

## In The Supreme Court of Ohio

NEW YORK FROZEN FOODS, INC.	:	
AND AFFILIATES,	:	
	:	Case No. 15-0575
Appellants/Cross-Appellees,	:	
	:	
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.	:	

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### THIRD BRIEF OF APPELLANTS/CROSS-APPELLEES

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## INTRODUCTION

This matter arrives at the Court because Appellees simply refuse to refund tax that Appellants erroneously overpaid to the City of Bedford Heights. The Appellees' alleged authority for denying the refunds is invalid. Appellees nonetheless continue to ignore the law and continue to fight, relying solely on the 2009 revision to the Regional Income Tax Agency ("R.I.T.A.") Rule Section 5:06(A) which the City of Bedford Heights has never adopted (the revision to the Rule is nevertheless invalid even if it had been properly adopted by City Council) and which is in direct conflict with both R.C. 718.06 and the Bedford Heights Ordinances.

Appellees do not dispute that, on both the original due dates of the tax returns and on the date that Appellants filed the amended consolidated returns at issue, Appellants were expressly permitted by both R.C. 718.06 and by the Bedford Heights Ordinances to file consolidated tax returns with the City of Bedford Heights. Appellees do not dispute that, for tax years beginning on and after January 1, 2003, R.C. 718.06 states that a consolidated group of corporations may elect to file a municipal consolidated tax return in any Ohio municipality if that same group filed a federal consolidated group return for the same tax period. Appellees do not dispute that the Bedford Heights' Ordinances expressly permit consolidated group returns and that the ordinances permitted consolidated returns prior to the enactment of R.C. 718.06. Appellees do not dispute that the 2009 revision to R.I.T.A. Rule Section 5:06(A) (the singular provision upon which Appellees rely to deny the refunds) was not legislatively adopted by the City Council of Bedford Heights in 2009 or thereafter.

Appellees entirely misstate the holdings of *State v. Gill*, 63 Ohio St. 3d 53, 584 N.E.2d 1200 (1992) and *State, ex rel. Timken Roller Bearing Co. v. Indus. Comm.*, 136 Ohio St. 148, 24 N.E.2d 448 (1939) (and ignore *Estate of Hughes v. Lindley*, No. 41671, 1980 Ohio App. LEXIS 12207, at \*11 (Cuyahoga County May 22, 1980)) in their attempt to manufacture a rationale for Appellees'

denial of the refunds, again, based solely on the 2009 revision to R.I.T.A. Rule Section 5:06(A). Appellees also incorrectly assert that R.C. 718.06 is not an express limitation on the power of taxation of Bedford Heights. The Appellees also wrongly assert that three distinct tax phrases with three distinct meanings are actually only two tax phrases, alleging that two of the three actually mean the same thing. The Appellees' assertions are incorrect, and the Appellees' actions in this case are an example of the importance of the Ohio Constitution's instruction, in Article XIII, Section 6, that the "General Assembly shall \* \* \* restrict [cities' and villages'] power of taxation \* \* \* so as to prevent the abuse of such power."

The Appellees state, at page 1 of the Second Brief, that the refund claims were "properly denied by three separate adjudicatory bodies – the Bedford Heights City Tax Administrator, the Bedford Heights Income Tax Board of Review, and \* \* \* the Ohio Board of Tax Appeals," but this Court should not be misled. The Bedford Heights Tax Administrator is the same individual that denied the refund claims in the first instance. The Bedford Heights Income Tax Board of Review is comprised of three employees of the City of Bedford Heights: the Mayor, the Council President, and the Assistant Law Director. Furthermore, the singular reason the Ohio Board of Tax Appeals ("BTA") did not reverse the Bedford Heights Income Tax Board of Review's decision is because the BTA stated that it is not permitted to declare a local ordinance 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.

As this Court recently explained in *Panther II Transportation, Inc. v. Village of Seville Board of Income Tax Review*, 138 Ohio St.3d 495, 2014-Ohio-1011, 8 N.E.3d 904, although municipal governments have a plenary power to tax, the General Assembly has authority to impose specific

limits on that power. *Id. at* ¶ 11, 12. R.C. 718.06 is precisely that – a limit on the extent of each Ohio municipality’s ability to tax a corporation that is part of a consolidated group of corporations.

The Appellees cannot overcome the clear and unambiguous language in R.C. 718.06. Filing as a group significantly reduces tax compliance costs and allows for a more fair system of taxation that does not merely isolate activities of one subsidiary corporation, but instead looks to the group as a whole economic unit. The General Assembly, in enacting R.C. 718.06, intended to supplant any attempt by a municipality to disallow consolidated returns.

This Court should order that Appellees adhere to R.C. 718.06, refute all of the Appellees spurious arguments, and order that Appellees grant the requested refunds of tax plus applicable interest.

**Appellants timely appealed the BTA’s Decision and Order dated March 20, 2015<sup>1</sup>**

Appellees are wrong when they assert that the Notice of Appeal in this case was filed beyond the thirty-day period to appeal a decision to this Court, as prescribed in R.C. 5717.04. The Notice of Appeal in this case was filed on April 10, 2015, twenty-one days from the BTA’s March 20, 2015 Decision and Order. The Appellees incorrectly assert that the thirty-day period began from the March 9, 2015 Decision and Order that was vacated by the BTA on March 20, 2015.

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

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<sup>1</sup> Appellees filed a motion to dismiss and Appellants filed a memorandum in opposition to the motion to dismiss. A summary of the assertions are extracted here for the Court’s reference.

BTA agreed with Appellants on that issue. While Appellees characterize the BTA's change from disagreement to agreement on an issue as somehow not a substantive change, Appellees are wrong. There exists no more substantive a change than a change from disagreement on an issue to agreement on that same issue.

In *National Tube Co. v. Ayres*, 152 Ohio St. 255, 89 N.E.2d 129 (1950) this Court stated that when the BTA vacates its decision prior to an appeal being instituted with respect to that decision and prior to the expiration of the thirty-day appeal period to appeal that decision, and issues a new decision, the time for filing a notice of appeal runs from the entry of the new decision. That is precisely what happened in this matter. Appellees' motion to dismiss, based on its premise that the 30-day appeal period commenced from a vacated decision, wholly ignores *Ayres*, is wrong, and should be denied. Appellants timely appealed the BTA Decision and Order dated March 20, 2015 to this Court.

### **ARGUMENT**

**A. R.C. 718.06 is an express limitation on Bedford Heights' power of municipal taxation and Bedford Heights may not enforce ordinances or rules that ignore the General Assembly's clear directive regarding consolidated returns.**

**1. The Court may avoid ruling on the other Propositions of Law by simply concluding that R.C. 718.06 is the sole reason that Bedford Heights must accept the consolidated returns at issue.**

Appellees make various assertions regarding supposedly valid conditions for, or restrictions against, Appellants' filing of amended tax returns on a consolidated basis. Appellees aver that such conditions or restrictions are valid and that the conditions or restrictions are validly incorporated into the Bedford Heights Ordinances, by reference to the R.I.T.A. Rules. As explained throughout this Brief, Appellants are incorrect on all of their assertions. Appellees' assertions that relate to ordinances or rules that are inconsistent with R.C. 718.06 are moot because R.C. 718.06 is an

express limitation on Bedford Heights' power of taxation. Appellants were permitted to file amended consolidated returns notwithstanding any other provision of Bedford Heights' law. Accordingly, this Court may rule on the simple premise that R.C. 718.06 mandates that amended consolidated returns are permitted and may avoid ruling on the other issues addressed.

**2. R.C. 718.06 provides an express restriction or limitation on Bedford Heights' power of taxation by requiring the tax administrator to accept consolidated returns if the group of corporations filed a federal consolidated return.**

R.C. 718.06 is clear and unambiguous. It states very simply 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.” The General Assembly's instruction to all Ohio municipalities that the municipalities “shall” accept a type of return is clear. “In statutory construction, the word 'may' shall be construed as permissive and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage. *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 271 N.E.2d 834 (1971) paragraph one of the syllabus. The "shall" in [an Ohio Revised Code provision] clearly requires a mandatory construction.” *Ohio Civ. Rights Comm. v. Countrywide Home Loans, Inc.*, 99 Ohio St.3d 522, 2003-Ohio-4358, 794 N.E.2d 56, ¶ 4.

As indicated in the Ohio Legislative Service Commission's Bill Analysis explaining R.C. 718.06's enactment:

“[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.) (Underline added for emphasis.)

Filing as a consolidated group does, in certain circumstances, result in a taxpayer owing less local tax than if the members of the group filed as separate corporations. Clearly, the General Assembly was expressly restricting municipal taxation when providing corporate taxpayers the right to compute and pay tax as if the taxpayer were one economic unit. 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 Tel. Co. v. Cincinnati*, 81 Ohio St.3d 599, 605, 693 N.E.2d 212, 217 (1998). That is exactly what R.C. 718.06 is, an express act of limitation or restriction. The limitation is that the tax administrator must accept the group’s election to treat itself as one taxpayer, rather than as several separate taxpayers. The General Assembly did not provide any conditions other than that the consolidated group must be the same consolidated group that filed as a group for federal income tax purposes.

“That the General Assembly is aware that it may exercise its limiting power \* \* \* is demonstrated by its passage of specific prohibitions on municipal taxation of certain types of income as provided in R.C. 718.01.” *Cincinnati Bell* at 606. R.C. 718.01 contains several limitations that are similar to the limitation contained in R.C. 718.06. For example, municipalities may not tax intangible income [R.C. 718.01(H)(3)], or the military pay or allowances of members of the armed forces of the United States [R.C. 718.01H)(1)], or employee compensation that is not “qualifying wages” as defined in section 718.03 of the Revised Code [R.C. 718.01(H)(10)]. Another example of a limitation is in R.C. 718.04, which provides, in part, that “No municipal corporation other than the municipal corporation of residence and the city of Columbus shall levy a tax on the income of the chief justice or a justice of the supreme court received as a result of services rendered as the chief

justice or justice.”<sup>2</sup> Just as the municipalities and R.I.T.A. may not ignore or refuse to apply the limitations in R.C. 718.01 and R.C. 718.04, they may not ignore the clear direction in R.C. 718.06.

It is difficult to imagine a more restrictive or limiting concept with respect to municipal taxation than the General Assembly’s allowing taxpayers to elect to file tax returns in a manner that could result in less local tax owed. *See, e.g. Greater Fremont 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). It is also difficult to imagine a more express statement in a statute than indicating that any municipal corporation that imposes a tax on the income or net profits of corporations **shall** accept consolidated returns.

**3. The limitation or restriction must be “express” but need not be “specific.”**

In *Panther II Transportation, Inc. v. Village of Seville Board of Income Tax Review*, 138 Ohio St.3d 495, 2014-Ohio-1011, 8 N.E.3d 905, the taxing authority asserted former R.C. 4921.25 did not *explicitly* mention a prohibition of local income taxes and that the imposition of those taxes supposedly was not subjected to "an express act of restriction." This Court stated, at ¶19, “[the tax administrator’s] argument is mistaken because it confuses two different things: explicitness on the one hand and specificity on the other.” The Court went on to state that *Cincinnati Bell* does require "an express act of restriction by the General Assembly" for local taxes to be preempted. \* \* \* But *Cincinnati Bell* does not state that an express preemption must specifically identify the tax to be preempted. Nor does it necessarily follow that the legislature must specifically have that tax in mind (here, an income tax that did not exist when the predecessor of former R.C. 4921.25 was enacted) as the type of tax that will be preempted.” *Panther II* at ¶ 19, 20.

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<sup>2</sup> Surely Bedford Heights City Council would like the opportunity to object if R.I.T.A. or any tax administrator for Bedford Heights would seek to impose Bedford Heights tax on a justice of this court for services performed in Bedford Heights as a non-resident in contravention of R.C. 718.04.

R.C. 718.06 is express – it has no caveats. It does not require approval by a local tax administrator nor does it limit its application to originally filed returns. *Panther II* indicates that so long as the limitation or restriction is “express,” it need not be “specific.” The limitation or restriction enacted in R.C. 718.06 need not state that the ability to elect to file a consolidated return applies to both an original and an amended return. It need only state that tax administrators “shall” accept the consolidated return. It is therefore “express.”

**4. The General Assembly knew how to add conditions regarding the ability to file amended consolidated tax returns and knew how to add tax administrator discretion as a condition, but it chose not to add those conditions to R.C. 718.06.**

If the General Assembly intended to add conditions regarding the filing of a consolidated group return on an amended basis or if it intended to add the tax administrator’s approval of a group return as a condition to the acceptance of the group return, it had a roadmap in R.C. 5733.052. The General Assembly chose not to add such conditions to R.C. 718.06. R.C. 5733.052 (an Ohio corporation franchise tax statute) provides in part that:

(A) At the *discretion* of the tax commissioner, any taxpayer \* \* \* may be required or permitted \* \* \* to combine its net income with the net income of any such other corporations.

(B) A combination of net income may also be made at the election of any two or more taxpayers \* \* \*. *This election, once made by two or more such taxpayers, may not be changed by such taxpayers with respect to amended reports or reports for future years without the written consent of the commissioner.* \* \* \* (Emphasis added.) (Appellants’ Appx. to Third Brief 4, 5.)

R.C. 5733.052 illustrates two things. First, it provides an example [in subsection (A)] of the General Assembly’s making a tax administrator’s *discretion* relevant when a taxpayer elects to file a group tax return. In R.C. 718.06, by comparison, the General Assembly did not add the condition of tax administrator approval, or allow the tax administrator discretion to deny the taxpayer’s election to file in that manner.

Second, R.C. 5733.052 provides an example [in subsection (B)] showing that the General Assembly certainly knew how to draft a statute that specifically denied the right to file *amended* group returns without the written consent of the tax administrator. Here, the General Assembly could have added conditions to disallow the group election on an amended return in R.C. 718.06, but the General Assembly chose not to.

*Beau Brummell Ties, Inc. v. Lindley*, 56 Ohio St.2d 310, 383 N.E.2d 907 (1978) addressed the difference between division (A) and division (B) of R.C. 5733.052. In *Beau Brummell Ties, Inc.*, this Court held that division (B) did not contain language giving the tax commissioner the power or authority to disprove such an election or to require the taxpayer to obtain approval of the commissioner. “If the General Assembly had desired to make a combined return under R.C. 5733.052(B) subject to the commissioner’s approval, it could easily have put such language into the statute, as evidenced by paragraph (A) and by the fact that his approval is necessary under paragraph (B) to abandon the use of a combined return once adopted.” *Id.* at 312.

Division (A) of R.C. 5733.052 expressly adds tax commissioner discretion to the statute. Comparatively, R.C. 718.06 does not allow tax administrator discretion to deny the consolidated return. Division (B) of R.C. 5733.052 expressly disallows changing the group election on *amended* returns. Comparatively, R.C. 718.06 does not expressly disallow the group election on *amended* returns. It is presumed that the General Assembly, in enacting R.C. 718.06, was aware of the Court’s decision in *Beau Brummell Ties, Inc.* and if it wanted to add the condition of tax administrator approval, it could have enacted language similar to R.C. 5733.052(A). If it wanted to disallow a taxpayer the ability to file amended returns, it could have enacted language similar to R.C. 5733.052(B). It chose to do neither.

R.C. 718.06 does not narrow a taxpayer's right to file a consolidated return by stating that the return must be filed on or before the original due date of the return. R.C. 718.06 also does not state that the taxpayer must ask permission from the tax administrator to file a consolidated return. R.C. 718.06 also does not state that the taxpayer may not change the manner in which it files from one tax year to the next tax year. R.C. 718.06 provides an unrestricted right to file a consolidated return so long as the consolidated group is the same as the federal group.<sup>3</sup>

**5. *Badaracco* merely concluded that amending a fraudulent return does not make that fraudulent return a nullity.**

Appellees' discuss *Badaracco v. Commissioner*, 464 U.S. 386 (1984) for the incorrect proposition that "return" as used in R.C. 718.06 refers only to the original municipal tax return and not an amended municipal tax return. Appellees' assertion in this regard is misplaced. Appellees cite one sentence from the case to assert an alleged holding that does not exist.

*Badaracco* addressed the limitation period in which the government could pursue a taxpayer when the taxpayer initially filed a fraudulent return, but then later the taxpayer filed a non-fraudulent amended return for the same tax period. The taxpayer argued that the filing of the amended return results in the fraudulent return being a nullity. Appellees do not draw any parallel to the issue of the amended consolidated tax returns filed by Appellants in this case, because no parallel exists. *Badaracco* held that "the return" referred to in Internal Revenue Code ("I.R.C.") § 6501 included the fraudulent "original" return that was later amended. The Court simply concluded that a fraudulent "return" was nonetheless a "return" and was not a nullity. *Id.* at 396-397. The Court did not state that the amended return was not a return.

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<sup>3</sup> The only other Chapter 718 provision that is relevant to the filing of a consolidated return on an amended return is the general statute of limitations provision found in R.C. 718.12, which provides a three-year statute of limitations to request a refund of taxes erroneously paid.

Here, the Appellants' original tax returns filed with Bedford Heights are similarly not a nullity; the original returns are merely returns that were later amended by the Appellants. The Appellees have not made any fraud allegations. The Appellees do not contend that the Appellants filed the amended returns beyond the three-year statute of limitations. *Badaracco* simply held that "nothing in the statutory language, the structure of the Code, or the decided cases supports the contention that a fraudulent return is a nullity for statute of limitations purposes." *Id.* at 397. Appellees' reading of *Badaracco*, that it holds that a "return" means only the original return, and not an amended return, is wrong.

**6. R.C. 718.06's use of the article "a" in modifying "consolidated tax return" is meaningless as compared to a possible use of "all" or "any."**

At page 11 of the Second Brief, Appellees creatively assign significance to the General Assembly's choice of the article "a" to modify the term "consolidated income tax return." Appellees assert that the General Assembly could have used the words "any" or "all" to modify the term "consolidated income tax return." In Appellees' view, the General Assembly's use of the singular "a" as opposed to a plural "any" or "all" somehow indicates that the General Assembly references only original returns, and not amended returns, in R.C. 718.06. Appellees seek a legitimate provision of law that supports the denial of the consolidated returns, but Appellees' attempt is futile.<sup>4</sup>

**7. Appellees cite R.C. 718.41, which is not operative until tax years beginning on and after January 1, 2016**

At page 11 of their Second Brief, Appellees assert that R.C. 718.41 is a provision that is a "section relating specifically and only to amended returns." Appellees may not know that R.C.

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<sup>4</sup> Taking Appellees' argument regarding the grammar of the provision even further, will Appellees next allege that the use of the word "a" means that a taxpayer may file only "a" municipal consolidated tax return for one tax year, and after that first tax year, the taxpayer may not file a consolidated tax return for any subsequent tax year? That would frustrate the purpose of R.C. 718.06 and would lead to an absurd result.

718.41 was recently enacted in Am. Sub. H.B. 5 of the 130<sup>th</sup> Ohio General Assembly and is operable with respect to municipal taxable years beginning on or after January 1, 2016. R.C. 718.41 did not exist during any of the tax years at issue, nor did it exist when any of the returns at issue were filed, and as of the date of the filing of this Brief, it is still not operable.

**8. The “hundreds of other municipalities” in Ohio that Appellees assert have enacted similar limitations for amended returns are presumably based on the purported effect of R.I.T.A. Rule Section 5:06(A), as it was amended in 2009. The R.I.T.A. Rule violates R.C. 718.06 and violates the Bedford Heights Ordinances in any event.**

Presumably, Appellees refer, at page 12 of the Second Brief, to the approximately 250 municipalities for which R.I.T.A. acts as tax administrator. While Appellees’ assertion in this regard does not cite any authority, it appears that Appellees make this self-serving (and incorrect) statement based on the 2009 revision to R.I.T.A. Rule Section 5:06(A).

R.C. 718.06 does not permit local tax administrators to place conditions on the right to file consolidated returns, because it is an express act of limitation without any conditions attached. Second, an administrative rule may not expand the ordinance it seeks to apply. *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.”)

As described in later portions of this Brief addressing the conflict between the 2009 revision to R.I.T.A. Rule Section 5:06(A) and the Bedford Heights Ordinances, none of the Bedford Heights Ordinances permit the 2009 addition to R.I.T.A. Rule Section 5:06(A), which seeks to deny amended returns on a consolidated basis. Furthermore, as also described in later portions of this Brief addressing Bedford Heights’ unlawful delegation of legislative authority, even assuming *arguendo* that the 2009 revision to R.I.T.A. Rule Section 5:06(A) could apply in contravention of R.C. 718.06, the R.I.T.A. Rule was not properly incorporated into the Bedford Heights’ Ordinances.

**9. Appellees reliance on the third sentence of Bedford Heights Ordinance Section 173.14(a) is misplaced. The portions of Section 173.14(a) which conflict with R.C. 718.06 are invalid, and in any event, the third sentence of Section 173.14(a) addresses changing the method of filing, not on amended returns for a previously filed tax return for that tax year, but with respect to two consecutive tax years.**

Since 2011 and throughout the previous four years of this controversy, Appellees have relied upon two provisions to deny Appellants' amended returns: First, the Appellees have asserted that R.I.T.A. Rule Section 5:06(A), as revised by R.I.T.A. in 2009, permits the denial of the refunds because the third limitation "nor the method of filing" was incorporated into its laws via Bedford Heights Ordinance Section 173.56. Second, the Appellees have asserted that Bedford Heights Ordinance Section 173.15(a), which contains only two limitations—"A taxpayer may not change the method of accounting or apportionment of net profits after the due date for filing the original return"—permits the Appellees' denial of Appellants' returns, notwithstanding that the other provision relied upon by Appellees [R.I.T.A. Rule Section 5:06(A)] was revised in 2009 to add the third limitation "nor the method of filing (i.e., single or consolidated)."<sup>5</sup>

Now, four years into litigation of this controversy, the Appellees' Second Brief raises Appellees' reliance on a different Bedford Heights Ordinance for the first time – Bedford Heights

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<sup>5</sup> See pages 39 - 43 of this Third Brief for a detailed explanation of the three distinct tax expressions, as well as a discussion of the rules of statutory construction (no redundant words and *expressio unius est exclusio alterius*). The BTA's March 20, 2015 Decision and Order correctly agreed with Appellants that Bedford Ordinance Section 173.15(a) did not deny the refund claims since the ordinance contained only two limitations and did not contain the third limitation ("nor the method of filing"). Nonetheless, Appellees inexplicitly continue to assert that the third limitation added to the R.I.T.A. Rule in 2009 is the *same* as the other two limitations already expressly contained in both the R.I.T.A. Rule and in Bedford Ordinance Section 173.15(a). The Appellees' assertion defies logic and cannot be reconciled with a basic rule of statutory construction that requires that "words in statutes should not be construed to be redundant, nor should any words be ignored" *E. Ohio Gas Co. v. Pub. Util. Comm.*, 39 Ohio St.3d 295, 299, 530 N.E.2d 875, 879 (1988), and that statutory language "must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." *Meyers v. Board Of Education, Lucas County*, 95 Ohio St. 367, 116 N.E. 516 (1917).

Ordinance Section 173.14(a). Appellants inform the Court of this new argument raised by the Appellees merely to provide the Court with an insight into the “make up the rules as we go” tendencies that Ohio’s municipal taxpayers often face when interacting with municipal taxing authorities in Ohio.<sup>6</sup> Notwithstanding this new assertion, Bedford Heights Ordinance Section 173.14(a) does not deny the amended consolidated returns in any event.

- a. The third sentence of Bedford Heights Ordinance Section 173.14(a) addresses changing a filing method from tax year to tax year, not amending a previously filed return. Bedford Heights Ordinance Section 173.15(a) is the provision that addresses amended returns, which contains only two limitations and does not contain a limitation regarding changing the “method of filing.”**

Bedford Heights Ordinance Section 173.15(a) expressly allows amended returns (so long as filed within the three-year limitation period) and the BTA agreed, concluding that Bedford Heights Ordinance Section 173.15(a) contained only two limitations and did not contain the third, the “method of filing” prohibition. (Appx. 13.) Now, Appellees cite Bedford Heights Ordinance Section 173.14(a) as the latest rationale for denial of the consolidated returns. Appellees are wrong. Bedford Heights Ordinance Section 173.14(a) does not deny amended returns filed on a consolidated basis. Appellees conflate *amending* a previously filed return for a particular tax year, on the one hand, and changing the method of filing from tax year to year *with respect to two consecutive tax years*, on the other hand. The latter (which is invalid under R.C. 718.06 in any event) is what the third sentence of Bedford Heights Ordinance Section 173.14(a) seeks to prohibit.

Bedford Heights Ordinance Section 173.14(a) provides as follows:

Filing of consolidated returns may be permitted or required in accordance with rules and regulations prescribed by the Tax Administrator. Any affiliated group which files a consolidated return for federal income tax purposes pursuant to section 1501 of the Internal Revenue Code may file a consolidated return with the City of Bedford

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<sup>6</sup> Section 6 of Article XIII of the Ohio Constitution’s instructing the General Assembly that it “shall \* \* \* restrict (municipalities’) power of taxation \* \* \* so as to prevent the abuse of such power” was prescient. The Appellees’ actions here are certainly an abuse.

Heights. However, once the affiliated group has elected to file a consolidated return or a separate return with the City, the affiliated group may not change their method of filing in any subsequent tax year without written approval from the Administrator. (Bedford Heights Second Brief Appx. 45.)

The third sentence of Bedford Heights Ordinance Section 173.14(a) relates to changing the filing method *with respect to a subsequent tax year* following a tax year for which a different filing method was used. It does not relate to a taxpayer amending a previously filed tax return.

If Bedford Heights Ordinance Section 173.14(a)'s third sentence actually, as Appellees assert, relates to amending a previously filed tax return for a previous tax year, then the 2009 revision to R.I.T.A. Rule Section 5:06(A) would be redundant. Clearly, the R.I.T.A Rule was amended for a purpose (albeit an unlawful one, because R.C. 718.06 does not allow it). The R.I.T.A. 2009 revision was an attempt to add the third limitation to the filing of amended returns – “nor the method of filing”. Rules of statutory construction require that "words in statutes should not be construed to be redundant, nor should any words be ignored." See *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 26, citing *E. Ohio Gas Co. v. Pub. Util. Comm.*, 39 Ohio St.3d 295, 530 N.E.2d 875 (1988). "In cases of statutory construction, our paramount concern is the legislative intent in enacting the statute. To determine intent, we look to the language of the statute and the purpose that is to be accomplished by the statute \* \* \* Our role \* \* \* is to evaluate a statute as a whole and give such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative. [S]tatutes may not be restricted, constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act." *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, 929 N.E.2d 448, ¶ 20-21, internal citations omitted.

In their Proposition of Law on Cross Appeal, Appellees assert that both Bedford Heights Ordinance Section 173.15(a) and the prior version of R.I.T.A. Rule Section 5:06(A) bar the amended returns even if the 2009 version of the R.I.T.A. Rule Section 5:06(A) was not lawfully incorporated into the Bedford Heights Ordinances (discussed later in this Brief regarding unlawful delegation of legislative authority). Appellees make inconsistent assertions. Here, for the first time, the Appellees assert that Bedford Heights Ordinance Section 173.14(a) is the rationale for denying the amended return based on the Appellees' assertion that the Appellants must obtain written approval to change the "method of filing." However, regarding the issue on Cross-Appeal, the Appellees assert that the phrase "method of filing" is subsumed within the two tax phrases "method of accounting" and "method of apportionment" as used in Bedford Heights Ordinance Section 173.15(a). Clearly, the three expressions mean three different things. The Appellees' inconsistent assertions are another example of the abuse that the General Assembly sought to curtail in enacting R.C. 718.06.

**b. The portions of Section 173.14(a) that conflict with R.C. 718.06 are invalid in any event.**

Bedford Heights Ordinance Section 173.14(a) has specifically allowed taxpayers the ability to elect to file consolidated returns since at least 1996. However, following the enactment of R.C. 718.06, Bedford Heights Ordinance Section 173.14(a) was not amended by Bedford Heights to conform to the express direction of the General Assembly regarding R.C. 718.06's allowance of consolidated returns for tax years beginning in 2003 and after, and is therefore invalid in any event.

R.C. 718.06 does not permit a tax administrator to add conditions to the ability to file a consolidated tax return. See *Ransom & Randolph Co. v. Evatt*, at the syllabus ("rules may not enlarge or restrict statutes"). R.C. 718.06 does not allow a tax administrator to place conditions (such as "written approval" from the administrator) on the right for a taxpayer to file a consolidated return. Furthermore, there is no provision in R.C. 718.06 that would allow a tax administrator denial

of a consolidated return for a tax year merely because the taxpayer filed an original separate return for the *previous* tax year. If Bedford Heights Ordinance Section 173.14(a)'s third sentence may lawfully condition the filing of consolidated returns on tax administrator approval, then R.C. 718.06 is rendered meaningless to any taxpayer that did not file that way prior to 2003. A taxpayer filing a separate return relating to tax year 2002 could, under Appellee's interpretation of Bedford Heights Ordinance Section 173.14(a), be denied the right to file a consolidated return in tax year 2003 (or *any* tax year in the future) merely because the tax administrator could assert that a change is not permitted without the tax administrator's approval. Each tax administrator in Ohio with a similar ordinance could deny all consolidated returns for tax years 2003 and thereafter by stating that a change from a separate return in tax year 2002 to a consolidated group return in any year after 2002 was not allowed without the administrator's approval. That would entirely frustrate the purpose of R.C. 718.06.

If this Court concludes that R.C. 718.06 is an express limitation or restriction under the Ohio Constitution, then the Appellees' assertions regarding the third sentence of Bedford Heights Ordinance Section 173.14(a) are moot, and this Court should order the Appellees to refund the overpaid tax based solely on R.C. 718.06.

**B. Bedford Heights Ordinance Section 173.56 does not lawfully adopt future changes to the R.I.T.A. Rules. Its attempt to adopt future changes via an incorporating reference is an unconstitutional delegation of authority from Bedford Heights to R.I.T.A.**

- 1. Appellees misstate the holding in *State v. Gill*; *State v. Gill* does not "endorse" Bedford Heights Ordinance Section 173.56's purported prospective adoption of R.I.T.A. Rule changes by reference. This Court indicated that the General Assembly may only adopt provisions of federal statutes that are in effect *at the time* the state legislation is enacted.**

Appellees contend, throughout the Second Brief, that *State v. Gill*, 63 Ohio St. 3d 53, 584 N.E.2d 1200 (1992), "endorsed future incorporation" of subsequent amendments to other laws via an

incorporating reference contained in an Ohio law. This statement is a clear misstatement of the decision. It turns the decision on its head. *State v. Gill* does not endorse the delegation of legislative authority by Bedford Heights to R.I.T.A via Bedford Heights Ordinance Section 173.56's incorporating phrase "including all additions, deletions, and amendments made subsequent hereto." To the contrary, *State v. Gill* clearly opined that attempting to adopt future amendments of the federal law would constitute an unconstitutional delegation of legislative authority.

Appellees' misstatement of the decision is illustrated by examining Appellees' recitation of one small excerpt from *State v. Gill* that merely explained the difference in *intent* between the statute at issue [R.C. 2913.46(A)] and a different statute that was not at issue [R.C. 2915.01(AA)].

Appellees assert in the middle of page 19 of their Second Brief:

"In *State v. Gill* \* \* \* this Court endorsed such incorporation:

[If] 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". ...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. *Gill*, 63 Ohio St. 3d at 55-56."

This Court indeed wrote that "[If] 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." The Court, however, was merely comparing another statute (not at issue in the case) to show the difference in *intent* between two dissimilar statutes. The Court's investigation of the difference between the two phrases ["as amended" and "as now or hereinafter amended"] in *State v. Gill* made the Court's analysis and conclusion easier when ruling on Mr. Gill's assertion of the purported delegation of authority. Since there was no *intent* to adopt a future congressional change with the statute's use of

the phrase “as amended,” the Court therefore ignored the future changes by Congress when analyzing Mr. Gill’s assertion that the Ohio statute delegated away Ohio’s future legislative authority.

*State v. Gill*’s statement that the General Assembly “certainly knew how to do so” simply meant that the General Assembly certainly knew how to draft a statute with a different *intent*. The Appellees erroneously translate the Court’s statement – “certainly knew how to do so” into an alleged holding. The Appellees assert (incorrectly) that *State v. Gill* holds that since the General Assembly knew *how to* draft a statute that intended to pick up future changes, that such intent would have been *operable* against a non-delegation challenge and would have been *operable* with respect to the future changes. The Appellees’ translation of the Court’s analysis is incorrect.

Appellees fail to read the entire case and fail to address the holding of *State v. Gill*, “[t]he General Assembly may adopt provisions of federal statutes that are **in effect at the time** the state legislation is enacted.” *State v. Gill* did not hold that the future adoption by reference may lawfully “pick-up” subsequent amendments that are not in effect at the time the state legislation is enacted.

- 2. In *State v. Gill*, this Court did not conclude that, had the statute at issue contained the phrase “as now or hereinafter amended” instead of “as amended,” that such statute’s future incorporation language and intent would have constitutionally adopted those later enacted Congressional changes.**

Appellees’ infer throughout their Second Brief that *State v. Gill* suggests that if “as now or hereinafter amended” were used in R.C. 2913.46(A) to refer to the federal law, the future congressional changes would have lawfully applied without Ohio’s *reenactment* of the incorporating Ohio statute, R.C. 2913.46(A). That is simply not what *State v. Gill* holds. Appellees state, at the second to last line on page 19 of their Second Brief, that:

“*Gill* then went on to note that the General Assembly can ‘incorporate amendments subsequent to the time’ the incorporating statute is enacted.”

The Appellees however misconstrue *how* the General Assembly could accomplish that goal **subsequent** to the time when the incorporating statute is enacted. The manner in which the General Assembly could lawfully incorporate amendments subsequent to the time the incorporating statute is enacted is to re-adopt the Ohio law with the incorporating reference following each congressional amendment.

The reason that the incorporation provision (“as amended”) 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. This Court should not be confused by the “endorsement” allegation made by Appellees.

**3. Appellees’ assertion that the *State v. Gill* Court “advised the General Assembly that it could revise the incorporating statute at issue to expressly incorporate future amendments” without subsequent state legislative action is incorrect.**

Again, the Appellees misunderstand *State v. Gill*’s statement regarding *how* the General Assembly could solve the problem pointed out by the defendant in *State v. Gill* – that a person could be in compliance with federal food stamp law while nonetheless be committing an Ohio crime. At page 26 of its Second Brief, the Appellees incorrectly assert:

“this Court advised the General Assembly that it could revise the incorporating statute at issue to expressly incorporate future amendments: [Appellees’ then cite to *State v. Gill*, as follows]:

[Gill] further contends that to interpret and limit R.C. 2913.46(A) as incorporating Section 2011, Title 7, U.S. Code, as it read on the date R.C. 2913.46(A) was enacted, would create an unworkable situation. [Gill] argues that since the enactment of R.C. 2913.46(A), the federal food stamp law has been revised and some present lawful recipients would commit an Ohio crime by obtaining food stamps.

[Gill] makes a valid point. However, to avoid this problem, the General Assembly may update and revise R.C. 2913.46(A) to incorporate amended versions of the federal food stamp law.” Appellees’ Second Brief, Page 26.

Appellees erroneously imply that the Court’s reference to “avoid the problem,” means that had the General Assembly instead written “as now or hereinafter amended” as opposed to “as amended” in R.C. 2913.46(A), the incorporation would have been operable with respect to *later enacted* federal changes. That is simply wrong. The effective technique to “avoid the problem” is to update and revise the Ohio statute *after* each time the federal law is revised. This is precisely the holding of *State v. Gill* – that the “General Assembly may adopt provisions of federal statutes that are in effect at the time the state legislation is enacted.” Appellees conveniently and incorrectly ignore the “in effect at the time” clause.

- 4. The Ohio General Assembly has recognized the non-delegation issue with respect to Ohio’s desire to adopt changes to the Internal Revenue Code into Ohio’s tax laws, and it enacted R.C. 5701.11 in response to the *State v. Gill* decision. The very existence of R.C. 5701.11 supports Appellants’ assertions and refutes Appellees’ misunderstanding and misstatement of *State v. Gill*.**

The Ohio General Assembly understood the dilemma caused by *State v. Gill* in that, if the General Assembly desired to adopt, for Ohio income tax purposes, any I.R.C. changes that occurred in the future, the Ohio General Assembly would need to **reenact**, each year, all Ohio income tax laws which made reference to the I.R.C. Therefore, R.C. 5701.11 was enacted to simplify the process each year. R.C. 5701.11, when enacted in 2006 provided, in part:

“(A) Except as provided under division (B) of this section, any reference in Title LVII of the Revised Code to the Internal Revenue Code, to the Internal Revenue Code “as amended,” to other laws of the United States, or to other laws of the United States, “as amended” means the Internal Revenue Code or other laws of the United States as they exist on the effective date of this section as enacted by H.B. 530 of the 126th general assembly. This section does not apply to any reference to the Internal Revenue Code or to other laws of the United States as of a date certain specifying the day, month, and year. \* \* \*” (Appellants’ Appx. to Third Brief 2, 3.)

The General Assembly enacted R.C. 5701.11, so that each year, if the General Assembly wished to adopt I.R.C. changes made during that taxable year, the General Assembly could merely amend one

statute (R.C. 5701.11) at the end of the taxable year, as opposed to searching for multiple Ohio tax statutes that referenced the I.R.C. and including all those Ohio statutes in an Ohio legislative bill each year.<sup>7</sup> The Ohio Legislative Service Commission's analysis of the reason for the enactment of R.C. 5701.11 provides, in part:

“When a Revised Code section refers to a federal law, the federal law that applies is the one that exists on the date the bill enacting the reference was concurred in. If the federal law is subsequently amended, and the General Assembly wants that amendment to apply, it must pass an act incorporating the amendment. (Ohio Constitution, Art. II, Sec. 1; *State v. Gill* (1992), 63 Ohio St.3d 53.)” LSC Bill Analysis of Am. Sub. Ohio House Bill 530 from the 126<sup>th</sup> Ohio General Assembly. (Underline added for emphasis) (Appellant's Appx. to Third Brief 7.)

Without the Ohio General Assembly's re-adoption of Ohio's laws referencing the I.R.C., any future I.R.C. changes are not part of Ohio's law. *Estate of Hughes v. Lindley*, No. 41671, 1980 Ohio App. LEXIS 12207, at \*11 (Cuyahoga County May 22, 1980) and *State v. Gill*.

Clearly, the Ohio General Assembly and the Ohio Legislative Service Commission disagree with Appellees' characterization of *State v. Gill*. Furthermore, *Estate of Hughes* and *Robinson v. Tax Commr. of Indian Hill*, 61 Ohio Misc.2d 95, 574 N.E.2d 596 (C.P.1989) apply the same rationale. As reasoned by the court in *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." Bedford Heights' City Council is the legislative authority imposing the tax. R.I.T.A. is not.

**5. *State v. Gill*, *Estate of Hughes* and other Ohio cases are not “readily distinguishable” from the Bedford Heights Ordinance’s incorporating reference to R.I.T.A.’s Rules merely because the cross-reference is to an administrative rule rather than to a federal statute.**

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<sup>7</sup> See *Lakengren v. Kosydar*, 44 Ohio St.2d 199, 339 N.E.2d 814 (1975) explaining that if a tax year is still open, the General Assembly may enact an Ohio tax law change that applies to the entire year.

The Appellees assert that the non-delegation cases involving references to the federal statutes are “readily distinguishable” from Bedford Heights Ordinance Section 173.56’s reference to the R.I.T.A. Rules, because, according to Appellees, “R.I.T.A. is “an agency specifically designed to administer Bedford Heights’ (and many others municipalities’) municipal tax systems.” Second Brief, at page 23-24. However, Appellees provide no policy or case law to support Appellees’ self-serving statement that delegation to R.I.T.A. is permissible under Ohio law while delegation to Congress is not permissible.

The unconstitutional delegation of legislative authority assertion by Appellants does not relate to any expertise (or lack thereof) that R.I.T.A., or Congress, or the Ohio General Assembly may possess regarding good tax policy. Rather, the unconstitutional delegation of authority issue relates to *which legislative body* has the authority to alter the taxing jurisdiction’s laws, regardless of the soundness of the tax policy. R.I.T.A. is not a legislature, and even if it were, Bedford Heights may not adopt R.I.T.A. Rule changes without a legislative act by Bedford Heights’ City Council.

R.I.T.A.’s rule-making process (actually, the lack thereof) further supports Appellees’ contentions that neither Bedford Heights nor any member of R.I.T.A. may delegate to R.I.T.A. the municipality’s legislative power to change laws. For example, could two R.I.T.A. employees (or even one R.I.T.A. employee acting alone) merely decide to draft R.I.T.A. Rule changes that are inconsistent with a municipality’s ordinance or inconsistent with a provision of Chapter 718 of the Revised Code? Appellants assert that the answer to that question is unequivocally “No.”

In R.I.T.A’s Amicus Brief,<sup>8</sup> at page 3, R.I.T.A. readily admits that its rule-making process has no oversight, nor any process of approval:

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<sup>8</sup> R.I.T.A. did not serve its Amicus Brief upon Appellants, but Appellants discovered a copy of the Amicus Brief on the Supreme Court Clerk’s on-line docket.

RITA periodically updates its rules and regulations to address changes in administration, or changes in the law affecting administration, of the income tax ordinances. The 246 members of the council of governments do not re-adopt the RITA rules and regulations each time an update is made. (Emphasis added).

R.I.T.A. admits that there is no oversight when R.I.T.A. attempts to make a Rule change that would (if this Court allows it) fundamentally change 246 sets of local laws that apply to the 246 member municipalities for which R.I.T.A. acts as tax administrator. This is certainly not consistent with the Ohio Constitution nor with Bedford Heights' Charter, which provides that "The legislative power of [Bedford Heights], except as limited by this Charter, and such additional powers as may be expressly granted by this Charter, shall be vested in the Council [of Bedford Heights]." (Appx. 31.)

R.I.T.A. is not permitted to enact a substantive law change without any legislative oversight. Appellees' assertion that R.I.T.A.'s expertise makes R.I.T.A. distinguishable from this Court's analysis regarding the inability to delegate legislative authority to Congress is wrong. R.I.T.A.'s expertise (or lack thereof as the case may be) is not the issue. The issue is whether Bedford Heights may allow R.I.T.A. to change its laws. Bedford Heights may not.

**6. Appellees' citation to Ohio statutes, administrative code provisions, and municipal ordinances using "as now or hereinafter amended" does not mean that such provisions automatically adopt future changes made by other legislatures.**

Appellees' Second Brief, at pages 20-21, cites state laws and local ordinances containing incorporating phrases "as now or hereinafter amended," or similar language. Appellees then assert that "adopting NYFF's proposition of law would effectively nullify, as unconstitutional, numerous other laws enacted by the General Assembly and municipalities across the State." Appellees misstate the issue. Appellants merely assert that those provisions (and Bedford Heights Ordinance Section 173.56) do not, under *State v. Gill* and Article II, Section 1, Ohio Constitution, adopt *future* changes made to the statutes that are referenced therein. Merely because those provisions have not been challenged does not mean that the provisions lawfully adopt *future* changes.

**7. *Timken* addressed a General Code provision that referenced another General Code provision; it did not address an assertion of unlawful delegation of a legislature’s authority to another agency or legislature.**

*State, ex rel. Timken Roller Bearing Co, v. Indus. Comm.*, 136 Ohio St. 148, 24 N.E.2d 448 (1939) did not involve a delegation of authority assertion and does not “endorse” Bedford Heights Ordinance Section 173.56’s attempt to adopt future changes by R.I.T.A. *Timken* did not address whether the Ohio Constitution prohibited a legislature from delegating its authority to another legislature or agency. *Timken* addressed whether the Ohio General Assembly intended to incorporate by reference changes to another Ohio statute that the General Assembly itself had drafted. Such is not a delegation question and *Timken* has no applicability to Appellees’ assertion that the 2009 revision to R.I.T.A. Rule Section 5:06(A) lawfully was adopted by Bedford Heights Ordinance Section 173.56.

**8. Appellees’ assertion that the “intelligible principle” doctrine allows Bedford Heights to delegate its authority to R.I.T.A is misplaced because the 2009 amendment to the R.I.T.A. Rule is not merely an administrative provision providing guidance regarding administrative discretion. The 2009 amendment to the Rule would substantively eliminate the right for a taxpayer to file a consolidated return on an amended basis.**

Appellees’ reliance on *Fondessy, Blue Cross of Northeast Ohio v. Ratchford*, and *Peachtree* does not support the Appellees’ assertion that Bedford Heights Ordinance Section 173.56 lawfully delegates to R.I.T.A. the authority for R.I.T.A. to change the laws of Bedford Heights.

**a. R.C. 718.06 does not require or permit discretion.**

*Blue Cross of Northeast Ohio v. Ratchford*, 64 Ohio St.2d 256, 416 N.E.2d 614 (1980) at the syllabus, states that “A statute does not unconstitutionally delegate legislative power if it establishes, through legislative policy and such standards as are practical, an intelligible principle to which the administrative officer or body must conform and further establishes a procedure whereby exercise of

the discretion can be reviewed effectively.” Here, there is no procedure to review R.I.T.A.’s law change, as admitted by R.I.T.A in its Amicus Brief.<sup>9</sup>

The cases cited by Appellees address provisions that, by their very nature, require discretion: reasonable rates for insurance, environmental issues, and zoning issues, for example. Filing as a consolidated group should not require discretion, because there is no subjectivity involved. Either the group that files the municipal consolidated return is the same group that filed for federal purposes (in which case the filing is permitted under both R.C. 718.06 and the Bedford Heights Ordinances) or it is not the same group that filed for federal purposes (in which case, the group filing is not permitted).

*Matz v. J.L. Curtis Cartage Co.*, 132 Ohio St. 271, 7 N.E.2d 220 (1937), at paragraph 6 of the syllabus states: “The General Assembly cannot delegate legislative power to an administrative board and any enactment which in terms does so is unconstitutional and void; but laws may be passed which confer on such a board *administrative powers only*.” (Italics added). Here, R.I.T.A.’s 2009 Rule change is not merely administering the processing (and auditing) of tax returns; it is substantively attempting to deny a statutorily authorized filing method. *Matz* also provides an exception under paragraph 7 of the syllabus: “As a general rule a law which confers discretion on an executive officer or board without establishing any standards for guidance is a delegation of legislative power and unconstitutional; but, when the discretion to be exercised relates to a police regulation for the protection of the public morals, health, safety, or general welfare, and it is impossible or impracticable to provide such standards, and to do so would defeat the legislative object sought to be accomplished, legislation conferring such discretion may be valid and

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<sup>9</sup> Even if there were a procedure to review R.I.T.A.’s administrative rule changes, the right granted by R.C. 718.06 is not subject to discretion, because to allow discretion would permit the tax administrator to deny consolidated returns completely.

constitutional without such restrictions and limitations.” *Matz* supports, in limited circumstances, conferring discretion on administrative bodies *without* establishing any guidance, but only when the discretion relates to “police regulation for the protection of the public morals, health, safety, or general welfare, and it is impossible or impracticable to provide such standards, and to do so would defeat the legislative object sought to be accomplished.” *Id.*

Appellants’ filing of municipal tax returns does not relate to police regulation or public health and safety in which discretion is practically necessary. Therefore, the exception under paragraph 7 of the Syllabus of *Matz* does not save Appellees. (See also *In re Adoption of Uniform Rules and Regulations Relating to Valuation of Real Property*, 169 Ohio St. 445, 160 N.E.2d 275 (1959) stating, at 451, “Whether the Legislature has exceeded its power in delegating legislative authority is determined by the extent to which it has created companion rules and standards for the guidance of the administrative agency concerned. If a clear and sufficient determination of policy has been legislatively made and adequate rules and standards of guidance are provided, a claim of unconstitutionality must fall. Unconstitutionality exists where the *assigned function of the administrative unit transcends mere functional operation and extends into the policy-making area.*.” (Emphasis added) Here, R.I.T.A., with no oversight or legislative approval, determined that the policy should be to disallow consolidated returns if they were filed on an amended basis. The 2009 R.I.T.A. Rule change transcends mere functional operation and extends into the policy area.

The exception in *Matz* is not applicable here. The authority for municipalities to enact local taxes is not a police power, but instead a power of local self-government. *State ex rel. Zielonka v. Carrel*, 99 Ohio St. 220, 227, 124 N.E. 134, 136 (1919) (“[t]here can be no doubt that the grant of authority to exercise all powers of local government includes the power of taxation.”)

**b. Appellees make a circular argument regarding a conflict between the 2009 revision to the R.I.T.A. Rule and the Bedford Heights Ordinances.**

The Appellees appear to assert that *Peachtree Development Co. v. Paul*, 67 Ohio St.2d 345, 423 N.E.2d 1087 (1981) somehow means that Bedford Heights Ordinance Section 173.56 does not delegate authority to R.I.T.A merely because Bedford Heights Ordinance Section 173.56 also states that any conflict between the Ordinance and the RITA Rule would defer to the Ordinance and that is the sufficient constraint or guideline necessary to overcome *Matz*.<sup>10</sup>

Appellees assert, at page 23 of the Second Brief, that because the other Bedford Heights Ordinances control over any conflicting R.I.T.A Rule, that is the sufficient “constraint” over R.I.T.A exceeding its authority. Appellees make a circular argument. Appellees assert that the 2009 revision to R.I.T.A. Rule Section 5:06(A) adding the “change of filing method” restriction (which adds to and exceeds the Ordinances) is valid because, Appellees’ assert, the Ordinance (which conflicts with the 2009 revision to R.I.T.A. Rule Section 5:06(A) contains *other* provisions stating that any conflict between the two is resolved in favor of the Ordinances. That is a circle.

Recall that the Ordinance does not deny consolidated returns on an amended basis, so it should control. The 2009 revision to R.I.T.A. Rule Section 5:06(A), however, seeks to deny them. If the Ordinance controls, then the Rule is invalid. “Administrative rules may facilitate the operation of what has been enacted by the General Assembly but may not add to or subtract from the

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<sup>10</sup> First, it should be noted that any zoning matter, by its very nature, almost always involves discretion because of the difficulty in pigeonholing certain uses of property and difficulty in reviewing an overall plan without reviewing issues on a case by case basis. *Peachtree* addressed whether Article XVI of the Hamilton County Zoning Resolution unlawfully delegates legislative authority to the regional planning commission. *Peachtree* stated, at p. 352, “We summarily reject appellants’ contention that Article XVI of Hamilton County Zoning Resolution impermissibly delegates legislative authority to the regional planning commission. Our review of the Zoning Resolution compels us to conclude that Article XVI only confers, on the regional planning commission, discretion as to the execution of the law *by setting forth standards and guidelines* that are sufficiently definite to pass constitutional muster.” (Italics added for emphasis.)

legislative enactment.” *State ex rel. Foster v. Evatt*, 144 Ohio St. 65, 102, 56 N.E.2d 265, 281 (1944).

Depending on how ordinances are drafted in the other 245 communities for which R.I.T.A. acts as tax administrator (and whether those 245 communities lawfully re-adopt any incorporating provisions in their ordinances), if Bedford Heights Ordinance Section 173.56 is permitted to delegate to R.I.T.A. its legislative authority, it could allow R.I.T.A., or actually even one person at R.I.T.A., to change the law in 245 municipalities. R.I.T.A. does not, and should not, have that power.

**C. R.I.T.A. Rule Section 5:06(A), as amended by R.I.T.A. in December 2009, conflicts with Bedford Heights Ordinance Section 173.15(a) because the Rule adds a third prohibition not contained in Bedford Heights Ordinance Section 173.15(a); Appellees argument to the contrary defies common sense and ignores the doctrine of *expressio unius est exclusio alterius*.**

**1. There is a clear conflict between the Rule and the Ordinance.**

The Appellees assertion, at page 28 of the Second Brief, that there is not a conflict between the R.I.T.A. Rule Section 5:06 (as it was amended in December of 2009) and Bedford Heights Ordinance section 173.15(a) is wrong. The assertion that the two provisions are “semantically identical besides the addition of the ‘nor the method of filing’ phrase in Section 5:06(A)” actually supports Appellants’ case. Asserting that one provision (the Ordinance) that contains **two** limitations is “semantically identical” as a different provision (the R.I.T.A. Rule) that contains **three** limitations is absurd. The critical point is that the third limitation added in December 2009 to R.I.T.A. Rule Section 5:06(A) is only contained in the Rule upon which the City erroneously relied as its rationale for denial. It is not contained in Bedford Heights Ordinance section 173.15(a). The BTA agreed with Appellants on this issue. (Appx. 13.)

Appellees’ statement that Bedford Heights Ordinance Section 173.15(a) and R.I.T.A. Rule Section 5:06(A) are “in all substantive respects, semantically identical *besides* the ‘nor the method of

filing’ phrase” directly supports Appellants’ position and refutes Appellees’ position.<sup>11</sup> Such statement by Appellees is akin to stating that a traffic light with two lights (a yellow light and a green light), is identical to a traffic light with three lights (a red light, a yellow light, and a green light) except for the red light, of course. The critical difference is that the “method of filing” prohibition is not in Bedford Heights Ordinance Section 173.15(a), the Ordinance upon which Appellees rely. By analogy, there is no “red light” in Bedford Heights Ordinance Section 173.15(a) and Appellees have nothing to rely upon to deny the refund without the red light. The limitations are not the same.

Bedford Heights Ordinance Section 173.15(a) expressly permits a taxpayer to file amended returns in order to request a refund of tax overpaid, subject to only two limitations regarding amending returns after the due date for the original return. First, a taxpayer may not change the “method of accounting,” (from cash to accrual or from accrual to cash). Second, a taxpayer may not change the “method of apportionment” (from the standard three factor apportionment formula—which measures a ratio of the property, payroll, and sales in a particular taxing district—to separate accounting, or vice versa). There is no prohibition in Bedford Heights Ordinance Section 173.15(a) against amending a return from separate return to a consolidated group return. The BTA agreed.

The 2009 revision to R.I.T.A. Rule Section 5:06(A), however, contains three limitations regarding amending returns after the due date for the original return. The first two limitations are the same as indicated in the previous paragraph. The third limitation is the Appellees’ purported “smoking gun” which, in Appellees’ view, provides Bedford Heights with the singular statutory

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<sup>11</sup> At page 28 of Appellee’s Second Brief, the Ordinance and the R.I.T.A. Rule (as changed by R.I.T.A. in 2009) are shown side by side. The difference between the two is clearly shown, which is the entire point raised by Appellants. One contains two limitations and the other contains three.

rationale to deny the refunds.<sup>12</sup> The third limitation (that is not in the Ordinance) is that a taxpayer may not change its “method of filing (i.e., single or consolidated)” after the due date for filing the original return.

*Expressio unius est exclusio alterius* means "the expression of one thing is the exclusion of the other." If a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded." *Thomas v. Freeman*, 79 Ohio St.3d 221, 224, 680 N.E.2d 997, 1000, citing Black's Law Dictionary (6 Ed.1990) 581. Bedford Heights Ordinance Section 173.15(a) expresses two limitations. It does not express a third limitation.

**2. Appellees reliance on *Fondessy* and *Ohioans for Concealed Carry, Inc.* is misplaced. Those cases address the Home Rule Amendment to the Ohio Constitution and the analysis regarding the ability for municipalities to enforce police powers that are not in conflict with general laws. The municipal power of taxation is a power of local self-government.**

Appellees' Second Brief discusses cases regarding alleged conflicts between a local ordinance and a “general” state law under Article XVIII, Section 3, Ohio Constitution. It provides, in part, that municipal corporations shall have authority “to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” The conflict asserted by Appellants under Proposition of Law No. 3, however, is the conflict between the Bedford Heights Ordinance and the R.I.T.A. Rule Section 5:06(A), as amended in 2009. Article XVIII, Section 3 of the Ohio Constitution is not implicated.

*Ohioans for Concealed Carry, Inc. v. Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967, ¶ 24, states: “A home-rule analysis presents a three-step process. *Am. Fin. Servs. Assn. v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, 858 N.E.2d 776, ¶ 23-24; see also *Mendenhall v.*

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<sup>12</sup> Recall of course, that Appellants' assert that R.C. 718.06's express restriction or limitation mandates that Bedford Heights allow consolidated returns even if any local ordinance would seek to deny the return, and that Bedford Heights cannot delegate its authority to R.I.T.A. to change its laws in any event.

*Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, ¶ 17. The first step is to determine whether the ordinance at issue “involves an exercise of local self-government or an exercise of local police power.” \* \* \* If the ordinance is one relating solely to matters of self-government, “ the analysis stops\* \* \*.”

Here, the Ordinance and the R.I.T.A. Rule relate to Bedford Heights’ power of taxation, which is not a police power. It is a power of local self-government. There can be no doubt that the grant of authority to exercise all powers of local government includes the power of taxation. *Cincinnati Bell*, at 602. As *Ohioans for Concealed Carry, Inc. v. Clyde* instructs, the analysis stops. The issue here is not whether there is a conflict between a police power and a “general” state law. The conflict is between R.I.T.A.’s Rule and the Bedford Heights Ordinance.<sup>13</sup>

- 3. Rules may not add to or exceed the plain language of the Ordinance. Appellees’ assertion that R.I.T.A. Rule Section 5:06(A) is “merely additive” of Bedford Heights Ordinance Section 173.15(a), and therefore valid, is wrong. The Rule, which adds to and enlarges the provisions of the Ordinance, is the violation in the first instance and the police power cases do not support Appellees’ assertions.**

At page 28 of the Second Brief, Appellees assert:

“at the very most, Section 5:06(A) **adds to**—rather than contradicts—anything in BHO § 173.15 by adding the ‘method of filing’ language. \* \* \* Nothing in BHO § 173.15(a) purports to **authorize** changing from single to consolidated filer (or vice versa) after the due date for filing the original return.”

While the logic of Appellees is difficult to discern, it appears that Appellees assert that adding an additional prohibition is permissible because it is “merely additive.” Appellees “additive” assertion is misplaced. *Fondessy Enters, Inc. v. City of Oregon*, 23 Ohio St. 3d 213, 492 N.E.2d 797 (1986) addressed a conflict analysis under the “police power” provision of Article XVIII, Section 3,

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<sup>13</sup> Appellants also assert under Proposition of Law No. 1, that R.C. 718.06 is an express restriction on Bedford Heights’ power of taxation and that any local ordinance that seeks to add further conditions is invalid. The Ohio General Assembly is authorized by the Constitution to place restrictions and limitations on the taxing authority enjoyed by municipalities, Article XIII, Section 6, and Article XVIII, Section 13, Ohio Constitution.

Ohio Constitution. This Court held that that the City of Oregon had the authority to enforce monitoring of hazardous waste facilities within the corporate limits of the City, because the Oregon Ordinance did not permit anything forbidden by the Ohio statute, R.C. Chapter 3734. Appellees fail to understand that Appellants' assertions under Proposition of Law No. 3 relate to a comparison of the Bedford Heights Ordinances and the 2009 revision to the R.I.T.A. Rule. They do not relate to a comparison between R.C. 718.06 and the 2009 revision to the R.I.T.A. Rule. Those assertions are addressed under Proposition of Law No. 1.

When addressing *Wardrop v. Middletown Income Tax Review Bd.*, 12th Dist. Butler Nos. CA2007-09-235, 2008-Ohio-5298, Appellees assert, at page 30 of the Second Brief, that *Wardrop* is “factually distinguishable.” Of course the facts are different. What is not different, however, is the rule of law. As stated in *Wardrop v. Middletown Income Tax Review Bd.*, ¶ 24 “[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*, 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.”) Here, the 2009 revision to R.I.T.A. Rule Section 5:06(A) unlawfully attempts to restrict the Appellants’ ability to rely on Bedford Heights Ordinance Section 173.15(a) that contains only two limitations, neither of which were violated in the filing of the Appellants’ amended returns.

**4. Allowing municipal tax administrators to add conditions on the ability to file consolidated returns would entirely frustrate R.C. 718.06.**

Appellees assert that the Bedford Heights Ordinances permit the Appellees to place further conditions on a taxpayer's ability to file consolidated returns (conditions beyond whether the amended returns at issue here are allowed). Adding further conditions is simply not permitted. If each of the nearly 550 municipal corporations in Ohio levying a municipal income tax may indeed add conditions to a taxpayer's ability to file a consolidated return, then R.C. 718.06's purpose is entirely frustrated. If the General Assembly had intended municipal tax administrators have the power to place conditions on the ability to file consolidated returns, then R.C. 718.06 could have been written with conditions such as "subject to the discretion of the tax administrator" or "if requested by the taxpayer and if permitted by the tax administrator" or something similar. See *Beau Brummell Ties, Inc.*, discussed herein.

The General Assembly included only one condition in R.C. 718.06 for taxpayers to be permitted to elect to file consolidated returns—the group of corporations that filed for federal income tax purposes must be the same group that files for municipal tax purposes. It clearly and unambiguously instructs Ohio municipalities that they shall accept consolidated returns, with that singular condition.

**D. The Retroactivity Clause analysis must be applied with reference to the action taken by the Appellants when Appellants filed the original tax returns, when Appellants had a right to file either separately or as a consolidated group.**

**1. The Appellees measure the retroactivity at the wrong time.**

The Appellees assert, at pages 31-32 of the Second Brief, that the March 9, 2010 date (the date when the Appellants filed the amended consolidated tax returns with Bedford Heights) is the relevant date for measuring whether the revision to the R.I.T.A. Rule was unlawfully retroactive.

Appellees are incorrect. The relevant dates are the dates when the Appellants filed the original separate returns, which were all filed prior to the 2009 revision to the R.I.T.A. Rule.

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. On those dates, neither the Bedford Heights Ordinances nor R.C.718.06 required that the consolidated return filing must be made on initial returns or prohibited taxpayers from filing amended returns on a consolidated basis.

The Retroactivity Clause, Article II, Section 28, 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. 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.)

When a member that was included in the Appellants' federal consolidated group return filed its initial returns 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, 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) immediately 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 immediate 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 immediately 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 to the R.I.T.A. Rule. Thus, Appellants would be denied the right to file a consolidated group return. Such would be an unconstitutional retroactive application of law.

- 2. Appellees' reliance on *Couchot* is misplaced. *Couchot's* winning of the lottery was not a "closed transaction" when the Ohio law was amended to tax lottery winnings because the installments of the lottery winnings were still being paid to him. There were no "new obligations respecting transactions already completed" in *Couchot*.**

Appellees assert that *Couchot v. State Lottery Comm.*, 74 Ohio St.3d 417, 659 N.E.2d 1225 (1996) supports its assertion that the R.I.T.A. Rule revision in 2009 may lawfully be applied to take away a vested right that accrued when the Appellants took an action when filing the original returns. Appellees are wrong and fail to understand *Couchot*.

Here, the action taken by Appellants was the reliance on the option to elect to file either separate returns or consolidated returns when the original returns were actually filed. *Couchot*, on

the other hand, indicates that Mr. Couchot's "winning of the lottery in 1988 was not a closed transaction, wholly completed at that time \* \* \* and his subsequent receipt of installment winnings does not result in new obligations respecting transactions already completed, and, thus, no question of retroactivity is involved" *Id.* at 426. The "non-retroactivity" ruling in *Couchot* was based largely on the fact that Mr. Couchot received income from the lottery in years after the Ohio tax law was changed to tax lottery winnings. The "non-retroactivity" ruling was not based on whether or not Mr. Couchot "took an action" *only once* in purchasing a lottery ticket prior to the time when the Ohio law taxed lottery winnings. This Court stated, at 426, that:

[T]he taxable event upon which R.C. Chapter 5747 levies a tax is the receipt of income. *Dery v. Lindley*, 57 Ohio St.2d 5, 7, 385 N.E.2d 291, 292 (1979). A state, having the power to tax by virtue of the circumstance from which the income is derived, may choose the time the income is received as the incidence and measurement of the tax. See *Chope v. Collins* (1976), 48 Ohio St.2d 297, 302-303, 2 O.O.3d 442, 445, 358 N.E.2d 573, 577; *Internatl. Harvester*, supra, 322 U.S. at 445, 64 S.Ct. at 1065, 88 L.Ed. at 1381. What seems to have particularly disturbed the court of appeals is the fact that the General Assembly decided to tax lottery winnings of nonresidents after Couchot had already won the lottery. However, Couchot's winning of the lottery in 1988 was not a closed transaction, wholly completed at that time. Accordingly, [imposing tax on] his subsequent receipt of installment winnings does not result in new obligations respecting transactions already completed, and, thus, no question of retroactivity is involved.

Here, by comparison, the "transaction already completed" was the filing of the original returns based on the law as it then existed. The Court in *Couchot* clearly stated that it did not consider the purchase of the lottery ticket as the "closing" of the transaction.

- 3. The Appellees attempt to avoid Appellants' Proposition of Law No. 4 by assuming that the Court will conclude that there is no unlawful retroactivity here. Appellees are wrong that the Court need not address the Appellants' assertion that 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.**

The Appellees do not address Proposition of Law No. 4, and for good reason. There is not a response that would allow the 2009 revision to R.I.T.A. Rule Section 5:06(A) to be applied retroactively, because the Rule does not express any intent to apply it retrospectively to taxpayers that had already filed tax returns.

Appellees also fail to address *Bielat v. Bielat*, 87 Ohio St.3d 350, 353, 721 N.E.2d 28, 33 (2000) (“In considering a challenge to the retroactive application of a statute or rule, the Court has applied a two-step test.”) and for good reason. There is not a response that refutes Appellants’ assertions regarding the inability to apply the 2009 revision to R.I.T.A. Rule Section 5:06(A) retroactively to the Appellants.

R.I.T.A., in 2009, revised its Rule Section 5:06(A). The Rule does not express whether the revision is intended to first apply to tax years that have not yet closed (i.e., to tax years 2009 and forward), whether it is intended to apply to tax years for which the statute of limitations to amend returns is otherwise still open, or whether it is intended to apply immediately to *every* possible scenario where a taxpayer may otherwise have a tax benefit. Without any clear expression, it can only be applied, at the earliest, to tax years where the taxpayer has not yet filed a tax return. 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). Here, the R.I.T.A. Rule revision is silent as to its effective date, and it should not be allowed to retrospectively deny Appellants' amended tax returns.

### **BEDFORD HEIGHTS PROPOSITION OF LAW ON CROSS-APPEAL**

**BEDFORD HEIGHTS PROPOSITION OF LAW NO. 1: BHO § 173.15(a) and the prior version of RITA Rule §5.06(A) bar NYFF from changing from single to consolidated filer status after the due date for filing the original returns, irrespective of whether the July 2009 version of RITA Rule §5.06(A) is properly incorporated into the Bedford Heights Ordinances.**

**A. Appellees' assertion that two technical tax phrases, "method of accounting" and "method of apportionment," subsumes the technical tax phrase "method of filing" is wrong because the three tax phrases have three distinct technical meanings.**

**1. The BTA correctly held that two tax technical tax phrases do not subsume the third technical tax phrase.**

The BTA correctly held that the Appellants' "filing of amended returns as a consolidated filer was not prohibited by [Bedford Heights Ordinance Section] 173.15(a)." (Appx. 13.) In reaching that conclusion, the BTA compared R.I.T.A. Rule Section 5:06(A) and Bedford Heights Ordinance Section 173.15(a) and held "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."

**2. "Method of accounting" refers to when income and expenses are reported.**

The term "method of accounting" contemplates types of accounting such as cash versus accrual accounting, and contemplates various mechanisms of inventory valuation.

I.R.C. § 446 provides, in part:

"[s]ubject to the provisions of subsections (a) and (b), a taxpayer may compute taxable income under any of the following methods of accounting—(1) the cash receipts and disbursements method; (2) an accrual method; (3) any other method

permitted by this chapter; or (4) any combination of the foregoing methods permitted under regulations prescribed by the Secretary.”

Treas. Reg. § 1.446-1 provides, in part:

A change in the “method of accounting” includes the following changes:

1. From the cash method to the accrual method or from the accrual method to the cash method;
  2. From one method or basis of inventory valuation to another;
  3. From the long-term contract method to the cash or accrual method, or vice versa;
  4. To or from a specialized method such as the crop method;
  5. Certain changes in computing depreciation or amortization.
- 3. “Method of apportionment” refers to how a taxpayer’s income is divided up among several taxing jurisdictions.**

A “method of apportionment” addresses how a business’ net income is divided among the various taxing jurisdictions in which the business has nexus. The apportionment formula enacted by a taxing jurisdiction effectively operates to assign a portion of the income of the business to the taxing jurisdiction, based generally on the business’ presence therein. The Supreme Court of the United States, in *Oklahoma Tax Com'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), explained the term “apportionment” in a state and local tax context, as follows:

“The very term “apportionment” tends to conjure up allocation by percentages, and where taxation of income from interstate business is in issue, apportionment disputes have often centered around specific formulas for slicing a taxable pie among several States in which the taxpayer's activities contributed to taxable value. In *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978), for example, we considered whether Iowa could measure an interstate corporation's taxable income by attributing income to business within the State “in that proportion which the gross sales made within the state bear to the total gross sales.” *Id.*, at 270. We held that it could. In *Container Corporation*, we decided whether California could constitutionally compute taxable income assignable to a multijurisdictional enterprise's instate activity by apportioning its combined business income according to a formula “based, in equal parts, on the corporation of [such] business' total payroll, property, and sales which are located in

the taxing State.” 463 U.S., at 170. Again, we held that it could. Finally, in *Central Greyhound*, we held that New York's taxation of an interstate busline's gross receipts was constitutionally limited to that portion reflecting miles traveled within the taxing jurisdiction. 334 U.S., at 663.”

Bedford Heights Ordinance Section 173.05 contains the “apportionment” formula that is used for Bedford Heights’ net profits tax purposes. (Appellants’ Appx. to Third Brief 8, 9.) The apportionment formula codified in Bedford Heights Ordinance Section 173.05 is a formula that is based on the ratio of the property, payroll, and sales of a business in Bedford Heights to the total of the property, payroll, and sales of that business worldwide. This equally weighted three-factor apportionment formula is the “method of apportionment” that is used as the apportionment measurement under the Bedford Heights Ordinances. Additionally, pursuant to Bedford Heights Ordinance Section 173.05, the tax administrator is permitted to approve a “books and records” method of apportionment of a business’ income instead of requiring the business to use the equally weighted three-factor apportionment method.

A change of the “method of apportionment” under Bedford Heights Ordinance Section 173.15(a) includes a change from the three-factor formula to a books and records approach, and vice versa (from a books and records approach to the three-factor apportionment formula).

**4. “Method of filing (single or consolidated)” relates to whether a corporation that is part of a group of corporations files as a stand-alone corporation (single), or whether the group of corporations elects to be treated as a single economic unit (consolidated).**

One element of this controversy is whether Appellants could change the manner in which it filed with Bedford Heights from single filer to consolidated group filer. This is the meaning of the phrase “method of filing.” The BTA correctly understood the difference between these three tax phrases and held “it is clear that changing from single filing to consolidated filing is not the same as changing the method of accounting or apportionment.” (Appx. 13.)

5. **A comparison of Bedford Heights Ordinance Section 173.14(a) and Bedford Heights Ordinance Section 173.15(a) refutes Appellees' assertion that Bedford Heights Ordinance Section 173.15(a) disallows filing amended returns on a consolidated basis. Bedford Heights Ordinance Section 173.14(a) indicates that "method of filing" relates to changing, from tax year to tax year, the method of filing as either a separate taxpayer or a consolidated taxpayer and is an entirely different concept than Bedford Heights Ordinance Section 173.15(a)'s restriction regarding changing the "method of apportionment" or "method of accounting."**

Bedford Heights Ordinance Section 173.14 (a) addresses changing the "method of filing" for a tax year subsequent to a tax year in which a different "method of filing" was used. Clearly, the "method of filing" in Bedford Heights Ordinance Section 173.14(a) is different than the "method of apportionment" and the "method of accounting" indicated in Bedford Heights Ordinance Section 173.15(a), which relates to amended returns. Appellees are wrong when they assert that Bedford Heights Ordinance Section 173.15(a) contains a restriction regarding changing the method of filing. Had Bedford Heights intended to disallow a "method of filing" change on an amended return in Bedford Heights Ordinance Section 173.15(a), it would have used the technical tax phrase "method of filing" that it used in Bedford Heights Ordinance Section 173.14(a). See *Beau Brummell Ties, Inc.*

- B. Acceptance of the Appellee's Proposition of Law on Cross-Appeal would render the revision to R.I.T.A. Rule Section 5:06(A) unnecessary and redundant. In any event, courts may not delete words or insert words not used.**

As stated earlier in this Brief, a basic rule of statutory construction requires that "words in statutes should not be construed to be redundant, nor should any words be ignored." See *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 26, citing *E. Ohio Gas Co. v. Pub. Util. Comm.*, 39 Ohio St.3d 295, 530 N.E.2d 875 (1988). Here, Appellees' assertion would make the 2009 revision to the R.I.T.A. Rule unnecessary and redundant.

Furthermore, Bedford Heights did not include language so providing in Bedford Heights Ordinance Section 173.15(a), and it would be improper to add such language under the guise of

construction. *R.W. Sidley, Inc. v. Limbach*, 66 Ohio St.3d 256, 257 (1993). To do so would violate a fundamental rule of statutory construction that courts may not legislate to add a requirement to a legislative enactment. *Wheeling Steel Corp. v. Porterfield*, 24 Ohio St.2d 24, 27-28 (1970); accord *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, at ¶29 (“We cannot, however, add or delete words to R.C. 124.11(D)”); *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, ¶19 (“Courts may not delete words used or insert words not used”).

**C. R.C. 718.06 expressly refutes Appellees assertion that should this Court determine that Bedford Heights Ordinance Section 173.15(a) prohibits amended returns on a consolidated basis, then Appellants’ entire appeal is moot.**

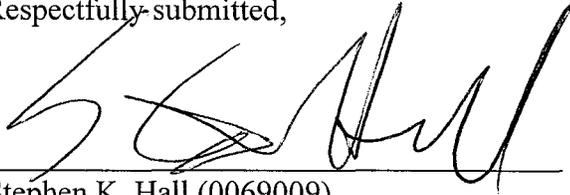
As described earlier in this Third Brief, R.C. 718.06 does not permit a tax administrator to place conditions on the Appellants’ ability to file consolidated returns. R.C. 718.06 contains only one condition to be permitted to file a consolidated group return – that the municipal consolidated group must be the same group as the group that filed a federal consolidated income tax return. This Court may decide this case based exclusively on R.C. 718.06.

### **CONCLUSION**

For the foregoing reasons, and for the reasons set forth in its opening brief, Appellants, New York Frozen Foods Inc., and Affiliates request that this Court reverse the decision of the Ohio Board of Tax Appeals and order that the City of Bedford Heights grant Appellants’ request for refund of overpaid tax and applicable interest thereon.

Dated: 10/16/2015

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

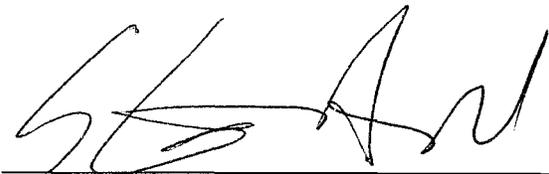
I hereby certify that a copy of this *Third Brief of Appellants/Cross-Appellees* was filed via the Supreme Court of Ohio electronic portal and served via electronic mail and Regular U.S. Mail upon the following on this 16<sup>th</sup> day of October, 2015:

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

## Ohio Statutes

### Title 7. MUNICIPAL CORPORATIONS

#### Chapter 718. MUNICIPAL INCOME TAXES

*Current with legislation signed by the Governor as of 7/16/2015*

#### § 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

§ 5701.11. References to Internal Revenue Code - election of taxable year.

## Ohio Statutes

### Title 57. TAXATION

#### Chapter 5701. DEFINITIONS

*Current with legislation signed by the Governor as of 7/16/2015*

#### § 5701.11. References to Internal Revenue Code - election of taxable year

The effective date to which this section refers is the effective date of this section as amended by H.B. 19 of the 131st general assembly.

- (A)
  - (1) Except as provided under division (A)(2) or (B) of this section, any reference in Title LVII of the Revised Code to the Internal Revenue Code, to the Internal Revenue Code "as amended," to other laws of the United States, or to other laws of the United States, "as amended," means the Internal Revenue Code or other laws of the United States as they exist on the effective date.
  - (2) This section does not apply to any reference in Title LVII of the Revised Code to the Internal Revenue Code as of a date certain specifying the day, month, and year, or to other laws of the United States as of a date certain specifying the day, month, and year.
- (B)
  - (1) For purposes of applying section 5733.04, 5745.01, or 5747.01 of the Revised Code to a taxpayer's taxable year ending after March 22, 2013, and before the effective date, a taxpayer may irrevocably elect to incorporate the provisions of the Internal Revenue Code or other laws of the United States that are in effect for federal income tax purposes for that taxable year if those provisions differ from the provisions that, under division (A) of this section, would otherwise apply. The filing by the taxpayer for that taxable year of a report or return that incorporates the provisions of the Internal Revenue Code or other laws of the United States applicable for federal income tax purposes for that taxable year, and that does not include any adjustments to reverse the effects of any differences between those provisions and the provisions that would otherwise apply, constitutes the making of an irrevocable election under this division for that taxable year.
  - (2) Elections under prior versions of division (B)(1) of this section remain in effect for the taxable years to which they apply.

**Cite as R.C. § 5701.11**

**History.** Amended by 131st General Assembly File No. TBD, HB 19, §1, eff. 4/1/2015.

Amended by 130th General Assembly File No. 2, SB 28, §1, eff. 3/22/2013.

Amended by 129th General Assembly File No.188, HB 472, §1, eff. 12/20/2012.

Amended by 129th General Assembly File No.3, HB 58, §1, eff. 3/7/2011.

Amended by 128th General Assembly File No.55, HB 495, §1, eff. 12/15/2010.

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

Effective Date: 2006 HB530 03-30-2006; 2006 HB699 12-28-2006; 2007 HB157 12-21-2007; 2008 HB458 12-31-2008

**Related Legislative Provision:** *See 128th General Assembly File No.55, HB 495, §4*

§ 5733.052. Combining net incomes of corporations.

## Ohio Statutes

### Title 57. TAXATION

#### Chapter 5733. CORPORATION FRANCHISE TAX

*Current with legislation signed by the Governor as of 7/16/2015*

#### § 5733.052. Combining net incomes of corporations

- (A) At the discretion of the tax commissioner, any taxpayer that owns or controls either directly or indirectly more than fifty per cent of the capital stock with voting rights of one or more other corporations, or has more than fifty per cent of its capital stock with voting rights owned or controlled either directly or indirectly by another corporation, or by related interests that own or control either directly or indirectly more than fifty per cent of the capital stock with voting rights of one or more other corporations, may be required or permitted, for purposes of computing the value of its issued and outstanding shares of stock under division (B) of section 5733.05 of the Revised Code, to combine its net income with the net income of any such other corporations.
- (B) A combination of net income may also be made at the election of any two or more taxpayers each having income, other than dividend or distribution income, from sources within Ohio, provided the ownership or control requirements contained in the division (A) of this section are satisfied and such combination is elected in a timely report which sets forth such information as the commissioner requires. This election, once made by two or more such taxpayers, may not be changed by such taxpayers with respect to amended reports or reports for future years without the written consent of the commissioner. As used in this section, "income from sources within Ohio" means income that would be allocated or apportioned to Ohio if the taxpayer computed its franchise tax without regard to this section.
- (C) No combination of net income under division (A) of this section shall be required unless the commissioner determines that, in order to properly reflect income, such a combination is necessary because of intercorporate transactions and the tax liability imposed by section 5733.06 of the Revised Code.
- (D) In case of a combination of income, the net income of each taxpayer shall be measured by the combined net income of all the corporations included in the combination. For purposes of such measurement, each corporation's net income shall be determined in the same manner as if the corporation were a taxpayer under this chapter. In computing combined net income, intercorporate transactions, including dividends or distributions, between corporations included in the combination shall be eliminated. If the computation of net

income on a combination of income involves the use of any of the formulas set forth in this chapter, the factors used in the formulas shall be the combined totals of the factors for each corporation included in the combination after the elimination of any intercorporate transactions. The exemptions and deductions permitted under this chapter shall be taken in the same manner as if each corporation filed a separate report.

- (E) For purposes of division (B) of section 5733.05 of the Revised Code, each taxpayer's net income allocated or apportioned to this state shall be computed as follows: to compute the taxpayer's net income allocated to this state for purposes of division (B)(1) of section 5733.05 of the Revised Code, the taxpayer's net income for sources allocated under section 5733.051 of the Revised Code shall be separately determined, eliminating intercorporate transactions, and allocated to this state as provided by section 5733.051 of the Revised Code. To compute the taxpayer's net income apportioned to this state for purposes of division (B)(2) of section 5733.05 of the Revised Code, the combined net income, other than net income from sources allocated under section 5733.051 of the Revised Code, shall be apportioned to Ohio and then prorated to the taxpayer on the basis of its proportionate part of the factors used to apportion the total of such net income to Ohio.

**Cite as R.C. § 5733.052**

**History.** Effective Date: 06-30-1997



## *Final Analysis*

*Ralph D. Clark,  
Jennifer A. Parker, and  
other LSC staff*

*Legislative Service Commission*

### **Am. Sub. H.B. 530\***

126th General Assembly

(As Passed by the General Assembly)

**Reps. Calvert, Coley, Allen, Aslanides, Collier, Combs, Dolan, Evans, C., Evans, D., Flowers, Hagan, Law, Martin, McGregor, R., Peterson, Schneider, Seitz, Setzer, Webster, White, Widowfield**

**Sens. Carey, Harris, Spada**

**Effective date: June 30, 2006; certain sections and provisions effective March 30, 2006; certain other sections and provisions effective on other dates; contains item vetoes**

This analysis is arranged by state agency, beginning with the Adjutant General and continuing in alphabetical order. Items that do not directly involve an agency are located under the agency that has regulatory authority over the item, or otherwise deals with the subject matter of the item. The analysis includes a Local Government category, and concludes with a Miscellaneous category.

Within each category, a summary of the items appears first (in the form of dot points), followed by a discussion of their content and operation. Items generally are presented in the order in which they appear in the Revised Code.

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\* *This analysis does not address appropriations, fund transfers, and similar provisions. See the Legislative Service Commission's Fiscal Note for Am. Sub. H.B. 530 for an analysis of such provisions.*

**R.C. 5701.11 incorporates recent changes to the Internal Revenue Code**

(R.C. 5701.11 and 5745.01)

When a Revised Code section refers to a federal law, the federal law that applies is the one that exists on the date the bill enacting the reference was concurred in. If the federal law is subsequently amended, and the General Assembly wants that amendment to apply, it must pass an act incorporating the amendment. (Ohio Constitution, Art. II, Sec. 1; *State v. Gill* (1992), 63 Ohio St.3d 53.)

The act expressly incorporates all changes that have been made to the Internal Revenue Code (IRC) and other federal laws as of H.B. 530's immediate effective date. It does not, however, incorporate changes to the IRC or other federal laws where the Revised Code references the IRC or other federal law as of a specific date. For example, if a Revised Code section referenced "section 243 of the Internal Revenue Code *as section 243 existed on January 1, 2002*," the Revised Code section would not be affected by the act's incorporation of recent federal law changes. The hypothetical Revised Code section would continue to incorporate section 243 of the IRC as it existed on January 1, 2002.

The laws governing municipal taxation of electric and telephone company income reference the IRC as it existed on December 31, 2001. The act eliminates all these references to a specific date. Accordingly, under the act, all changes that have been made to the IRC as of the act's relevant effective date will be incorporated into the laws governing municipal taxation of electric and telephone company income insofar as those laws reference the Internal Revenue Code.

The act allows taxpayers subject to the corporation franchise or personal income tax and electric and telephone companies subject to a municipal income tax for a taxable year ending in 2005 to irrevocably elect to incorporate the IRC and other federal laws that were in effect for that taxable year, as opposed to laws that would otherwise be incorporated under the act (*i.e.*, the IRC and federal laws as they exist on the act's immediate effective date). If a taxpayer files a report or return for the taxable year ending in 2005 that incorporates federal law applicable to that taxable year, without adjustments to reverse the effects of any differences between those provisions and those that would otherwise be incorporated under the act, that taxpayer is deemed to have made an irrevocable election to incorporate the federal law in effect for that taxable year rather than that which



- (h) On the portion of the distributive share of the net profits earned and received of a resident shareholder of S Corporation income (but for tax years after 2004 only on such income that represents wages as defined in section 3121 (a) of the Internal Revenue Code or net earnings from self-employment as defined in section 1402(a) of the Internal Revenue Code), whether or not such S Corporation business entity has an office or place of business in the City of Bedford Heights. The portion of the net profits attributable to the City of a taxpayer conducting a business, profession or other activity both within and without the boundaries of the City of Bedford Heights shall be determined as provided in Sections 718.01 and 718.02 of the Ohio Revised Code in accordance with the Rules and Regulation adopted pursuant to this chapter.  
(Ord. 2004-218. Passed 12-21-04.)

#### **173.04 EFFECTIVE PERIOD.**

The tax shall be levied, collected and paid with respect to the salaries, qualifying wages, commissions and other compensation, and with respect to the net profits of businesses, professions or other activities earned and received or accrued on and after July 1, 1981.  
(Ord. 2004-218. Passed 12-21-04.)

#### **173.05 METHOD OF DETERMINATION.**

The portion of the entire net profits of a taxpayer to be allocated as having been derived from within the City of Bedford Heights, in the absence of actual records thereof, shall be determined as follows:

Multiply the entire net profits by a business allocation percentage to be determined by a three factor formula of property, payroll and sales, each of which shall be given equal weight, as follows:

- (a) The average net book value of the real and tangible personal property owned or used by the taxpayer in the business or profession in the City of Bedford Heights during the taxable period to the average net book value of all the real and tangible personal property owned or used by the taxpayer in the business or profession during the same period, wherever situated. As used in the preceding paragraph, real property and tangible personal property shall include property rented or leased by the taxpayer and the value of such property shall be determined by multiplying the annual rental thereon by eight.
- (b) Wages, salaries and other compensation paid during the taxable period to persons employed in the business or profession for services performed in the City of Bedford Heights to wages, salaries and other compensation paid during the same period to persons employed in the business or profession, wherever their services are performed.
- (c) Gross receipts of the business or profession from sales made and services performed during the taxable period in the City of Bedford Heights to gross receipts of the business or profession during the same period from sales and services, wherever made or performed. In the event that the foregoing allocation formula does not produce an equitable result, another basis may, by approval of the Administrator and under uniform regulations, be substituted so as to produce such result.

If the Administrator approves the use of books and records as a substitute method, the following shall apply:

- (1) The net profits allocable to the City of Bedford Heights from business, professional or other activities conducted in the City by corporations or unincorporated entities (whether resident or non-resident) may be determined from the records of the taxpayer only if the taxpayer has bonafide records which disclose with reasonable accuracy what portion of its net profits is attributable to the part of its activities conducted within the City of Bedford Heights.
- (2) If the books and records of the taxpayer are used for the basis for apportioning net profits, a statement must accompany the return explaining the manner in which such apportionment is made in sufficient detail to enable the Administrator to determine whether the net profits attributable to the City of Bedford Heights are apportioned with reasonable accuracy.
- (3) In determining the income allocable to the City of Bedford Heights from the books and records of a taxpayer, an adjustment may be made for the contribution made to the production of such income by headquarters activities of the taxpayer, whether such headquarters is within or without the City of Bedford Heights.  
(Ord. 2004-218. Passed 12-21-04.)

#### **173.06 SALES MADE IN THE CITY.**

As used in Section 173.05(c), "sales made in the City" means:

- (a) All sales of tangible personal property which is delivered within the City of Bedford Heights regardless of where title passes if shipped or delivered from a stock of goods within the City.
- (b) All sales of tangible personal property which is delivered within the City of Bedford Heights regardless of where title passes even though transported from a point outside the City if the taxpayer is regularly engaged, through its own employees, in the solicitation or promotion of sales within the City of Bedford Heights and the sales result from such solicitation or promotion.
- (c) All sales of tangible personal property which is shipped from a place within the City of Bedford Heights to purchasers outside the City regardless of where title passes if the taxpayer is not, through its own employees, regularly engaged in the solicitation or promotion of sales at the place where delivery is made.  
(Ord. 2004-218. Passed 12-21-04.)

#### **173.07 TOTAL ALLOCATION.**

Add together the percentages determined in accordance with Section 173.05(a), (b) and (c) or such of the aforesaid percentages as are applicable to the particular taxpayer and divide the total so obtained by the number of percentages used in deriving such total in order to obtain the business allocation percentage referred to in Section 173.05.

A factor is applicable even though it may be allocable entirely in or outside the City of Bedford Heights. (Ord. 2004-218. Passed 12-21-04.)