OHIO BOARD OF TAX APPEALS

Hunter T. Hillenmeyer, Appellant, vs. City of Cleveland Board of Review and Nassim Lynch, Cleveland Tax Administrator, Appellees.	)	CASE NO. 2009-3688 (MUNICIPAL INCOME TAX) DECISION AND ORDER

APPEARANCES:

For the Appellant - McDonald Hopkins LLC
Richard C. Farrin
41 South High Street, Suite 3550
Columbus, Ohio 43215

Hemenway & Barnes LLP
Stephen W. Kidder
60 State Street
Boston, Massachusetts 02109

For the Appellees - Barbara A. Langhenry
City of Cleveland Director of Law
Linda L. Bickerstaff
Assistant Director of Law
205 West St. Clair Avenue
Cleveland, Ohio 44113

Entered JAN 14 2014

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above-named appellant from a decision of the City of Cleveland Board of Review, i.e., municipal board of appeal

("MBOA").[1] Therein, the MBOA denied appellant's appeal of the city of Cleveland Tax Administrator's ("administrator") denial of his request for refund of income tax paid to the city of Cleveland for tax years 2004 through 2006; specifically, the MBOA concluded that the administrator properly allocated appellant's income as a professional athlete to the city of Cleveland using the games-played method.[2] All parties to the appeal waived the opportunity to appear before this board and thus, this matter was submitted to the Board of Tax Appeals upon the notice of appeal, the transcript certified to this board by the MBOA ("S.T., Vols. I-VI"), and the parties' legal briefs.

The notice of appeal sets forth appellant's specifications of error, in pertinent part, as follows:

> "1. The Board of Review erroneously concluded that the City of Cleveland's use of games played formula to allocate the income of Appellant was permissible under the Ohio Revised Code and the Cleveland Income Tax Ordinance despite the fact that Appellant demonstrated clearly at the hearing before the Board of Review that Cleveland's use of a games played formula resulted in Cleveland imposing a tax on income that is not earned for work done or services performed in Cleveland, in violation of both the Ohio Revised Code and the City Ordinance.
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> "2. The Board of Review erroneously concluded that the City of Cleveland's games played method of allocating Appellant's income was reasonable despite the fact that Appellant demonstrated clearly at the hearing before the

[1] R.C. 718.11 requires the legislative authority of each municipal corporation that imposes a tax on income to maintain a board to hear appeals. R.C. 5717.011 refers to this body as a "municipal board of appeal." Therefore, although the city of Cleveland's board identifies itself as the "City of Cleveland Board of Review," for purposes of consistency, we shall refer to Cleveland's board as the municipal board of appeal, i.e., "MBOA."

[2] The "games-played" method apportions income to a jurisdiction based upon the number of games played in a particular jurisdiction as compared to the total number of games played.

Board of Review that Cleveland's method of allocating Appellant's income results in Cleveland unfairly apportioning to Cleveland income earned by Appellant for services performed elsewhere, in violation of the Commerce Clause and Due Process Clause of the United States Constitution.

"3. The Board of Review erroneously concluded that the Ohio Supreme Court's decision in Hume v. Limbach (1991), 61 Ohio St.3d 387, did not prohibit the use of a games played formula to allocate Appellant's income despite the fact that the Court in Hume specifically concluded that when a professional athlete's contract compensated him for all his services from preseason training through the regular season and the play-offs, the taxing authorities were required to allocate his income earned for services rendered based on all services he rendered, despite the fact that his contract compensation was only paid during the regular season.

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"5. The Board of Review erroneously concluded that the facts supported the conclusion that Appellant was employed 'to play games' despite the fact that Appellant demonstrated clearly at the Hearing before the Board of Review that Appellant's contract required him to:

'report promptly for and participate fully in Club's official mandatory mini-camp(s), official preseason training camps, all Club meetings and practice sessions, and all pre-season, regular season and post-season football games scheduled for or by Club.'

"6. The Board of Review erroneously concluded that Cleveland's allocation of Appellant's roster bonus, which the Board concluded was paid based solely on Appellant's being on the roster of the Club, on the games played formula was reasonable despite the fact that inclusion of such bonus in income allocated to Cleveland is wholly inconsistent with Cleveland's rationale that the games played formula is appropriate because Appellant was paid to play games. Because the roster bonus was not paid for playing in games, or in fact for performing any services, allocating the roster bonus to Cleveland based on games played results in the City taxing qualifying wages that are not earned for work done or

> services performed within the City, in violation of both the Ohio Revised Code and the City Ordinance, and the Due Process clauses of the United States and Ohio Constitutions.
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> "8. Although the Board of Review does not have jurisdiction to determine the constitutional validity of a statute, to protect his ability to raise the issue, Appellant asserts that the exclusion of professional athletes from the protection afforded by R.C. 718.011 for individuals who perform services in the municipal corporation on twelve or fewer days in a calendar year violates the Equal Protection clauses of the United States and Ohio Constitutions because the exclusion results in certain individuals (professional athletes and entertainers) within the class of nonresident individuals being treated differently than other individuals in the same class."

During the years in question, appellant was a nonresident professional football player for the Chicago Bears. In each of the years in question, appellant, as part of the Chicago Bears organization, traveled to Cleveland to play a game, either as part of the exhibition season or the regular season.[3] As a result of those games, in each year, appellant was in Cleveland for two days. For each of the years in question, appellant filed a city of Cleveland tax return with the Central Collection Agency[4] ("CCA") and now seeks a refund for the "difference in city tax withheld by his

[3] In 2004 and in 2006, the Chicago Bears traveled to Cleveland to play in one exhibition game; in 2005, the Bears traveled to Cleveland to play in one regular season game.

[4] "The Central Collection Agency is an entity created by Cleveland Codified Ordinance ('C.O.') 191.2311 that collects and distributes income taxes for its member communities. In accordance with C.O. 191.2303, the Agency is governed by a set of Rules and Regulations approved by the boards of income tax review of each member community. The Rules and Regulations along with the income tax ordinances govern income tax matters within the various member communities. The city of Cleveland is a member community of the Agency whose board of review adopted and incorporated the Agency's Rules and Regulations into its Income Tax Ordinance." Appellees' Initial Brief at 2.

employer and remitted to the City under the City's games-played apportionment method[5] and the duty-days method.[6]" Cleveland Brief at 2.

Appellant's tax liability was determined pursuant to CCA Article 8:02(E)(6), which provides, in pertinent part:

> "E. In the case of employees who are non-residents of the taxing community, the amount to be deducted is the current rate of tax on the compensation paid or earned and deferred with respect to personal services rendered in said taxing community.
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> "Where a non-resident receives compensation for personal services, rendered or performed partly within and partly outside a taxing community, the withholding employer shall withhold, report and pay the tax on that portion of the compensation which is earned within said taxing community in accordance with the following rules of apportionment:
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> "***
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> "6.*** In the case of employees who are non-resident professional athletes, the deduction and withholding of personal service compensation shall attach to the entire amount of compensation earned for games that occur in the taxing community."

The article continues, setting forth the apportionment formula[7] that "must be used" for a "non-resident athlete not paid specifically for the game played in a taxing community," e.g., appellant.

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[5] See Footnote #2.

[6] The "duty-days" method allocates income to a particular jurisdiction based upon the number of days in which services are performed in the jurisdiction as compared to all days in which services are performed in any jurisdiction.

[7] "The compensation earned and subject to tax is the total income earned during the taxable year, including incentive payments, signing bonuses, reporting bonuses, incentive bonuses, roster bonuses and other extras, multiplied by a fraction, the numerator of which is the number of exhibition, regular season, and post-season games the athlete played (or was available to play for his team, as for example, with substitutes), or was excused from playing because of injury or illness, in the taxing

At the outset of our review herein, we acknowledge appellant's constitutional claims, but make no finding in relation thereto. Although the Ohio Supreme Court has authorized this board to accept evidence on constitutional points, it has clearly stated that we have no jurisdiction to decide constitutional claims. *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229; *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 198.

Further, we find that the Cleveland ordinances under consideration do not operate in contravention of any state statute regarding municipal income taxes[8] or Ohio case precedent. [9] As such, Cleveland's method for apportionment of non-resident athletes' income "is a valid exercise of the city's municipal power to tax." *Gesler v. City of Worthington Income Tax Bd. of Appeals*, Slip Opinion No. 2013-Ohio-4986, ¶22.

Finally, the Board of Tax Appeals has no express or implied equity jurisdiction and therefore cannot render a determination whether the Cleveland ordinances constitute a fair or reasonable method by which to apportion appellant's

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community during the taxable year, and the denominator of which is the total number of exhibition, regular season, and post-season games which the athlete was obligated to play under contract or otherwise during the taxable year, including games in which the athlete was excused from playing because of injury or illness."

[8] See R.C. 718.01(H)(8) and R.C. 718.011 which provide that a municipal corporation shall not tax "a nonresident individual for personal services performed by the individual on twelve or fewer days in a calendar year unless *** [t]he individual is a professional *** athlete."

[9] The parties have argued the applicability of the court's holding in *Hume v. Limbach* (1991), 61 Ohio St.3d 387, which concerns the allocation of compensation of a non-resident professional athlete for purposes of imposition of state individual income tax. Specifically, the athlete was compensated in Ohio for services performed outside of Ohio and the court held that such athlete could "allocate out of state the income for services performed in Florida." The court did not, however, indicate the method by which such allocation should be made. Thus, we find little utility in the court's holding in *Hume* to our analysis herein; in the instant appeal, there is no dispute that appellant's income must be allocated between the city of Cleveland and other locales where the appellant "performed services;" the dispute arises regarding the allocation method to be utilized.

income for the subject years. *Columbus Southern Lumber Co. v. Peck* (1953), 159 Ohio St. 564. As a creature of statute, we have only the jurisdiction, power, and duties expressly given by the General Assembly. *Steward v. Evatt* (1944), 143 Ohio St. 547. See, also, *HealthSouth Corp. v. Levin*, 121 Ohio St.3d 282, 2009- Ohio-584, ¶ 24; *Gen. Motors Corp. v. Limbach* (1993), 67 Ohio St.3d 90, 93. Accordingly, we are limited in the instant determination to whether, based upon the specific provisions of the city of Cleveland ordinances, the Cleveland Tax Administrator acted properly in denying appellant's claim for refund of income taxes for the time period in question, specifically, tax years 2004-2006.

"When cases are appealed from a municipal board of review to the BTA, the burden of proof is on the appellant to establish a right to the relief requested. Cf. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121." *Marion v. Marion Bd. of Rev.* (Aug. 10, 2007), BTA No. 2005-T-1464, unreported, at 3. As the appellees have aptly pointed out, the "[t]axpayer does not complain that the Tax Administrator applied or even interpreted Cleveland's games-played method wrong. His only complaint is that he prefers another method." Appellees' Initial Brief at 10. The Cleveland Tax Administrator has accurately determined appellant's tax liability for the years in question, using the games-played method set forth in CCA Article 8:02(E)(6). We make no finding regarding the propriety of the allocation methodology set forth in the city ordinance, as such determination is outside of this board's jurisdiction. Accordingly, the decision of the MBOA, affirming the actions of

the Administrator, is hereby affirmed.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

A.J. Groeber, Board Secretary