, the Bedford Heights Board of Appeal made an audio recording of the hearing. By agreement between the parties, Bedford Heights engaged a court reporter to transcribe the audio recording in connection with NYFF's appeal of the Bedford Heights Board's decision to the Ohio BTA.
[3] R.I.T.A. is the acronym for Regional Income Tax Agency.

returns on an amended basis, that the R.I.T.A. Rule 5:06(A) cited by the Bedford Heights Board was never properly incorporated into the Bedford Ordinances, that the R.I.T.A. Rule was in conflict with the Bedford Heights Ordinances in any event, and that R.C. 718.06 required Bedford Heights to accept consolidated returns.

On March 9, 2015, the BTA issued a Decision and Order, which addressed one of the Appellants' specifications of error, ignored some of the Appellants' specifications of error, and acknowledged Appellants' constitutional challenges, but stated that the BTA is without jurisdiction to declare a given statute or ordinance to be unconstitutional. The BTA decision indicated that the BTA disagreed with one of Appellants' specifications of error which addressed the meaning of the terms "method of accounting" and "method of apportionment" as used in the City's Ordinance and the R.I.T.A. Rules. Specifically, the BTA wrote, "Appellants argue that filing amended consolidated returns is not a 'change in the method of accounting or apportionment of net profits.' We disagree [with Appellants]." (March 9, 2015 BTA Decision and Order at 4[4], Appx. 16.)

On March 18, 2015, Appellants filed a Motion for Reconsideration of the March 9, 2015 BTA Decision and Order. After considering the Motion for Reconsideration, the BTA vacated its March 9, 2015 Decision and Order and issued a new and substantively different Decision and Order dated March 20, 2015, 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 March 9, 2015 Decision and Order of the BTA stated

[4] The BTA's decision does not contain page references. The page references to the BTA's decision denoted herein are made with reference to the four pages of the decision, in chronological order.

that the BTA disagreed with Appellants regarding the Appellants' contention that filing amended consolidated returns after initially filing a separate return is not a 'change in the method of accounting or apportionment of net profits" [and therefore, as Appellants contend, not prohibited by the Bedford Heights Ordinance Section 173.15(a)], the BTA's March 20, 2015 decision stated that the BTA agreed with Appellants' contention. In the March 20, 2015 BTA decision, the BTA agreed that filing amended consolidated returns after initially filing a separate return is not a "change in the method of accounting or apportionment of net profits" and that Bedford Heights Ordinance Section 173.15(a) did not prohibit the filing of the amended returns on a consolidated basis. (March 20, 2015 BTA Decision and Order at 2-3, Appx. 12-13.)

Notwithstanding the BTA's holding in favor of the Appellants with respect to Section 173.15(a), the BTA's Decision and Order affirmed the denial of the refunds to Appellants on a different basis:

> 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. (March 20, 2015 BTA Decision and Order, at 4, Appx. 14.)

The BTA's Decision and Order dated March 20, 2015 does not contain any analysis regarding R.C. 718.06 or Appellants' constitutional arguments. The BTA noted that the Appellants raised assertions that the City's attempt to incorporate future amendments to the R.I.T.A. Rules was an unconstitutional delegation of authority, but the BTA found that it is without jurisdiction to declare a given statute or ordinance to be unconstitutional. The BTA also noted Appellants' assertion regarding R.C. 718.06, but

the BTA did not provide any analysis of R.C. 718.06, presumably because the BTA found that assertion to also constitute a constitutional issue, which the BTA is without jurisdiction to consider.

The BTA's Decision and Order dated March 20, 2015 vacating the March 9, 2015 Decision and Order was entered 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 occurred prior to any party actually 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 filed a Notice of Appeal to this Court from the March 20, 2015 BTA Decision and Order, setting forth several errors Appellants claimed were made by the BTA.

D. Ohio's Statutory Framework Governing Municipal Income Taxes and the Enactment of R.C. 718.06

The Ohio Constitution grants municipalities the right to exercise all powers of local self-government. Ohio Constitution, Article XVIII, Sections 3 and 7. Municipalities have the power to adopt and enforce local regulations, including the power of taxation, so long as such regulations do not conflict with Ohio general law or constitutional provisions. *Id.*; *Thompson v. City of Cincinnati*, 2 Ohio St.2d 292, 294, 208 N.E.2d 747 (1965). The Ohio General Assembly is authorized by the Constitution to place restrictions and limitations on the taxing authority enjoyed by municipalities, Ohio Constitution, Article XIII, Section 6, and Article XVIII, Section 13, and the General Assembly has done so in several statutory provisions within Chapter 718 of the Revised Code.

The provision requiring municipalities to allow consolidated returns occurred in 2000, when, in Am. Sub. H.B. No. 477, the 123rd General Assembly enacted R.C. 718.06. That provision states that "[o]n and after January 1, 2003, any municipal corporation that imposes a tax on the income or net profits of corporations shall accept for filing a consolidated income tax return from any affiliated group of corporations subject to the municipal corporation's tax if that affiliated group filed for the same tax reporting period a consolidated return for federal income tax purposes pursuant to section 1501 of the Internal Revenue Code."

R.C. 718.06 requires Bedford Heights (and all Ohio taxing municipalities) to accept a consolidated net profits tax return from any affiliated group of corporations if that affiliated group of corporations filed a consolidated return for federal income tax purposes for the same tax period. Appellants meet this criterion because Appellants filed a consolidated return for federal income tax purposes for the same federal tax periods as the Tax Years to which the refund claims relate. (Supp. 1, Stip. ¶1.)

E. Bedford Heights Charter and Bedford Heights Ordinances

1. *Bedford Heights Charter grants legislative power to City Council*

City of Bedford Heights Charter, Article VI, Section 6.01 (Article VI of the Charter is entitled "Council" and Section 6:01 is entitled "Powers") provides:

> The legislative power of the municipality, except as limited by this Charter, and such additional powers as may be expressly granted by this Charter, shall be vested in the Council.

2. *Bedford Heights Ordinance governing refund claims and prohibition on changing the method of accounting or method of apportionment after due date for filing the original return*

City of Bedford Heights Ordinance Section 173.15(a) provides:

> (a) 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, or both, contained in Sections 173.30 through 173.35. Such amended return shall be on a form obtainable on request 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." (italics added for emphasis.)

Bedford Heights Ordinance Section 173.15(a) contains only two restrictions regarding amended returns: a taxpayer may not change the method of apportionment or the method of accounting after the due date of the original return. It does not contain a restriction regarding a change in the method of filing (single to consolidated group) on amended returns after the due date for the original return.[5] Bedford Heights Ordinance Section 173.15 has never been amended following its adoption in 2004. (Supp. 2, Stip. ¶7(b).)

3. <u>*Incorporation of R.I.T.A. Rules and Regulations*</u>

City of Bedford Heights Ordinance Section 173.56 was adopted by the Bedford Heights City Council on December 21, 2004 and has never been amended. (Supp. 3-4, Stips. ¶12, ¶13.) Since its adoption on December 21, 2004, City of Bedford Heights Ordinance Section 173.56 has provided, in its entirety, as follows:

> (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

[5] As indicated above, the March 20, 2015 BTA decision correctly found that Bedford Heights Ordinance Section 173.15 does not preclude the refunds claimed by NYFF on amended returns filed on a consolidated basis because a change in the "method of filing (i.e., single or consolidated)" after the original due date of the return is not prohibited by Bedford Heights Ordinance Section 173.15. (BTA March 20, 2015 Decision and Order, at 2-3, Appx. 12-13.)

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. (Supp. 3-4, Stip. ¶13.)

F. R.I.T.A's role with respect to Bedford Heights' municipal income tax and R.I.T.A. Rule Section 5:06(A)

R.I.T.A. was formed around 1971 under the aegis of the Regional Council of Governments, which was established under R.C. 167.01. R.I.T.A. periodically promulgates administrative Rules which may be adopted by its member municipalities. R.I.T.A. acts as the tax administrator of member municipalities in the administration, enforcement, and collection of taxes imposed by the member municipalities.

1. *R.I.T.A. Rule Section 5:06(A) on December 21, 2004*

On the date that City of Bedford Heights Ordinance Section 173.56 was enacted (December 21, 2004), Section 5:06(A) of the R.I.T.A. Rules provided, in its entirety:

> 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 return shall be clearly marked 'Amended.' A taxpayer may not change the method of accounting or apportionment of the net profits after the due date for filing the original return. Amended returns cannot be filed after three (3) years from the original filing date. (Supp. 2-3, Stip. ¶8.)

The limiting phrase "nor the method of filing (i.e., single or consolidated)" of R.I.T.A. Rule Section 5:06(A), which the BTA ultimately relied upon as its basis for upholding Bedford Heights' denial of the consolidated returns filed on an amended basis

was not contained in Section 5:06(A) of the R.I.T.A. Rules at the time City of Bedford Heights Ordinance Section 173.56 was enacted or last amended. (Supp. 2-3, Stip. ¶8(a) and (b).)[6]

2. *R.I.T.A. Rule Section 5:06(A) as amended in July 2009*

In July of 2009, R.I.T.A. amended Section 5:06 of the R.I.T.A. Rules to read, in its entirety:

> 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 return shall be clearly marked 'Amended.' A taxpayer may not change the method of accounting or apportionment of the 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. (Supp. 2-3, Stip. ¶8(b).) (The language added by the July 2009 R.I.T.A. amendment is shown in bold for emphasis).

3. *Bedford Heights' lack of legislative action regarding Bedford Heights Ordinance Section 173.56 after December 21, 2004*

Bedford Heights Ordinance Section 173.56 was adopted by the Bedford Heights City Council on December 21 of 2004. (Supp. 3, Stip. ¶12.) Bedford Heights Ordinance Section 173.56 has never been amended or reenacted. (Supp. 3-4, Stips. ¶12, ¶13.)

4. *If Bedford Heights Ordinances and R.I.T.A. Rules conflict, the Bedford Heights Ordinance controls*

The preamble to the R.I.T.A. Rules, Chapter 5:00 (the Chapter which includes Rule 5:06 regarding amended returns) provides, in part, that:

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[6] The version of Section 5:06(A) of the R.I.T.A. Rules cited by the Bedford Heights Board of Appeal in its November 9, 2011 decision is not the version of Section 5:06(A) that was in effect on the last date that Bedford Heights Ordinance Section 173.56 was enacted or last amended.

> In the event of a conflict with this Chapter of the Rules & Regulations and any provision(s) of the Ordinance of [Bedford Heights],[7] the Ordinance will supersede.

G. Singular reason for the BTA's affirming of the denial of the refund claims

Appellants assert that Bedford Heights' denial of the refund claims violates several provisions of the Ohio Constitution. The BTA affirmed Bedford Heights' denial of Appellants' refund claims for one reason and one reason only – because the BTA is not permitted to declare a local ordinance (here, Bedford Heights Ordinance Section 173.56) unconstitutional and is not permitted to rule on other constitutional questions raised in this case. *S.S. Kresge Co. v. Bowers*, 170 Ohio St. 405, 166 N.E.2d 139 (1960), paragraph one of the syllabus. The BTA's decision was based solely upon Bedford Heights' application of a 2009 amendment to the R.I.T.A. Rule Section 5:06(A) which was adopted more than four years after Bedford Heights Ordinance Section 173.56 was enacted in 2004 and after the Tax Years at issue had closed and the due date for filing the initial returns had passed, and that was never incorporated into the Bedford Heights' Ordinances in any event.

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[7] The R.I.T.A. Rules & Regulations are written generically, and also provide, in the General Information Section that "Any place in these Rules & Regulations where the term this municipality appears, the name of any member municipality can be inserted." Accordingly, the words "Bedford Heights" are included in the citation above in lieu of "this municipality."

ARGUMENT

Introductory Statement

This case concerns primarily the legality of Bedford Heights' actions in denying Appellants' filing of consolidated net profits tax returns for the 2005, 2006, and 2007 Tax Years on an amended basis even though R.C. 718.06 requires municipalities to accept such consolidated returns and notwithstanding that the Bedford Heights' Ordinance allows consolidated returns and contains no language denying the ability to file consolidated returns on an amended basis. This case also concerns whether Bedford Heights Ordinance Section 173.56, to the extent it purports to adopt future amendments to R.I.T.A. Rules, is invalid as an unconstitutional delegation of authority in violation of the Ohio Constitution. Another issue is whether the application of the 2009 R.I.T.A. amendment to R.I.T.A. Rule Section 5:06(A) to Appellants' Tax Years 2005, 2006, and 2007 was intended to apply retrospectively to earlier tax years that had closed and for which the due date for filing the initial returns had passed and whether its application to Appellants constitutes an unconstitutional retroactive law. These are all questions of law subject to de novo review by this Court.

The Appellants' assertions, in summary, are: (a) R.C. 718.06 is a limitation or restriction on the power of Ohio's municipalities to tax and that limitation or restriction supersedes any Bedford Heights Ordinance or rule to the contrary; (b) Bedford Heights Ordinance Section 173.56 may only incorporate by reference those R.I.T.A. Rules that were in existence on December 21, 2004; (c) the July 2009 amendment to R.I.T.A. Rule Section 5:06(A) exceeds the prohibitions in City of Bedford Heights Ordinance Section 173.15(a) regarding the filing of amended returns; (d) the additional prohibition on filing

amended returns changing the method of filing contained in R.I.T.A. Rule Section 5:06(A) is invalid because it is in conflict with the Bedford Heights' Ordinances; (e) the application of the R.I.T.A. 2009 amendment to R.I.T.A. Rule Section 5:06(A) to tax years that had closed and for which the due date for filing initial returns had passed is an invalid retrospective application of a Rule that does not have an express retrospective intent; and (f) the application of the R.I.T.A. 2009 amendment to R.I.T.A. Rule Section 5:06(A) to tax years that had closed and for which the due date for filing initial returns had passed is an invalid retroactive law.

A decision of the BTA must be reversed or vacated if it is "unreasonable or unlawful." R.C. 5717.04. In determining whether a BTA decision is unreasonable or unlawful, this Court reviews questions of law de novo. *Columbus City School Dist. Bd. of Educ. v. Testa*, 130 Ohio St.3d 344, 2011-Ohio-5534, 958 N.E.2d 557, ¶12. This Court should reverse the BTA's decision because it is unlawful and should order Bedford Heights to refund to the Appellants the tax and interest that the Appellants are legally due.

Appellants' Proposition of Law No. 1:

> **The City of Bedford Heights' refusal to accept Appellants' amended consolidated Bedford Heights' net profits tax returns is contrary to R.C. 718.06, which authorizes a taxpayer to file a municipal consolidated net profits tax return if the taxpayer filed a consolidated federal income tax return for the same tax period.**

This Court must construe the provisions of the Revised Code and Bedford Heights' Ordinances strictly, and resolve all doubts in favor of the taxpayer. *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 822 N.E.2d 400,

¶34; *Bowsher v. Euclid Income Tax Bd. of Review*, 99 Ohio St.3d 330, 2003-Ohio-3886, 792 N.E.2d 181, ¶14.

A. The Ohio General Assembly has the ability to restrict and impose limits on the power of taxation of municipal corporations.

As this Court recently explained in *Panther II Transportation, Inc. v. Village of Seville Board of Income Tax Review*, 2014-Ohio-1011:

> First, the Home Rule Amendment, Article XVIII, Section 3 of the Constitution, confers upon municipalities the "authority to exercise all powers of local self-government," and there can be "'no doubt that the grant of authority to exercise all powers of local government includes the power of taxation.'" *Cincinnati Bell Tel. Co. v. Cincinnati*, 81 Ohio St.3d 599, 602, 693 N.E.2d 212 (1998), quoting *State ex rel. Zielonka v. Carrel*, 99 Ohio St. 220, 227, 124 N.E. 134 (1919). Second, Article XIII, Section 6 provides that the 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." Third, under Article XVIII, Section 13, "[l]aws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes * * *." Thus, <u>municipal governments have a plenary power to tax, but the General Assembly has authority to impose specific limits on that power</u>." *Cincinnati Bell* at 602. See also *Gesler v. City of Worthington Income Tax Bd. of Appeals*, 138 Ohio St.3d 76, ___ N.E.2d ___, 2013-Ohio-4986.

The General Assembly has the authority to limit or restrict local taxation, so long as it is "an express act of restriction" by the General Assembly. *Cincinnati Bell* at 602.

B. In exercising its taxing power, Bedford Heights may not exceed the restrictions or limitations on its authority by ignoring the restrictions imposed under Chapter 718 of the Revised Code, including R.C. 718.06.

The municipal power to tax is vested in the municipalities. *Id.* However, a municipality may not exceed the limitations on its taxing authority in imposing and administering its tax in a manner that ignores the provisions enacted by the General Assembly in Chapter 718 of the Revised Code. If a municipality ignores a Chapter 718

restriction or limitation, that attempt by the municipality is an invalid exercise of its municipal power. *See, e.g. Greater Freemont v. City of Fremont*, 302 F. Supp. 652, 666, 21 Ohio Misc. 127 (N.D. Ohio 1968) (stating that municipal taxing ordinances that do not conform to Chapter 718 apportionment provisions are invalid).

C. In enacting R.C. 718.06, the General Assembly expressly limited and restricted the power of municipal taxation by permitting taxpayers to file consolidated tax returns, which allow a group of related entities to be taxed as a single economic unit.

In 2000, the 123rd Ohio General Assembly passed Am. Sub. H.B. No. 477, 148 Ohio Laws, Part II, 5120, 5129-5130, in which R.C. 718.06 was enacted. R.C. 718.06 instructs, very simply, that beginning in 2003 and thereafter, a municipal corporation that imposes an income tax shall accept for filing a consolidated income tax return from any affiliated group of corporations that chooses to file a consolidated federal income tax return for the same tax period. As indicated at page 6 of the Legislative Service Commission's Bill Analysis of Am. Sub. H.B. No. 477:

> [R.C. 718.06] requires municipal corporations to accept consolidated returns from affiliated groups of corporations that file consolidated returns (for the same tax reporting period) for federal income tax purposes, beginning in 2003. This simplifies reporting for members of a corporate group and allows the group to offset operating losses of some group members against operating profits of other group members. (Appx. 45)

Filing municipal tax returns as a consolidated group could, and often does, result in a group of affiliated corporations incurring a smaller cumulative Ohio municipal tax obligation than if the members of the consolidated group of affiliated corporations filed as separate corporations. Presumably, that is why a taxpayer would elect to file a tax return on a consolidated basis.

The General Assembly, in enacting R.C. 718.06, was expressly restricting or limiting municipal taxation when providing municipal taxpayers the right to elect to compute and pay municipal income taxes as if the taxpayer were one economic unit, because the taxpayer could incur a smaller tax obligation.

As discussed above, Bedford Heights does not have an unrestricted power to tax under the Home Rule amendment to the Ohio Constitution. *Cincinnati Bell* at 602 (municipal governments have a plenary power to tax, but the General Assembly has authority to impose specific limits on that power). The General Assembly's authority to limit or restrict municipal taxation applies whether or not the municipality is a charter municipality. *The State Ex Rel. City of Toledo v. Cooper,* 97 Ohio St. 86, 119 N.E. 253 (1917) (Charter municipalities are not excluded from the General Assembly's ability to limit or restrict municipal taxation in Ohio).

D. Bedford Heights is subject to R.C. 718.06 and must permit taxpayers to file consolidated tax returns without imposing additional conditions.

In *Cincinnati Imaging Venture v. Cincinnati*, 116 Ohio App.3d 1, 686 N.E.2d 528 (1st Dist. 1996), Cincinnati was subject to and required to obey Chapter 718's mandated interest rate. In *Cincinnati Imaging*, a taxpayer overpaid tax to the City of Cincinnati, and subsequently filed an amended Cincinnati tax return, requesting a refund. Cincinnati refunded the tax, but Cincinnati attempted to avoid paying the taxpayer the interest prescribed in Chapter 718, contending that Article XVIII, Section 13 of the Ohio Constitution did not allow the General Assembly to interfere with the local administration and regulation of lawfully levied taxes by Cincinnati. In rejecting the City of Cincinnati's position, the court in *Cincinnati Imaging* wrote, "[i]t is difficult to interpret

[Ohio Constitution Article XVIII, Section 13], granting to the General Assembly the absolute right to limit the power of municipalities to impose taxes, as allowing these same municipalities the unfettered right to regulate the levy and collection of those taxes. * * * Cincinnati's tax must conform to the requirements of R.C. Chapter 718, including the payment of interest on refunds." *Id.* at 4-5.

R.C. 718.06 expressly states that municipalities "shall" accept a consolidated income tax return from an affiliated group of corporations if that affiliated group of corporations filed a consolidated return for federal income tax purposes for the same tax period. R.C. 718.06 does not contain any requirement that the consolidated group filing be made on the initial return or prohibiting such filing on an amended return. The express limitations imposed on municipalities by R.C. 718.06 may not be ignored by Bedford Heights. Bedford Heights' attempt to impose an additional condition on a taxpayer's ability to file consolidated returns (requiring that consolidated returns must be filed initially, as opposed to as amended returns) fails to conform with the limitations imposed by R.C. 718.06.

E. Although the BTA did not address R.C. 718.06, this Court should conclude that R.C. 718.06 must be followed by Bedford Heights under Article XIII, Section 6 and Article XVIII, Section 13 of the Ohio Constitution.

The BTA did not address Appellants' assertion that R.C. 718.06 requires Bedford Heights to accept consolidated tax returns. This Court should hold that R.C. 718.06 imposes an express restriction or limitation on the municipal power of taxation, and that Bedford Heights' refusal to allow Appellants' amended consolidated returns violates that provision in contravention of Article XIII, Section 6 and Article XVIII, Section 13 of the Ohio Constitution.

Appellants' Proposition of Law No. 2:

> **Bedford Heights Ordinance Section 173.56, which was last amended by the City Council of Bedford Heights on December 21, 2004, may only incorporate by reference those R.I.T.A. Rules that were in existence on December 21, 2004; to attempt to incorporate later amendments to the R.I.T.A. Rules amounts to an unconstitutional delegation of legislative authority.**

The BTA found, in part, "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." (March 20, 2015 BTA Decision and Order, at 4, Appx.14.) The adoption of a future R.I.T.A. amendment to its Rule, however, is not permitted.

The BTA acknowledged the constitutional issue, but found that it is without jurisdiction to declare a given statute or ordinance to be unconstitutional. It is clear that the BTA's conclusion on this issue was merely that the BTA found that the language contained in Bedford Heights Ordinance Section 173.56 intended to adopt future changes to R.I.T.A.'s Rules after Bedford Heights Ordinance Section 173.56 was enacted.

A. A law which incorporates another law by reference can only adopt the version of the other law as it existed at the time of the enactment, re-enactment, or amendment of the incorporating reference.

A law that adopts the provisions of another law or rule through incorporation by reference may only adopt the other law or rule as it existed at the time the incorporating law was enacted or last modified. *State, ex rel. Timken Roller Bearing Co, v. Indus. Comm.*, 136 Ohio St. 148, 153, 24 N.E.2d 448, 451 (1939); *Robinson v. Tax Commr. of Indian Hill*, 61 Ohio Misc.2d 95, 574 N.E.2d 596 (C.P.1989) citing *State, ex rel. Timken Roller Bearing Co.* Also see *Estate of Hughes v. Lindley*, No. 41671, 1980 Ohio App.

LEXIS 12207, at *11 (Cuyahoga County May 22, 1980); and *State v. Gill*, 63 Ohio St. 3d 53, 584 N.E.2d 1200 (1992). An attempt to incorporate later enacted laws or later promulgated rules constitutes an unconstitutional delegation of authority.

B. The City Council of Bedford Heights is the legislative body which enacts tax laws that are operative for Bedford Heights net profits tax purposes, and the City Council of Bedford Heights may not delegate its authority to R.I.T.A.

The City Council of Bedford Heights is the legislative body of Bedford Heights pursuant to its Charter, Article VI, Section 6.01.) R.I.T.A. acts, in some respects, as the tax administrator for the Bedford Heights net profits tax. (Supp. 1, Stip. ¶4.) It is an agency that assists in the administration and enforcement of the tax laws of Bedford Heights.

C. *State v. Gill* and *Estate of Hughes* compel the conclusion that Bedford Heights' attempt in Bedford Heights Ordinance Section 173.56 to incorporate amendments to R.I.T.A. Rules made after the date Bedford Heights Ordinance Section 173.56 was enacted or last amended is inoperable because it impermissibly delegates Bedford Heights' legislative authority to R.I.T.A.

1. *State v. Gill*, decided by this Court, does not allow future changes to the R.I.T.A Rules to be automatically picked-up without action by the City Council of Bedford Heights.

In *State v. Gill*, 63 Ohio St. 3d 53, 584 N.E.2d 1200 (1992), this Court addressed R.C. 2913.46(A), which provided that "[n]o individual shall knowingly possess, buy, sell, use, alter, accept, or transfer food stamp coupons in any manner not authorized by the 'Food Stamp Act of 1977,' 91 Stat. 958, 7 U.S.C. 2011, as amended." An individual who had been convicted of violating an Ohio food stamp law argued that an Ohio law [R.C.2913.46(A)] violated the Ohio Constitution because the Ohio law unlawfully delegated away Ohio's legislative authority to Congress. The individual argued that the

language "as amended," as used in R.C. 2913.46(A), rendered R.C. 2913.46(A) unconstitutional because by including that language, the General Assembly intended to incorporate future amendments to the federal law. This Court, in analyzing the language "as amended" in R.C. 2913.46(A), wrote:

> 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.

Id. at 55.

This Court found that because "as amended" in R.C. 2913.46(A) did not *attempt* to pick up future amendments, the statute did not constitute an unconstitutional delegation of authority. But that is not the end of this Court's analysis. This Court held:

> Considering the foregoing, we conclude that a reasonable interpretation of R.C. 2913.46(A) is that the General Assembly intended to prohibit any activity involving food stamps in a manner inconsistent with the federal food stamp law as the federal law read on the date R.C. 2913.46(A) was enacted. **The General Assembly may adopt provisions of federal statutes that are in effect at the time the state legislation is enacted.** Thus, we hold that R.C. 2913.46(A) does not constitute an unlawful delegation of state legislative authority, in violation of Section 1, Article II of the Ohio Constitution. (Emphasis added.)

Id. at 56.

Both the parties and the Court in *State v. Gill* recognized that a statute that attempts to incorporate by reference amendments made to another law after the enactment or latest amendment of the incorporating law, would constitute an unlawful delegation of authority. The reason that the incorporation provision was upheld in *State v. Gill* was that the Court interpreted it as incorporating only those amendments that

existed *at the time* the incorporating law was enacted. It is clear that had the incorporating law been read as intending to incorporate future amendments, the Court would have held it an unconstitutional delegation of authority.

2. Bedford Heights Ordinance Section 173.56 expresses an intent to incorporate future amendments to the R.I.T.A. Rules.

Bedford Heights Ordinance Section 173.56 provides, in part, that Bedford Heights adopts, "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**." (Emphasis added.) This incorporating language of Ordinance Section 173.56 is parallel to language that this Court and other courts have addressed when analyzing whether the Ohio Constitution's prohibition of the delegation of legislative authority is violated. In *State v. Gill* the Court compared the phrase "as amended" to "as now or *hereinafter* amended." The Court found that "as amended" was permissible, because "as amended" was referring to the amendments in the Internal Revenue Code that had already occurred (*i.e*, "as amended as of this date") as contrasted with "as now or *hereinafter* amended," which *State v. Gill* recognized would unconstitutionally delegate the state's legislative authority.

3. *Estate of Hughes'* holding that the incorporating reference to the I.R.C., which employed the phrase "or any amendments or reenactments, thereof," could not permissibly adopt future changes to the I.R.C. demonstrates that Bedford Heights Ordinance Section 173.56's attempt to adopt the 2009 R.I.T.A. Rules' amendments by utilizing the phrase "amendments made subsequent hereto," is an unconstitutional delegation of authority.

In *Estate of Hughes*, Mr. Hughes retired from the Cleveland Clinic, effective January 1, 1978, and commenced receiving retirement benefits from a pension plan in

1978. Mr. Hughes designated a trustee to be the beneficiary of the pension upon his death. Mr. Hughes then died March 16, 1978. At the time of his death, the Trustee elected to receive a lump sum benefit. Because of the timing of I.R.C. law changes and Ohio Revised Code law changes, a dispute arose regarding the extent of the estate's value for Ohio estate tax purposes. The Ohio Tax Commissioner attempted to include the value of the pension in the estate while the estate argued the pension's value was excludable.

The Ohio Revised Code Section at issue in *Estate of Hughes*, R.C. 5731.09, was enacted by the Ohio General Assembly on September 16, 1976. R.C. 5731.09 incorporated by reference I.R.C. § 2039, which provided an exclusion from the gross estate for the type of pension amounts that were paid to the beneficiary. In making the reference to I.R.C. § 2039, however, the Ohio General Assembly also attempted to "pick up" *future* changes to I.R.C. § 2039 by using the phrase "or any amendments or *re-enactments* [of I.R.C. § 2039]." At the time R.C. 5731.09 was enacted in 1976, I.R.C. § 2039 allowed an exemption for the type of pension at issue (meaning that Ohio would also allow such exemption for Ohio estate tax purposes). Subsequent to September 16, 1976, however, IRC § 2039 was changed by Congress to disallow such exemption from the gross estate for federal purposes. The estate argued that the version of I.R.C. § 2039 that was in effect on September 16, 1976 was the version that applied. The court agreed with the estate that the version of IRC § 2039 that ultimately applied for Ohio tax purposes was the version that existed at the time R.C. 5731.09 was enacted and not later amendments or reenactments of I.R.C. § 2039.

The power and discretion vested in a legislative taxing body requires that the inclusion or exclusion of items for taxation purposes be based on an evaluation of

political and social considerations "by the legislative authority imposing the tax." *Id.* at 12. The *Estate of Hughes* court held "the legislature's attempt to incorporate future amendments to federal tax law into Ohio's statutory tax scheme was an unconstitutional delegation of legislative powers and the appropriate application of R.C. 5731.09 requires disregarding such language." *Id.* at 13.

The City Council of Bedford Heights is the legislative authority imposing the tax. R.I.T.A. is not. Bedford Heights cannot delegate to R.I.T.A. its legislative authority to enact tax laws. *Estate of Hughes* requires that Bedford Heights Ordinance Section 173.56 be interpreted without regard to the following portion of the Ordinance: "including all additions, deletions, and amendments made subsequent hereto."

D. The prohibition against delegating legislative authority applies to municipal tax incorporating references and the administrative convenience of the municipality is not a valid basis to conclude otherwise.

Robinson v. Tax Commr. of Indian Hill, 61 Ohio Misc.2d 95, 574 N.E.2d 596 (C.P.1989), citing *State, ex rel. Timken Roller Bearing Co.*, found that a Village of Indian Hill ordinance that referred to a definition of income in the Ohio Revised Code referred to the version of the Ohio definition of "adjusted gross income" in existence when the Indian Hill ordinance was passed, and did not adopt later amendments to the Ohio statute. Although the Village Ordinances included language that clearly intended to adopt subsequent amendments to the Ohio statute's definition of "adjusted gross income," the court ruled that the Village could only adopt the version of the Ohio statute's definition of "adjusted gross income" that existed at the time of the enactment of the Indian Hill Ordinance.

The court stated:

> Certainly there is value in administrative convenience for Indian Hill to intend subsequent changes in the [Ohio] referenced statutes to be made in its own code. However, the problem of wholesale automatic adoption of the changes of law made by another legislative body motivate the overwhelming body of case law establishing the contrary proposition.

Id. at 99. The court stated that the taxing power of the Indian Hill Council is vested in the council by the residents of the Village of Indian Hill and cited the rationale from *Estate of Hughes*: the power and discretion vested in a legislative taxing body requires that the inclusion or exclusion of items for taxation purposes be based on an evaluation of political and social considerations "by the legislative authority imposing the tax." *Id.* at 7.)

One Columbus Building Associates Ltd. v. The City of Columbus Division of Income Tax, 10th Dist. Franklin No. 98AP-1309, 1999 WL 1072493, (Nov. 30, 1999) also rejects any assertion that Bedford Heights may apply rules promulgated by R.I.T.A. that have not been incorporated by legislation enacted by the Bedford Heights City Council. In *One Columbus*, the City of Columbus attempted to apply a federal statute that treats recaptured accelerated depreciation as ordinary income. However, the Columbus City Council did not enact an ordinance adopting this federal treatment that the City of Columbus was attempting to apply by rule. The court rejected this attempt. The following language from the *One Columbus* Court's holding is particularly instructive:

> [t]he Columbus City Code is silent as to the treatment of accelerated depreciation and therefore such recapture cannot be reclassified as ordinary income subject to taxation without specific city legislation. * * * Congress' election to treat recaptured accelerated depreciation as ordinary income as opposed to capital gains income was not in existence at the time the Columbus City Tax Codes came into existence. [The City] admits that it cannot merely concur with the federal government's classification of ordinary income unless there is an enactment by Columbus City Council

> codifying such classification. * * * City Council may have the authority to define accelerated recaptured depreciation as ordinary income; however, they have failed to do so. * * * No city can tax without legislative authority. Such legislative authority does not exist in this case. Absent a specific Columbus ordinance incorporating the existing federal definitions of ordinary income, Appellee lacks authority to tax recaptured accelerated depreciation.

Id. at 3-4.

Absent a legislative re-enactment of Bedford Heights Ordinance Section 173.56 by the City Council of Bedford Heights following the 2009 R.I.T.A. amendment, Bedford Heights cannot lawfully apply the 2009 amendment of R.I.T.A. Rule Section 5:06(A) to Appellants. Bedford Heights' attempt to apply the 2009 version of R.I.T.A. Rule Section 5:06(A) by the reference in Bedford Heights Ordinance Section 173.56 is invalid as an unconstitutional delegation of legislative authority. See *Estate of Hughes* and *State v. Gill.* The version of R.I.T.A. Rule Section 5:06(A) that was in effect when Bedford Heights Ordinance Section 173.56 was enacted is the version that existed prior to the R.I.T.A. Rule's 2009 amendment, and that version of the R.I.T.A. Rule does not deny a taxpayer the ability to change the method of filing from separate to consolidated on an amended return.

The BTA upheld the denial of the refund claims filed by Appellants based on the language in Bedford Heights Ordinance Section 173.56 that attempted to incorporate subsequent amendments to R.I.T.A. Rules and stated that it could not address Appellants' contentions regarding unconstitutional delegation of authority under the Ohio Constitution. (Appx. 9, March 20, 2015 BTA Decision and Order, at 4.)

This Court should find that the attempt by Bedford Heights Ordinance Section 173.56 to incorporate future R.I.T.A. amendments would constitute an unconstitutional delegation of authority.

Appellants' Proposition of Law No. 3:

> **The July 2009 amendment to R.I.T.A. Rule Section 5:06(A) exceeds the prohibition in City of Bedford Heights Ordinance Section 173.15(a) regarding the filing of amended returns and is invalid.**

Section 5:06(A) of the R.I.T.A. Rules, as amended in July 2009, unlawfully adds an additional prohibition, one not contained anywhere in the Bedford Heights Ordinances. Section 5:06(A) of the R.I.T.A. Rules, following the amendment of Section 5:06(A) in July 2009, states that a taxpayer "may not change the * * * method of filing (i.e., single or consolidated), after the due date for filing the original return." (Appx. 24.) The July 2009 version of Section 5:06(A) of the R.I.T.A. Rules adds a prohibition not contained in the Bedford Heights Ordinances and is invalid.

Bedford Heights Ordinance Section 173.15(a), the Ordinance governing Bedford Heights' refund claims, contains only two limitations regarding the computation of a taxpayer's tax liability: that a taxpayer "may not change the method of accounting or apportionment of net profits after the due date for filing the original return. There is no restriction within Bedford Heights Ordinance Section 173.15(a) on changing the method of filing (single to consolidated) by filing a Bedford Heights amended tax return.

The BTA agreed with Appellants that these three terms: "method of accounting," "method of apportionment," and "method of filing" were three distinct things. (March 20, 2015 BTA Decision and Order, at 2-3, Appx. 12-13.) The BTA also rejected Bedford Heights' contention that filing an amended return on a consolidated basis was disallowed

by Bedford Heights Ordinance Section 173.15(a). (March 20, 2015 BTA Decision and Order, at 3, Appx. 13.) The BTA agreed with Appellants that filing amended consolidated returns was not a "change in the method of accounting or apportionment of net profits." (March 20, 2015 BTA Decision and Order, at 3, Appx. 13.)

As detailed above, nothing in Bedford Heights Ordinance Section 173.15(a) prohibits a taxpayer from changing the "method of filing" from a separate return to a consolidated group return on an amended return. The Bedford Heights Tax Administrator may not apply a rule that would add to or exceed the plain language of an ordinance in applying the ordinance. In *Wardrop v. Middletown Income Tax Review Bd.*, 12th Dist. Butler Nos. CA2007-09-235, 2008-Ohio-5298, ¶24 the court stated that "[i]t is beyond dispute 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." Accord *City of Cincinnati v. De Golyer*, 26 Ohio App.2d 178, 182, 270 N.E.2d 664, 666 (1st Dist.1969) ("This provision is not in the ordinance, and exceeds the authority granted the tax commission by the ordinance. * * * the rule-making power of the tax commission may not be exercised to exceed the statutory provisions on the same subject."); *Ransom & Randolph Co. v. Evatt*, 142 Ohio St. 398, 52 N.E.2d 738 (1944), syllabus ("While the Tax Commissioner has the power under the statutes of this state to enact rules to facilitate the work of his department, such rules may not enlarge or restrict statutes exempting intangible property from taxation.")

Appellants' Proposition of Law No. 4:

> **Because the 2009 amendment to R.I.T.A. Rule Section 5:06(A) was not expressly made retrospective it cannot be applied to taxpayers whose tax years ended and for which the due date for the initial returns has passed prior to the effective date of the R.I.T.A. Rule's amendment.**

Even assuming the 2009 version of R.I.T.A. Rule Section 5:06(A) was properly incorporated into the Bedford Heights Ordinances (which it was not, as explained above in Proposition of Law No. 2), it cannot be applied retrospectively to tax years that have closed and for which the due date for filing the initial returns has passed.

In considering a challenge to the retroactive application of a statute or rule, the Court has applied a two-step test. First, it must be determined whether the legislature "expressly intended the statute to apply retroactively." *Bielat v. Bielat*, 87 Ohio St.3d 350, 353, 721 N.E.2d 28, 33 (2000). If so, then it must be determined whether the law is substantive, rendering it unconstitutionally retroactive, as opposed to merely remedial. A substantive statute is one that "impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction." *Id.* at 354; *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 106-107, 522 N.E.2d 489, 495-496 (1988). If there is no express intent that the law be applied retroactively, there is no need to consider the second part of the test, whether the application violates the Retroactivity Clause of the Ohio Constitution. *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 899, at ¶24.

A. A statute or rule is presumed to be prospective in operation unless expressly made retrospective.

R.C. 1.48 provides: "A statute is presumed to be prospective in operation unless expressly made retrospective." In *Youngstown Sheet & Tube Co. v. Lindley*, 38 Ohio

St.3d 232, 234, 527 N.E.2d 828, 830 (1988), this Court recognized that an administrative rule, promulgated in accordance with statutory authority, has the force and effect of law. Thus, like a statute, an administrative rule is presumed to have a prospective effect unless a retrospective application is clearly expressed. *State v. Brunson*, 4th Dist. Washington No. 04CA4, 2004-Ohio-2874, ¶10, citing *Youngstown Sheet & Tube*. See *Bellefontaine City School Dist. Bd. of Edn. v. Benjamin Logan Local School Dist. Bd. of Edn.*, 10th Dist. Franklin No. 91AP-1277 (June 16, 1992), citing *Greene v. United States*, 376 U.S. 149 (1964). See also *Martin v. Ohio Dept. of Human Services*, 130 Ohio App.3d 512, 524, 720 N.E.2d 576, 585 (2nd Dist.1998) citing *Batchelor v. Newness*, 145 Ohio St. 115, 60 N.E.2d 685 (1945).

B. The 2009 amendment to R.I.T.A. Rule Section 5:06(A) does not expressly state that it is intended to apply retrospectively.

The 2009 amendment to R.I.T.A. Rule Section 5:06(A) does not expressly state that is intended to apply to tax years for which returns had already been filed, nor does it expressly state that it is intended to apply to tax years that had already closed as of July 2009. It does not contain any language suggesting an intent that it be applied retrospectively. Therefore, the 2009 amendment, which imposed a third restriction regarding filing amended returns (changing the "method of filing") cannot be applied to deny the filing of Appellants' amended returns on a consolidated basis for the 2005, 2006, and 2007 Tax Years because it would amount to a retrospective application the rule.

Appellants' Proposition of Law No. 5:

> **Bedford Heights' application of the 2009 amendment to R.I.T.A. Rule Section 5:06(A) to Appellants' tax returns for Tax Years 2005, 2006, and 2007 amounts to a retroactive law in violation of the Retroactivity Clause of Article II, Section 28 of the Ohio Constitution. Even if the 2009 amendment to R.I.T.A. Rule Section 5:06(A) had expressly stated that it was intended to apply retrospectively, it would violate the Retroactivity Clause of Article II, Section 28 of the Ohio Constitution because it attaches a new disability to transactions (the filing of initial returns for closed tax years) already past.**

A. When New York Frozen Foods, Inc. filed its initial separate returns for the Tax Years 2005, 2006, and 2007, R.C. 718.06 and the Bedford Heights Ordinances in effect at that time permitted taxpayers to file amended returns on a consolidated basis.

At the time the initial separate Bedford Heights tax returns were filed by New York Frozen Foods, Inc. (a member of the Appellants' federal consolidated group), both the Bedford Heights Ordinances and R.C. 718.06 permitted consolidated returns to be filed for a tax year if the affiliated group of corporations filing the municipal tax return filed for the same tax reporting period a consolidated federal tax return for the same affiliated group of corporations. Neither the Bedford Heights Ordinances nor R.C.718.06 required that the consolidated return filing had to be made on initial returns or prohibited taxpayers from filing amended returns on a consolidated basis.

R.I.T.A. Rule Section 5:06(A) was not amended to state that a taxpayer may not change the "method of filing" on an amended return until after all three of the Tax Years' returns at issue were initially filed and after all three of the Tax Years at issue had closed and the due dates for filing the initial returns for those Tax Years had passed. Accordingly, as of the date the initial separate tax returns were due and filed by New York Frozen Foods, Inc., the ability to change the method of filing from separate to

consolidated on an amended return existed under the Bedford Heights Ordinances and R.C. 718.06.

B. The Retroactivity Clause prohibits retroactive laws.

The Retroactivity Clause, in Article II, Section 28 of the Ohio Constitution prohibits retroactive laws. See *Lakengren v. Kosydar*, 44 Ohio St.2d 199, 339 N.E.2d 814 (1975). A retroactive law is one that impairs rights that are vested or acquired under existing laws, or that creates a new obligation or duty or attaches a new disability with respect to transactions already past. *Van Fossen* at 106-107. In *State ex. rel. Matz. v. Brown*, 37 Ohio St.3d 279, 281, 525 N.E.2d 805, 807 (1988), the Court held "a later enactment will not burden or attach a new disability to a past transaction or consideration in the constitutional sense, *unless the past transaction or consideration, if it did not create a vested right, created at least a reasonable expectation of finality.* (Emphasis added).

C. Applying the 2009 amendment to R.I.T.A. Rule Section 5:06(A) to the Appellants in this case attaches a new disability to actions already past.

If the 2009 amendment to R.I.T.A. Rule Section 5:06(A) may apply to deny the Appellants' amended consolidated tax returns for Tax Years 2005, 2006, and 2007, Appellants are subjected to an unconstitutional retroactive law. Appellants were permitted to rely upon the laws and rules in effect when its Tax Years had ended and when it filed Bedford Heights initial tax returns for the Tax Years 2005, 2006, and 2007. The application of the amended Rule to Tax Years 2005, 2006, and 2007 after the initial returns were due and filed would be an unconstitutional retroactive application of the Rule.

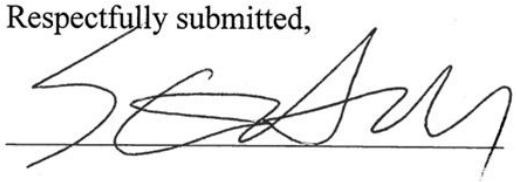
When a member that was included in the Appellants' federal consolidated group return filed its initial returns for Tax Years 2005, 2006, and 2007 on a separate basis, the member and the Appellants had, at that time, the ability to file consolidated returns under R.C. 718.06 and the Bedford Heights' Ordinances on either the initial return or on an amended return. The member of Appellants' federal consolidated group took an action in filing the separate returns with Bedford Heights initially. When the Appellants' member took that action (prior to 2009), it had the right to change the method of filing to a consolidated basis on an amended return. It would be impossible, however, for Appellants to exercise the ability to file consolidated returns if the July 2009 amendment to R.I.T.A. Rule Section 5:06(A) applies to Appellants' Tax Years for which returns were already due and filed before July 2009. Such an application by Bedford Heights attaches a new disability to transactions or actions already past and amounts to an invalid retroactive law. The "action already past" was the initial filing of the returns on a separate basis when the Appellants could have, at that time, filed a consolidated tax return. The "new disability" that attaches to the Appellants is the application by Bedford Heights of the 2009 amendment to R.I.T.A. Rule Section 5:06(A) which would disallow consolidated returns on an amended basis. Under the 2009 amendment, Appellants would have to make their consolidated filing on an initial return in the first instance, which becomes impossible if the 2009 R.I.T.A. Rule applies to the Tax Year 2005, 2006, and 2007 returns. The initial returns for each of the Tax Years 2005, 2006, and 2007 had been due and had been filed prior to the 2009 amendment. Thus, Appellants would be denied the right to file a consolidated group return. Such would be an unconstitutional retroactive application of law.

CONCLUSION

For the foregoing reasons, Appellants request that this Court reverse the decision of the Ohio Board of Tax Appeals and order that Bedford Heights grant the requests for refunds of net profits taxes erroneously paid to Bedford Heights for the 2005, 2006, and 2007 Tax Years in the amount of $698,294, together with interest thereon, as required under the Bedford Heights Ordinances, R.C. 718.06, and R.C. 718.12(D).

Dated: July 31, 2015

Respectfully submitted,



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AND AFFILIATES

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Merit Brief of Appellants/Cross-Appellees was sent via Regular Mail to counsel of record for Appellees/Cross-Appellants listed below on the 31ST day of July, 2015.

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Administrator, et al.

Stephen K. Hall (0069009)
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ORIGINAL

IN THE SUPREME COURT OF OHIO

NEW YORK FROZEN FOODS, INC. AND AFFILIATES, Appellants, v. BEDFORD HEIGHTS INCOME TAX BOARD OF REVIEW AND CITY OF BEDFORD HEIGHTS INCOME TAX ADMINISTRATOR, ET AL., Appellees.	:	CASE NO. 15-0575 On Appeal from the Ohio Board of Tax Appeals Board of Tax Appeals Case No. 2012-55

NOTICE OF APPEAL OF APPELLANTS NEW YORK FROZEN FOODS, INC. AND AFFILIATES

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ADMINISTRATOR, ET AL.

FILED
APR 10 2015
CLERK OF COURT
SUPREME COURT OF OHIO

New York Frozen Foods, Inc. and Affiliates ("Appellants") hereby give notice of an appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio from a Decision and Order ("Decision") of the Ohio Board of Tax Appeals (the "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. A true and accurate copy of the Decision and Order being appealed is attached hereto and incorporated herein by reference.

The errors in the Decision and Order of which the Appellants complains are:

1. The BTA acted unreasonably and unlawfully in holding that City of Bedford Heights Ordinance Section 173.56, as last amended in December 2004, incorporated the 2009 amendment to Section 5:06(A) of the Regional Income Tax Agency ("R.I.T.A.") Rules and Regulations.
2. The BTA acted unreasonably and unlawfully by failing to hold that City of Bedford Heights Ordinance Section 173.56, to the extent it adopted amendments to Section 5:06(A) of the R.I.T.A. Rules and Regulations promulgated after the latest amendment to City of Bedford Heights Ordinance Section 173.56, is an unlawful delegation of legislative authority, in violation of Article XVIII, Sections 3 and 7 of the Ohio Constitution.
3. To the extent City of Bedford Heights Ordinance Section 173.56 adopted amendments to Section 5:06(A) of the R.I.T.A. Rules and Regulations promulgated after the latest amendment to City of Bedford Heights Ordinance Section 173.56, such adoption constitutes an unlawful delegation of legislative authority, in violation of Article XVIII, Sections 3 and 7 of the Ohio Constitution.

4. The BTA acted unreasonably and unlawfully by failing to consider Appellants' argument that the 2009 amendment to Section 5:06(A) of the R.I.T.A. Rules and Regulations, which attempts to disallow a taxpayer the ability to file an amended return on a consolidated basis after the due date for filing the original return, is inconsistent with and contradicts the Bedford Heights Administrative Code and is therefore invalid.
5. The BTA acted unreasonably and unlawfully by failing to conclude that the 2009 amendment to Section 5:06(A) of the R.I.T.A. Rules and Regulations, which attempts to disallow a taxpayer the ability to file an amended return on a consolidated basis after the due date for filing the original return, is inconsistent with and contradicts the Bedford Heights Administrative Code and is therefore invalid.
6. The BTA acted unreasonably and unlawfully by failing to consider Appellants' argument that R.C. 718.06 required the City of Bedford Heights Tax Administrator to accept consolidated returns regardless of whether the consolidated returns were filed as original returns or as amended returns.
7. The BTA acted unreasonably and unlawfully by failing to conclude that R.C. 718.06 required the City of Bedford Heights Tax Administrator to accept consolidated returns regardless of whether the consolidated returns were filed as original returns or as amended returns.
8. The BTA acted unreasonably and unlawfully by failing to consider Appellants' argument that Section 5:06(A) of the R.I.T.A. Rules and Regulations, as amended in 2009, conflicts with R.C. 718.06 and therefore Section 5:06(A) of the R.I.T.A. Rules and Regulations is invalid.

9. The BTA acted unreasonably and unlawfully by failing to conclude that Section 5:06(A) of the R.I.T.A. Rules and Regulations, as amended in 2009, conflicts with R.C. 718.06 and therefore Section 5:06(A) of the R.I.T.A. Rules and Regulations is invalid.

10. The BTA acted unreasonably and unlawfully by failing to consider Appellants' argument that the portion of the 2009 amendment to Section 5:06(A) of the R.I.T.A Rules and Regulations that added the phrase "nor the method of filing (i.e., single or consolidated)" is not applicable to the tax years at issue, Appellants' tax years 2005, 2006, and 2007, because those tax years had closed prior to the 2009 amendment of Section 5:06(A) of the R.I.T.A Rules and Regulations.

11. The BTA acted unreasonably and unlawfully by failing to conclude that the 2009 amendment to Section 5:06(A) of the R.I.T.A Rules and Regulations that added the phrase "nor the method of filing (i.e., single or consolidated)" is not applicable to the tax years at issue, Appellant's tax years 2005, 2006, and 2007, because those tax years had closed prior to the 2009 amendment of Section 5:06(A) of the R.I.T.A Rules and Regulations.

Respectfully submitted,

Dated: 4/10/2015

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Appeal was sent via Certified Mail, Return Receipt Requested, to counsel for all parties to the proceedings before the Oho Board of Tax Appeals on the 10th day of April, 2015.

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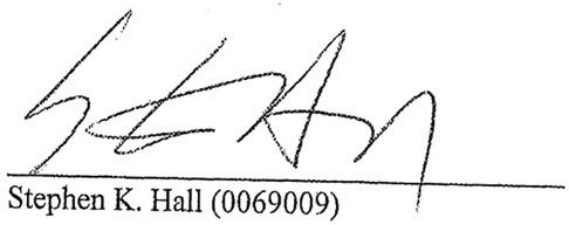

Stephen K. Hall (0069009)

OHIO BOARD OF TAX APPEALS

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

Appellant(s),

vs.

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

Appellee(s).

CASE NO(S). 2012-55

(MUNICIPAL INCOME TAX)

DECISION AND ORDER

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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, appellant 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

PROOF OF FILING

I hereby certify that a copy of the foregoing notice of appeal was filed with the Ohio Board of Tax Appeals on this 10TH day of April, 2015.

Stephen K. Hall (0069009)

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 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, appellant 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

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 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 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, appellant 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

BEDFORD HEIGHTS INCOME TAX BOARD OF REVIEW

STATEMENT OF THE CASE:

New York Frozen Foods (NY) 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, NY 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 NY in excess of $698,000.00.

R. I. T. A. Rejected the amended returns and NY appealed to the Bedford Heights Income Tax Review Board. A hearing was held before the Bedford Heights Income Tax Review Board on September 19, 2011. Representing NY was William G. Nolan of Ernst & Young. Subsequent to the hearing, Mr. Nolan submitted a memorandum in furtherance of the position of NY.

APPLICABLE LAW:

The first question raised by the amended returns for tax years 2005, 2006 and 2007 is whether or not they were proper under Chapter 173 of the Bedford Heights Administrative Code and the R. I. T. A. Rules and Regulations.

Section 173.15 of the Bedford Heights Administrative Code provides, in pertinent part as follows:

> **"173.15 AMENDED RETURNS.**
> (a) 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 R. I. T. A Rules and Regulations contain a provision substantially similar to Section 173.15 of the Bedford Heights Administrative Code. Section 5:06 (A) of the R. I. T. A. Rules and Regulations states as follows:

> "Section 5:06(A)
> Amended Returns
>
> 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 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 addition to the foregoing, Section 173.32 of the Bedford Heights Administrative Code further provides as follows:

> **"173.32 REFUNDS OF TAXES ERRONEOUSLY PAID.**
> Taxes erroneously paid shall not be refunded if the application for refund is not made within three years from the date on which such payment was made or the return due."

Taken together Sections 173.15, 173.32 of the Bedford Heights Administrative Code and Section 5:06(A) of the R. I. T. A. Rules and Regulations are identical in effect. Neither 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**. It cannot be reasonably or logically argued that attempting to change from a single filer to a consolidated filer is not a "change in the method of accounting or the apportionment of net profits or the method of filing" all of which are prohibited by Sections 173.15, 173.32 of the Bedford Heights Administrative Code and Section 5:06(A) of the R. I. T. A. Rules and Regulations.

DECISION:

Based on the foregoing, the decision of the Bedford Heights Tax Administrator is hereby affirmed.

Dated: 11/9/11

BEDFORD HEIGHTS INCOME
TAX BOARD OF REVIEW

Fletcher Berger

Fletcher Berger, Mayor

Philip D. Saunders

Philip D. Saunders, Council President

Stephen M. Klonowski, Asst., Law Director

The City of Bedford Heights

5661 PERKINS ROAD • BEDFORD HEIGHTS, OHIO 44146-2597 • PHONE (440) 786-3223
FAX (440) 735-7507

MAYOR FLETCHER BERGER

ALLISON J. CHANCE
Director of Finance
Tax Administrator

July 22, 2011

Michael D. Lake
Executive Director
Ernst & Young
312 Walnut Street Suite 1900
Cincinnati, Ohio 45202

Dear Michael:

Our office is in receipt of the refund requests for tax years 2005, 2006 and 2007 on the amended returns filed by your client New York Frozen Foods.

The tax administrator for the city of Bedford Heights is Regional Income Tax Agency (R.I.T.A.).

The refunds requested were denied by R.I.T.A. because the rules and regulations adopted by the city of Bedford Heights prohibited the filing of amended returns to change the method of filing.

The city's legal counsel has reviewed the rules and regulations with respect to amended returns and the city concurs with the denial made by R.I.T.A.

Your client has the right to be heard by the city Income Tax Board of Review. Should that be the course of action your client chooses to pursue please notify the undersigned in writing.

Best Regards,

Allison J. Chance

Allison J. Chance
Director of Finance
Tax Administrator

Cc: Ross Cirincione, Law Director
Amy Arrighi, R.I.T.A. Legal Counsel
File

R.I.T.A Rules and Regulations, Section 5:06

[version as it existed on December 21, 2004]

5:06 Amended Returns

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 return shall be clearly marked "Amended". A taxpayer may not change the method of accounting or apportionment of the net profits after the due date for filing the original return. Amended returns cannot be filed after three (3) years from the original filing date.

R.I.T.A Rules and Regulations, Section 5:06

[version as it existed following the July 2009 R.I.T.A. amendment]

5:06 Amended Returns

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 return shall be clearly marked "Amended". A taxpayer may not change the method of accounting or apportionment of the 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.

CHAPTER 5:00

RETURNS

In the event of a conflict with this Chapter of the Rules & Regulations and any provision(s) of the Ordinance of this municipality, the Ordinance will supersede.

GENERAL INFORMATION

Any place in these Rules & Regulations where the term this municipality appears, the name of any member municipality can be substituted.

Ohio Statutes

GENERAL PROVISIONS

Chapter 1. DEFINITIONS; RULES OF CONSTRUCTION

Current with legislation signed by the Governor as of 5/12/2015

§ 1.48. Presumption that statute is prospective

A statute is presumed to be prospective in its operation unless expressly made retrospective.

Cite as R.C. § 1.48

History. Effective Date: 01-03-1972

Ohio Statutes

Title 1. STATE GOVERNMENT

Chapter 167. REGIONAL COUNCILS OF GOVERNMENTS

Current with legislation signed by the Governor as of 5/12/2015

§ 167.01. Regional councils of government

That governing bodies of any two or more counties, municipal corporations, townships, special districts, school districts, or other political subdivisions may enter into an agreement with each other, or with the governing bodies of any counties, municipal corporations, townships, special districts, school districts or other political subdivisions of any other state to the extent that laws of such other state permit, for establishment of a regional council consisting of such political subdivisions.

Cite as R.C. § 167.01

History. Effective Date: 11-17-1967

Ohio Statutes

Title 7. MUNICIPAL CORPORATIONS

Chapter 718. MUNICIPAL INCOME TAXES

Current with legislation signed by the Governor as of 5/12/2015

§ 718.06. *[Operative Until 1/1/2016]* Consolidated income tax return

On and after January 1, 2003, any municipal corporation that imposes a tax on the income or net profits of corporations shall accept for filing a consolidated income tax return from any affiliated group of corporations subject to the municipal corporation's tax if that affiliated group filed for the same tax reporting period a consolidated return for federal income tax purposes pursuant to section 1501 of the Internal Revenue Code.

Cite as R.C. § 718.06

History. Repealed by 130th General Assembly File No. TBD, HB 5, §2, eff. 3/23/2015, applicable to municipal taxable years beginning on or after 1/1/2016.

Effective Date: 07-26-2000

Ohio Statutes

Title 7. MUNICIPAL CORPORATIONS

Chapter 718. MUNICIPAL INCOME TAXES

Current with legislation signed by the Governor as of 6/20/2015

§ 718.12. *[Operative Until 1/1/2016]* Statute of limitations

(A) Civil actions to recover municipal income taxes and penalties and interest on municipal income taxes shall be brought within three years after the tax was due or the return was filed, whichever is later.

(B) Prosecutions for an offense made punishable under a municipal ordinance imposing an income tax shall be commenced within three years after the commission of the offense, provided that in the case of fraud, failure to file a return, or the omission of twenty-five per cent or more of income required to be reported, prosecutions may be commenced within six years after the commission of the offense.

(C) Claims for refund of municipal income taxes must be brought within the time limitation provided in division (A) of this section.

(D) Interest shall be allowed and paid on any overpayment by a taxpayer of any municipal income tax obligation from the date of the overpayment until the date of the refund of the overpayment, except that if any overpayment is refunded within ninety days after the final filing date of the annual return or ninety days after the complete return is filed, whichever is later, no interest shall be allowed on the refunded overpayment. For purposes of computing the payment of interest on overpayments, no amount of tax for any taxable year shall be treated as having been paid before the date on which the tax return for that year was due without regard to any extension of time for filing that return. The interest shall be paid at the rate of interest prescribed by section 5703.47 of the Revised Code.

Cite as R.C. § 718.12

History. Repealed by 130th General Assembly File No. TBD, HB 5, §2, eff. 3/23/2015, applicable to municipal taxable years beginning on or after 1/1/2016.

Effective Date: 07-26-2000

ARTICLE VI
COUNCIL

SECTION 6.01. POWERS.

The legislative power of the municipality, except as limited by this Charter, and such additional powers as may be expressly granted by this Charter, shall be vested in the Council.

173.15 AMENDED RETURNS.

(a) 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, or both, contained in Sections 173.30 through 173.35. Such amended return shall be on a form obtainable on request 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.

(b) Within three months from the final determination of any Federal tax liability affecting the taxpayer's City liability, such taxpayer shall make and file an amended City return showing income subject to the City tax based upon such final determination of Federal tax liability and pay any additional tax shown due thereon or make claim for refund of any overpayment. (Ord. 2004-218. Passed 12-21-04.)

173.56 ADOPTION OF R.I.T.A.'S RULES AND REGULATIONS.

(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.
(Ord. 96-087. Passed 5-7-96.)

§ 28. Retroactive laws.

Ohio Constitution

Article II. Legislative

Current through the November 4, 2014 election

§ 28. Retroactive laws

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

§ 6. Organization of cities, etc.

Ohio Constitution

Article XIII. Corporations

Current through the November 4, 2014 election

§ 6. Organization of cities, etc

The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power.

§ 3. Powers.

Ohio Constitution

Article XVIII. Municipal Corporations

Current through the November 4, 2014 election

§ 3. Powers

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.

§ 7. Home rule.

Ohio Constitution

Article XVIII. Municipal Corporations

Current through the November 4, 2014 election

§ 7. Home rule

Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

§ 13. Taxation, debts, reports, and accounts.

Ohio Constitution

Article XVIII. Municipal Corporations

Current through the November 4, 2014 election

§ 13. Taxation, debts, reports, and accounts

Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities.

Checkpoint Contents
Federal Library
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Subtitle A Income Taxes §§1-1563
Chapter 6 CONSOLIDATED RETURNS §§1501-1563
Subchapter A Returns and Payment of Tax §§1501-1505
§1501 Privilege to file consolidated returns.

Internal Revenue Code

§ 1501 Privilege to file consolidated returns.

An affiliated group of corporations shall, subject to the provisions of this chapter, have the privilege of making a consolidated return with respect to the income tax imposed by chapter 1 for the taxable year in lieu of separate returns. The making of a consolidated return shall be upon the condition that all corporations which at any time during the taxable year have been members of the affiliated group consent to all the consolidated return regulations prescribed under section 1502 prior to the last day prescribed by law for the filing of such return. The making of a consolidated return shall be considered as such consent. In the case of a corporation which is a member of the affiliated group for a fractional part of the year, the consolidated return shall include the income of such corporation for such part of the year as it is a member of the affiliated group.

END OF DOCUMENT -

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Bethany Boyd *Legislative Service Commission*

Sub. H.B. 477

123rd General Assembly
(As Passed by the General Assembly)

Reps. **Mottley, Thomas, Hartnett, Jolivette, Peterson, Roberts, Corbin, Mead, Terwilleger, Barrett, DePiero, Van Vyven, Aslanides, Patton, Smith, J. Beatty, R. Miller, Barnes, Allen**

Sens. **Blessing, Horn, Herington, McLin**

Effective date: *

ACT SUMMARY

- Provides that parsonage allowances are exempted from municipal income taxation beginning in 2003.
- Ensures that most nonresidents are not taxed by a municipal corporation on income earned for performing work in the municipal corporation, if the work is performed for 12 or fewer days in a year.
- Prescribes limits governing nonresident employers' responsibility for withholding municipal income taxes from employee compensation.
- Prescribes minimum guidelines governing estimated tax payments.
- Ensures that municipal income tax returns do not have to be filed before the applicable federal filing deadline.
- Requires municipal corporations to grant filing extensions to taxpayers upon request, if the taxpayer has requested a federal income tax filing extension.
- Establishes minimum procedural requirements for municipal income tax appeals.

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* *The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared.*

- Permits affiliated groups of corporations to file consolidated municipal income tax returns if they file consolidated returns for federal income tax purposes.

- Requires that a municipal corporation declare how it will tax the income of pass-through entities and grants a credit to preclude multiple taxation of that income.

- Allows taxpayers to file "generic" municipal income tax forms.

- Requires municipal corporations to publish municipal income tax ordinances or rules on an Internet-accessible site, and to provide electronic versions of municipal income tax forms on such a site.

- Requires the Tax Commissioner to establish an Internet-accessible site, on which municipal corporations may post electronic forms and publish rules, and to which municipal corporations may link their own Internet sites.

CONTENT AND OPERATION

Municipal income taxation--generally

Municipal corporations have the authority under their home rule powers to tax incomes, but this authority is subject to limitation by the legislature. Over the years, the legislature has limited this authority to some extent by restricting the forms of income that may be taxed; prescribing how business income must be allocated among municipal corporations so as to avoid taxation by multiple municipal corporations on the same business income; imposing statutes of limitations on municipal income tax enforcement actions; requiring municipal corporations to pay interest on some overpaid taxes; and requiring taxpayer information to be kept confidential. (See Chapter 718.) Otherwise, municipal corporations' authority to tax incomes is governed by local laws and rules, subject to any applicable limitations of the Ohio and U.S. Constitutions.

The act places several new limitations and requirements on municipal corporations with respect to income taxation.

New exemptions

Parsonage allowances

(sec. 718.01(F)(7))

The act prohibits municipal corporations from taxing parsonage allowances. A parsonage allowance is an amount paid to a "minister of the gospel" in the form of a rental allowance as part of the minister's compensation, or the rental value of a home furnished to the minister as compensation. Parsonage allowances are not taxed under the federal or Ohio income tax and reportedly by only a few municipal corporations. (See I.R.C. sec. 107.)

The exemption takes effect January 1, 2003.

Occasional entrants to a municipal corporation

(secs. 718.01(F)(8) and 718.02(A)(2))

The act prohibits a municipal corporation from taxing compensation paid to nonresident individuals who are employed in the municipal corporation on an infrequent basis. Specifically, a municipal corporation may not tax compensation received by an individual for personal services performed within the municipal corporation if: (1) the services are performed on no more than 12 days in a calendar year, (2) the individual is not a resident of the municipal corporation, and (3) the principal place of business of the individual's employer is located outside the municipal corporation. Further, a business that employs such an individual in a municipal corporation would not have to count that person's compensation in the payroll factor that is used to allocate the business' income to the municipal corporation.

The exemption does not apply to professional entertainers, professional athletes, or promoters of professional entertainment or sports events and their employees (as reasonably defined by a municipal corporation).

The exemption takes effect January 1, 2001.

$150 threshold on withholding taxes from income

(sec. 718.03)

The act limits the power of municipal corporations to require nonresident employers to withhold municipal income taxes. Currently, withholding is governed solely by municipal ordinances or regulations.

Under the act, beginning January 1, 2001, municipal corporations may not require a nonresident employer to deduct and withhold municipal income taxes from employees' incomes unless the total amount of tax to be deducted and withheld from all employees is more than $150 for a calendar year. Once the total amount to be withheld exceeds $150 for a calendar year, the employer is required

to withhold tax for that year and all ensuing years, unless the amount falls below $150 per year for three consecutive years. The same limits apply to an agent of a nonresident employer that pays the employer's employees on the employer's behalf, and to any other nonresident person that pays withholdable compensation to an individual.

Estimated tax payments

(sec. 718.08)

The act prescribes a uniform schedule under which municipal corporations may require taxpayers to make estimated tax payments if estimated payments are required by the municipal corporation. Beginning January 1, 2003, estimated payments may be required only on a quarterly basis, and may be required only in the following amounts no earlier than the following dates: (1) for individuals, not more than 22-1/2% of the estimated annual tax liability (prior to applying any credits, estimated tax payments, or withheld taxes) by April 30, 45% by July 31, 67-1/2% by October 31, and 90% by January 31, (2) for calendar year taxpayers that are not individuals, 22-1/2% by the taxpayer's federal return filing date, 45% by June 15, 67-1/2% by September 15, and 90% by December 15, and (3) for fiscal year taxpayers that are not individuals, 22-1/2% by the 15th day of the fourth month of the taxpayer's taxable year, 45% by the 15th day of the sixth month, 67-1/2% by the 15th day of the ninth month, and 90% by the 15th day of the 12th month. Any amount deducted and withheld for taxes from an individual's compensation is considered as estimated taxes paid in equal amounts on the act's prescribed payment dates.

Safe harbors

(sec. 718.08(E))

The act prohibits municipal corporations from penalizing a taxpayer for the late payment or nonpayment of estimated taxes (by charging a penalty, interest, or similar charge) if the taxpayer pays estimated taxes equal to the taxpayer's reported tax liability for the preceding year (as long as the preceding year consisted of 12 months and the taxpayer actually filed a return for that year). Nor may a taxpayer be penalized for the late payment or nonpayment of estimated taxes if the taxpayer is a resident individual who was not domiciled in the municipal corporation on January 1 of the current calendar year.

Filing extensions

(sec. 718.05(D))

Beginning January 1, 2001, the act requires municipal corporations to grant tax return filing extensions to taxpayers that have requested a federal filing extension. Receiving a filing extension does not extend the payment due date, unless the municipal corporation extends that date. To receive a filing extension, a taxpayer must file a copy of the federal filing extension request with the municipal corporation not later than the normal municipal return filing deadline. The request must be granted for at least the same period as the federal extension. But the municipal corporation can deny the request if the taxpayer is late in filing the request, does not file a copy of the federal extension request, has not filed a return or other required document for a previous reporting period, or is delinquent in the payment of the municipal corporation's income tax (including any penalty, interest, assessment, or other charge).

Taxpayer appeals

(secs. 718.11 and 733.85; Section 3)

The act establishes certain minimum procedural requirements regarding municipal income tax appeals. The requirements apply only to municipal corporations that impose an income tax.

The act requires municipal corporations to create a board of appeals within 180 days of the act's effective date (if one has not already been created--most municipal corporations imposing an income tax already have an appeals board of some kind). If no municipal income tax is imposed on the act's effective date but is later imposed, a municipal corporation must establish such a board not later than 180 days after the tax takes effect. Taxpayers are given the right to appeal decisions of the municipal tax administrator to the board, provided that the taxpayer filed required tax returns and documents. Requests for appeals must be filed with the board within 30 days after the tax administrator issues an appealable decision. The request must be in writing and state the alleged errors in the decision. Appeals boards must schedule hearings within 45 days after receiving a request, unless the taxpayer waives the hearing. If a taxpayer does not waive the hearing, the taxpayer is entitled to appear before the board and be represented by an attorney at law, certified public accountant, or other representative. The board must issue a decision within 90 days after the final hearing, and send a notice of its decision to the taxpayer within 15 days after issuing the decision. The deadlines do not apply to any appeal filed before the act's effective date.

Each appeals board must adopt rules governing its procedures and keep a record of its transactions. The records are not open to public inspection under the state's public records law, and hearings before an appeals board are not subject to the state's open meetings law.

When issuing decisions that are appealable to the appeals board, tax administrators must inform taxpayers of their right to appeal and the manner in which the appeal must be filed with the board.

Consolidated corporation returns must be accepted

(sec. 718.06)

The act requires municipal corporations to accept consolidated returns from affiliated groups of corporations that file consolidated returns (for the same tax reporting period) for federal income tax purposes, beginning in 2003. This simplifies reporting for members of a corporate group and allows the group to offset operating losses of some group members against operating profits of other group members.

Tax treatment of pass-through entities; credits

(sec. 718.14)

The act requires each municipal corporation imposing an income tax that applies to income from a pass-through entity to declare how it taxes that income and to grant a credit to preclude multiple taxation of that income. (A pass-through entity generally is one of several forms of business organizations that, for federal income tax purposes, is not taxed on its income as an entity; instead, income is taxed only in the hands of each individual owner according to that owner's share of the entity. Partnerships, S corporations, some limited liability companies, and some trusts are forms of a pass-through entity.)

Declaration of tax treatment

Currently, municipal corporations do not have to follow the federal tax treatment of pass-through entities; some may tax the income of an entity in the hands of the entity, while others may tax it in the hands of the individual owners.

Under the act, beginning in 2003, each municipal corporation that taxes pass-through entity income must specify, by ordinance or rule, whether the municipal corporation taxes pass-through entity income in the hands of the entity or in the hands of the individual owners. The municipal corporation may specify a different ordinance or rule for each class of pass-through entities.

Credits for taxes paid to another municipal corporation

Beginning in 2003, each municipal corporation that imposes a tax on pass-through entity income must grant a credit to taxpayers domiciled in the municipal corporation for any municipal income tax paid on income from a pass-through

entity that does not conduct business in the municipal corporation. The credit applies only if the entity is taxed by another municipal corporation in Ohio. The amount of the credit equals the lesser of (1) the taxpayer's proportionate share of the tax paid by the pass-through entity to the other municipal corporation (based on ownership interest, e.g., if the taxpayer owns 20% of the entity, the taxpayer is entitled to a credit equal to 20% of the tax paid to the other municipal corporation) or (2) the amount of tax that would be imposed on the pass-through entity by the municipal corporation in which the taxpayer is domiciled if the entity conducted business in the municipal corporation, also apportioned according to ownership interest. If a municipal corporation has a policy of granting only a partial credit to individuals for income taxes paid to another municipal corporation (e.g., a credit of 80% of the taxes paid to a municipal corporation where the individual is employed), then the credit for taxes paid on pass-through entity income must be reduced to the same percentage (e.g., if the credit for taxes paid by a taxpayer to another municipality is 80%, then the credit for taxes paid on pass-through income to another municipality must be 80% of the taxes paid by the entity).

Generic tax returns and forms

(sec. 718.05)

Under the act, municipal corporations cannot require a taxpayer to file tax returns prior to the filing date for the corresponding federal tax reporting period. Municipal corporations must accept "generic" income tax returns and related documents beginning in 2001 if the returns and documents contain all of the information that the municipal corporation otherwise requires, and if the filer otherwise complies with the municipal corporation's filing requirements. Under the act, a generic form is any electronic or paper form designed for reporting estimated municipal income taxes and annual tax liability, but that is not prescribed by any particular municipal corporation.

Internet forms and publications; sites

(secs. 718.07 and 5703.49)

Beginning in 2002, any municipal corporation that imposes an income tax must make electronic versions of rules or ordinances governing the tax available to the public through the Internet, including rules and ordinances governing the tax rate; payment and withholding; filing returns or other documents and the dates for filing and paying; penalties, interest, assessment, and other collection remedies; and appeal rights and procedures. Any municipal corporation that requires taxpayers to file income tax returns or related documents is required by the act to make available over the Internet blanks of their various income tax returns, forms, and instructions.

A municipal corporation may make the foregoing information and forms available by posting them on the municipal corporation's own Internet site, or on a central site that the Tax Commissioner must create for that purpose by the end of 2001. The Tax Commissioner must provide an electronic link between the central site and the site created by any municipal corporation that establishes its own Internet site. The municipal corporation must incorporate an electronic link between the central site and its own site, and provide to the Tax Commissioner the site's uniform resource locator (i.e., the site's URL, or electronic address).

The Tax Commissioner may adopt rules governing the posting of information on the central site, and may charge municipal corporations a fee to defray the cost of establishing and maintaining the site. The Tax Commissioner is not responsible for the accuracy of the posted information and is not liable for inaccurate or outdated information provided by a municipal corporation.

HISTORY

ACTION	DATE	JOURNAL ENTRY	
Introduced	10-08-99	p.	1240
Reported, H. Ways & Means	11-10-99	pp.	1353-1354
Passed House (94-1)	01-11-00	pp.	1486-1487
Reported, S. Ways & Means	02-16-00	pp.	1389-1390
Passed Senate (33-0)	03-16-00	pp.	1466-1467
House concurred	03-21-00	p.	1487

00-HB477.123/jc

§ 5717.04. Appeal from certain decisions of board of tax appeals to supreme court; parties who may appeal; certification.

Ohio Statutes

Title 57. TAXATION

Chapter 5717. APPEALS

Current with legislation signed by the Governor as of 6/20/2015

§ 5717.04. Appeal from certain decisions of board of tax appeals to supreme court; parties who may appeal; certification

This section does not apply to any decision and order of the board made pursuant to section 5703.021 of the Revised Code. Any such decision and order shall be conclusive upon all parties and may not be appealed.

The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the supreme court or to the court of appeals for the county in which the property taxed is situate, or the county of residence of the agent for service of process, tax notices, or demands, or the county in which the corporation has its principal place of business. In all other instances, the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the court of appeals for Franklin county.

Appeals from decisions of the board determining appeals from decisions of county boards of revision may be instituted by any of the persons who were parties to the appeal before the board of tax appeals, by the person in whose name the property involved in the appeal is listed or sought to be listed, if such person was not a party to the appeal before the board of tax appeals, or by the county auditor of the county in which the property involved in the appeal is located.

Appeals from decisions of the board of tax appeals determining 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 instituted by any of the persons who were parties to the appeal or application before the board, by the person in whose name the property is listed or sought to be listed, if the decision appealed from determines the valuation or liability of property for taxation and if any such person was not a party to the appeal or application before the board, by the taxpayer or any other person to whom

the decision of the board appealed from was by law required to be sent, by the director of budget and management if the revenue affected by the decision of the board appealed from would accrue primarily to the state treasury, by the county auditor of the county to the undivided general tax funds of which the revenues affected by the decision of the board appealed from would primarily accrue, or by the tax commissioner.

Appeals from decisions of the board upon all other appeals or applications filed with and determined by the board may be instituted by any of the persons who were parties to such appeal or application before the board, by any persons to whom the decision of the board appealed from was by law required to be sent, or by any other person to whom the board sent the decision appealed from, as authorized by section 5717.03 of the Revised Code.

Such appeals 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. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed or within the time otherwise prescribed in this section, whichever is later. A notice of appeal shall set forth the decision of the board appealed from and the errors therein complained of. Proof of the filing of such notice with the board shall be filed with the court to which the appeal is being taken. The court in which notice of appeal is first filed shall have exclusive jurisdiction of the appeal.

In all such appeals the commissioner or all persons to whom the decision of the board appealed from is required by such section to be sent, other than the appellant, shall be made appellees. Unless waived, notice of the appeal shall be served upon all appellees by certified mail. The prosecuting attorney shall represent the county auditor in any such appeal in which the auditor is a party.

The board, upon written demand filed by an appellant, shall within thirty days after the filing of such demand file with the court to which the appeal is being taken a certified transcript of the record of the proceedings of the board pertaining to the decision complained of and the evidence considered by the board in making such decision.

If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

The clerk of the court shall certify the judgment of the court to the board, which shall certify such judgment to such public officials or take such other action in connection therewith as is required to give effect to the decision. The "taxpayer" includes any person required to return any property for taxation.

Any party to the appeal shall have the right to appeal from the judgment of the court of appeals on questions of law, as in other cases.

Cite as R.C. § 5717.04

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

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

Effective Date: 10-05-1987