In the

Supreme Court of Ohio

INTERNATIONAL BUSINESS MACHINES CORPORATION and IBM CREDIT CORPORATION,	:	
Appellants,	:	Case No. 2009-1296
v.	:	
RICHARD A. LEVIN, Tax Commissioner of Ohio,	:	Appeal from Ohio Board of Tax Appeals Case Nos. 2007-Z-1140, 2007-Z-1141, 2007-Z-1143
Appellee.	:	

BRIEF OF APPELLEE

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I. INTRODUCTION AND SUMMARY

The appellants, International Business Machines Corporation and IBM Credit Corporation (hereafter collectively "IBM"), take this appeal as of right pursuant to R.C. 5717.04. IBM seeks to recover interest on the amount of sales and use tax refunds granted by the appellee Commissioner pursuant to R.C. 5739.071. That statute grants sales and use tax refunds of 25% of the sales and use taxes paid by purchasers of equipment used primarily to perform "electronic information services" ("EIS") as defined in R.C. 5739.01(Y)(1)(c).

The Commissioner granted IBM's request for 25% partial refunds regarding the sales and use taxes it paid on qualifying EIS equipment, but denied IBM's request for interest thereon. See the Commissioner's final determinations at IBM Appx. 31-33. On appeal, the BTA affirmed the Commissioner's denial of interest on the 25% partial refunds of sales and use taxes. *Internatl. Business Machines Corp. and IBM Credit Corporation v. Levin* (June 23, 2009), BTA Case Nos. 2007-Z-1140, 1141, and 1143, 2009 Ohio Tax LEXIS 867, unreported (hereafter "*BTA Decision and Order*"), IBM Appx. 6-18.

It is well settled that interest on tax refunds may be lawfully recovered only when a "legislative enactment authoriz[es] such recovery." *BTA Decision and Order* at 11 (quoting *State ex rel. Cleveland Concession Co. v. Peck* (1954), 161 Ohio St. 31, 37, and citing *Chicago Freight Car Leasing Co. v. Limbach* (1992), 62 Ohio St.3d 489; and *General Electric Co. v. DeCourcy* (1979), 60 Ohio St.2d 69).[1] Thus, under *State ex rel. Cleveland Concession* and its progeny, the recovery of interest is purely a matter of "legislative grace," so that, in the absence

[1] See also, *BTA Decision and Order* at 13 (citing *Brown and Williamson Tobacco, Corp. v. Tracy* (Sept. 6, 1996), BTA Case No. 1995-M-1008, 1996 Ohio Tax LEXIS 1077, unreported, T.C. Appx. 17-19); and *Natl. Amusements, Inc. v. Springdale* (May 10, 1998), Hamilton App. Nos. C-870627, C-870634, 1989 Ohio App. LEXIS 1681, unreported, T.C. Appx. 20-22.

of express statutory authorization, no interest may be recovered on a tax refund claim. *BTA Decision and Order* at 13 (citing *General Electric*; and *Brown and Williamson*, supra).

A plain reading of the relevant statutes shows that no legislative enactment authorizes the recovery of interest on the 25% partial tax refunds granted pursuant to R.C. 5739.071. Thus, IBM is not entitled to recover interest. *BTA Decision and Order* at 11-13. The BTA's comprehensive review and analysis of the relevant statutes establish the correctness of this conclusion. Nonetheless, in this appeal, IBM advances the same erroneous reading of the applicable statutes that the BTA rejected below.

IBM wrongly asserts that R.C. 5739.071 indirectly authorizes the recovery of interest by "incorporating by reference" the entire statutory text of R.C. 5739.07, including R.C. 5739.07(F), which provides for the recovery of interest on tax refunds "granted by this section." See IBM's Notice of Appeal to this Court at numbered paragraphs four (4) and six (6), IBM Br. Appx. 2-3; IBM Br. 10-12; and *BTA Decision and Order* at 6. Thus, under IBM's "wholesale incorporation-by-reference" theory, R.C. 5739.07(F) would become incorporated into R.C. 5739.071, which, in turn, assertedly would provide the requisite "express statutory authorization" for allowing IBM to recover interest on its 25% partial sales and use tax refunds.

The plain meaning of R.C. 5739.071 refutes IBM's assertion. To be sure, R.C. 5739.071 references R.C.5739.07, but not so as to incorporate the entire text of R.C. 5739.07 into R.C. 5739.071. Rather, the extent of the incorporation is far more limited and wholly unrelated to the recovery of interest on tax refunds. Specifically, R.C. 5739.071's only reference to R.C. 5739.07 is in the second sentence of R.C. 5739.071(A), as follows: "[a]pplication for refund **shall be made in the same manner and subject to the same time limitations** as provided in R.C. 5739.07 and R.C. 5741.10." (Emphasis added). Thus, only those provisions of R.C. 5739.07 and

R.C. 5741.10 pertaining to **how** and **when** refund claims are properly and timely made are incorporated into R.C. 5739.071. The BTA properly so held:

> *** we [the BTA] cannot find that the references to R.C. 5739.07 and 5741.10 in R.C. 5739.071 substitute for a repetition of all the terms of R.C.5739.07 and 5741.10 because that is not what is expressly stated in R.C. 5739.071. We likewise cannot find that the cross-reference reflects the intention of the General Assembly to incorporate into R.C. 5739.071 the applicable refund provisions set forth in R.C. 5739.07, including the payment of interest set forth in R.C. 5739.07(F).

BTA Decision and Order at 12, IBM Br. Appx. at 17.

But even if R.C. 5739.071 were erroneously interpreted to incorporate the entire texts of R.C. 5739.07 and R.C. 5741.10, it would be of no help to IBM's claim. This is so because the refunds of sales tax granted under R.C. 5739.07 are limited to "illegal or erroneous payments" of sales tax, and the refunds of use tax granted under R.C. 5741.10 are limited to "illegal or erroneous payments" of use tax. By contrast, the partial 25% refund of sales and use tax granted under R.C. 5739.071 is in the nature of a "tax exemption" that must be "strictly construed." *BTA Decision and Order* at 10 (citing and quoting *Key Servs. Corp. v. Zaino* (2002), 95 Ohio St.3d 11, 15; and *National Tube Co. v. Glander* (1952), 157 Ohio St. 407, paragraph two of the syllabus). As such, tax refunds granted under R.C. 5739.071 do not constitute refunds of "illegal or erroneous payments" of sales and use taxes and, thus, are not the kinds of tax refunds granted under R.C. 5739.07 or R.C. 5741.10. Id. (citing and quoting *Key Serv.*, 95 Ohio St.3d at 15).

In addition, IBM asserts that the General Assembly's objectives in enacting R.C. 5739.071 would be better served by allowing the recovery of interest, but such considerations are the province of the General Assembly, not this Court. Here, the relevant statutes do not expressly authorize the recovery of interest on the tax refunds at issue. Thus, it would be both unwarranted and unprecedented for the Court to replace the General Assembly's express legislative will on

the basis of IBM's speculative ideas, about the implicit objectives of the General Assembly in enacting R.C. 5739.071.

Even if general tax policy considerations concerning the General Assembly's objectives in enacting R.C. 5739.071 properly could trump the plain meaning of the relevant statutes, those policy considerations would militate strongly for affirmance of the BTA and the Commissioner. IBM's assertion that the General Assembly's objectives are furthered by allowing IBM to recover interest ignores one of the most basic tax policy principles, namely, that tax exemptions are "in derogation of equal rights." *First Baptist Church of Milford, Inc. v. Wilkins*, 110 Ohio St.3d 496, 2006-Ohio-4966, ¶10 (citing *Cincinnati College v. State* (1850), 19 Ohio 110, 115). Specifically, the grant of tax exemption "necessarily shifts a heavier tax burden upon the non-exempt." *Parma Ht. v. Wilkins*, 105 Ohio St.3d 463, 2005-Ohio-2818 (quoting *Joint Hosp. Serv., Inc. v. Lindley* (1977), 52 Ohio St.2d 153, 155). The General Assembly's decision to grant or deny interest on tax-exemption benefits is subject to this same analysis. That is, if the state were to be required to make payments of interest to refund claimants under R.C. 5739.071, the increased amounts flowing from the state's financial coffers to those claimants would exacerbate the disproportionate burden placed on all non-exempt taxpayers.

To summarize, in affirming the Commissioner's denial of IBM's claim of entitlement to interest on the 25% partial tax refunds granted pursuant to R.C. 5739.071, the BTA applied the plain meaning of the relevant statutes and this Court's settled law, beginning with *State ex rel. Cleveland Concession* over a half century ago. This case is just one more in a long, continuous line of decisions barring the recovery of interest on tax refunds in the absence of an express statutory enactment authorizing such recovery. Therefore, the BTA's decision should be affirmed.

II. STATEMENT OF THE CASE AND FACTS

The Commissioner generally adopts the factual statements set forth in the "Statement of the Facts and Case" section of IBM's merit brief. The Commissioner, however, does take issue with that section of IBM's merit brief and the corresponding content in IBM's "Law and Argument" section in one respect. Specifically, the Commissioner contests IBM's characterization that in the two Commissioner final determinations granting IBM 25% partial refunds of use tax, the Commissioner stated that the refunds of use tax "were authorized pursuant to R.C. 5741.10." IBM's characterization is wrong on several levels.

First, a review of those two final determinations, S. Supp. 3 and 9, shows that the Commissioner merely stated that IBM's refund claims were "**filed** pursuant to R.C. 5739.071 and 5741.10." This prefatory language of the final determination simply reflects the language of R.C. 5739.071 providing that "[a]pplication for refund **shall be made in the same manner and subject to the same time limitations** as provided in R.C. 5739.07 and **R.C. 5741.10** (emphasis added.)[2]

Second, whether IBM's refunds were "authorized" or "filed" pursuant to a particular section or sections of the Revised Code are questions of law, not fact. Thus, to the extent that such questions are pertinent to the resolution of this case, they are ultimately *de novo* questions of law for this Court, not factual matters upon which the Commissioner could bind this Court.

Third, the briefing filed by the Commissioner at the BTA fully detailed the operation and effect of the relevant statutes to the effect that the 25% partial sales and use tax refunds in this case are granted under R.C. 5739.071 and do not constitute refunds of "illegal or erroneous" tax

[2] For a more detailed discussion of the relevant statutes, see Section B.2 of the Proposition of Law, infra.

payments. Commissioner's final determination that IBM's use tax refunds were "filed pursuant to R.C. 5741.10."

Fourth, in its decision below, the BTA repeatedly held that the statutory authorization for the Commissioner's grant to IBM of 25% partial refunds of sales and use tax was R.C. 5739.071. See, e.g., *BTA Decision and Order* at 2 ("the IBM companies applied for and were granted seven refunds pursuant to R.C. 5739.071"); *BTA Decision and Order* at 3 ("[w]hile the Tax Commissioner granted the refunds under R.C. 5739.071(A), he denied the payment of interest"). *Finally*, in its notice of appeal to this Court, IBM itself characterizes the refund as being granted pursuant to R.C. 5739.071. See numbered paragraph two (2) of IBM's notice of appeal, ("[t]he BTA erred by failing to find that a refund granted pursuant to R.C. 5739.071 is a refund granted pursuant to R.C. 5739.07 or R.C. 5741.10"), IBM Br. Appx. 3.

Thus, for all these reasons, the Court's review of the merits of the BTA's decision affirming the Commissioner's denial of interest should rest on the plain meaning of the relevant statutes, rather than IBM's attempt to mischaracterize the Commissioner's interpretation and application of those statutes.

Any further facts will be referenced directly to the evidentiary record in the Law and Argument Section which follows.

III. LAW AND ARGUMENT

Proposition of Law:

R.C. 5709.071 grants purchasers of equipment used primarily to perform "electronic information services" the right to receive a 25% partial refund of the sales and use taxes paid on qualifying purchases. The claimant is not entitled to interest on the refund because there is no express statutory authority granting such right.

A. In order for a tax refund claimant to be entitled to interest on the refund, the General Assembly must expressly provide the claimant the right to recover interest.

"[T]he rule established by the Supreme Court of the United States . . . [is] that 'interest, when not stipulated for by contract, or authorized by statute . . . is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers.'" *State ex rel. Cleveland Concession*, 161 Ohio St. at 35 (quoting *Schlesinger v. State* (1928), 195 Wis. 366, 218 N.W. 440, 441 [quoting *U.S. v. North Carolina* (1890), 136 U.S. 211, 216]).

In *State ex rel. Cleveland Concession*, involving former R.C. 5739.07, this Court followed the lead of the United States Supreme Court's jurisprudence by affirming the Commissioner's denial of interest on a tax refund concerning sales taxes that had been illegally or erroneously assessed and paid. This Court held that the refund claimant was not entitled to recover interest on the refunded sales taxes that had been illegally and erroneously assessed against it because former R.C. 5739.07 did not provide for the payment of interest on illegally or erroneously assessed and paid sales taxes. Id. Thus, under *State ex rel. Cleveland Concession*, interest on tax refunds may be lawfully recovered only when a "legislative enactment authoriz[es] such recovery." *BTA Decision and Order* at 11 (quoting *State ex rel. Cleveland Concession*, 161 Ohio St. at 37).

A substantial body of decisions from the Ohio Supreme Court, lower appellate court, and BTA has followed *State ex rel. Cleveland Concession*'s holding, including:

(1) *Chicago Freight*, 62 Ohio St.3d at 493 (in the absence of an express grant of the right to recover interest, denying a claim for interest on an overpayment of public utility personal property tax granted under the "certificate of abatement" provision in R.C. 5703.05(B));

(2) *General Electric*, 60 Ohio St.2d 68 (expressly following *State ex rel. Cleveland Concession* in denying a claim for recovery of interest on an overpayment of illegally or erroneously collected real estate taxes because of the absence of an express grant by the General Assembly of the right to recover interest on refunds on such overpayments granted under R.C. 5715.22);

(3) *Natl. Amusements, Inc.*, 1989 Ohio App. LEXIS 1681, unreported (denying a claim for interest on illegally or erroneously paid municipal admissions taxes because of the absence in the refund statute of an express right to recover interest on the taxes); and

(4) *Brown and Williamson Tobacco, Corp. v. Tracy* (Sept. 6, 1996), BTA Case No. 95-M-1008, unreported (expressly following *General Electric* in holding that "refunds of interest on overpaid taxes are a matter of legislative grace").

In the Court's 1992 decision in *Chicago Freight* (its most recent case applying *State ex rel. Cleveland Concession*), the Court held that because the applicable statute "did not mention interest," the Commissioner properly denied interest on the abatement of overpaid taxes refunded pursuant to R.C. 5703.05(B). 62 Ohio St.3d at 493. Additionally, the *Chicago Freight* litigant taxpayer contended that the Commissioner's denial of interest on abatements denied the taxpayer due process and equal protection of the laws on the asserted basis that other refund provisions provide for the payment of interest. The Court soundly rejected that contention, citing several United States Supreme Court cases including *Lehnhausen v. Lake Shore Auto Parts Co.* (1973), 410 U.S. 356 (equal protection) (holding that States "have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation"); and *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dept. of Business Regulation of Florida* (1990), 496 U.S. 18 (due process).

Similarly, in *General Electric*, 60 Ohio St.2d 68, the Court expressly followed *State ex rel. Cleveland Concession* in holding that, in the absence of express authorization for the recovery of interest on real property tax refunds of illegally or erroneously paid real property taxes, no interest was awardable. The Court reasoned that, in the wake of *State ex rel. Cleveland Concession*, the General Assembly's failure to amend the real property tax refund statute to expressly authorize the recovery of interest provided a particularly compelling basis for its holding. Id. at 70 ("[b]eing aware of that opinion, yet maintaining its silence on the subject of interest, we must assume that the General Assembly still intends that interest still should not be recoverable in such situations"). The *General Electric* Court's reasoning applies with even more force today because, in enacting R.C. 5739.071 in 1993, the General Assembly had the benefit not only of *State ex rel. Cleveland Concession* but of *Chicago Freight, General Electric*, and *National Amusement* as well.

Additionally, similar to the taxpayer litigant in *Chicago Freight*, the taxpayer litigant in *General Electric* asserted that the denial of interest on its tax refunds violated the taxpayer's right to equal protection of the laws. The Court strongly rejected the constitutional challenge, holding that ample rational bases supported the legislative choice to allow the recovery of interest in some instances but not in others, including consideration of relative administrative burdens and the distinct nature of the tax refunds involved. Id. at 71.

In the present case, IBM stops short of advancing a constitutional challenge to the Commissioner's denial of interest but, nonetheless, suggests that fairness considerations should entitle it to recovery of interest, asserting that "EIS refunds are the only refunds of sales and use tax not entitled to interest." IBM Br. 12. IBM's appeal to fairness on this purported basis is

unavailing for several reasons. *One*, as emphasized above, this Court already has rejected similar arguments against formal constitutional challenge in *Chicago Freight* and *General Electric*.

Two, in isolation, a suggestion of "unfairness," without more, hardly rises to the level of a valid basis for a Court to decide any interpretational issue. Instead, considerations of the plain meaning of the relevant law[3] apply, together with potential application of a wide range of aids to statutory interpretation. In the area of state taxation, "the courts, to a high degree, defer to the legislature." *Chicago Freight*, 62 Ohio St.3d at 493 (quoting *Bank One, Dayton, N.A. v. Limbach* (1990), 50 Ohio St.3d 163, 170).

Three, IBM misstates the actual sales tax law. IBM ignores that the 25% partial tax refund granted pursuant to R.C. 5739.071 is not the only sales tax benefit for which interest is not awardable. For example, the "bad debt deduction" granted pursuant to R.C. 5739.121 to vendors as an offset against Ohio vendors' current sales tax obligations is without any award of interest.

Four, the nature of the refund here provides a more than ample "rational basis" for the General Assembly's choice not to award interest on the refunds at issue. The nature of the refund at issue is that of a partial sales and use tax **exemption**, rather than a refund of illegal or erroneous payment of sales and use tax. *Key Servs.*, 95 Ohio St.3d at 15.[4] Exemptions are plainly matters of legislative grace, shifting a disproportionate burden on the non-exempt. *Parma Hts.*, 105 Ohio St.3d 463, 2005-Ohio-2818.

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[3] As we detail in Section B.1 and 2 of the Proposition of Law, infra, the BTA applied the plain meaning of the relevant statutes in holding that the General Assembly has not expressly authorized the recovery of interest on the 25% partial refunds of sales and use taxes granted pursuant to R.C. 5739.071.

[4] For a detailed discussion of this point, see Section B. 3 of this Proposition of Law, infra.

To summarize, denying interest for the refund credit granted in R.C. 5739.071 follows this Court's settled law and does not offend any notions of fairness, deny IBM equal protection of the laws, or violate due process.

B. The provisions of R.C. 5739.071, R.C. 5739.07, R.C. 5739.132, and R.C. 5741.10, do not provide for the payment of interest on the 25% refund of lawful and correct payments of sales and use tax paid on purchases of property used to provide electronic information services.

1. The 25% partial refund under R.C. 5739.071 is a refund of taxes paid lawfully and correctly under the sales tax Chapter 5739 and the use tax Chapter 5741 of the Revised Code. The actual grant of the 25% partial refund is provided in R.C. 5739.071.

R.C. 5739.071(A) provides for the refund of 25% of the sales and use tax paid on the purchase of qualifying equipment used primarily to provide EIS as defined in R.C. 5739.01(Y)(1)(c). IBM requested refunds for this 25% partial tax refund in accordance with R.C. 5739.071. All seven refunds were paid by the Tax Commissioner in accordance with the provisions of R.C. 5739.071. The mere fact that IBM's requested refunds were for 25% of the sales and use taxes originally paid under Revised Code Chapters 5739 and 5741 does not mean that the refunds were granted under R.C. 5739.07 or R.C. 5741.10.

The statutory language is clear that the refunds granted to IBM in this case, pursuant to R.C. 5739.071, are refunds granted by that specific Revised Code section and not refunds granted by R.C. 5739.07. Further, in its seminal case involving R.C. 5739.071, this Court expressly stated that the type of refund at issue in the present appeal is a "refund granted by R.C. 5739.071." *Key Servs.*, 95 Ohio St.3d at 15. Thus, the BTA's holding to that same effect is reasonable and lawful. *BTA Decision and Order* at 2-3 ("the Tax Commissioner granted the refunds under R.C. 5739.071(A) * * *").

2. By its express terms, R.C. 5739.071 incorporates only those provisions of R.C. 5709.07 and R.C. 5741.10 relating to how and when sales and use tax refund claims are properly and timely made. Consequently, the BTA correctly rejected IBM's contention that R.C. 5739.071 wholly incorporates the full texts of R.C. 5739.07 and R.C. 5741.10, including the payment of interest set forth in R.C. 5739.07(F).

As IBM tacitly concedes, there is no language within R.C. 5739.071 itself which provides for interest to be paid on the 25% partial refund of sales and use taxes granted by that statute. Instead, IBM asserts that R.C. 5739.071 incorporates by reference the full text of R.C. 5739.07 and R.C. 5741.10. Unfortunately for IBM, and as the BTA reasonably and lawfully held below, the plain meaning of R.C. 5739.071 refutes IBM's contention. *BTA Decision and Order* at 12, IBM Br. Appx. at 17. Contrary to IBM's "wholesale incorporation" theory, by its express terms, R.C. 5739.071 only selectively incorporates the statutory provisions of R.C. 5739.07 and R.C. 5741.10.

Namely, R.C. 5739.071 incorporates only those provisions of R.C. 5739.07 and R.C. 5741.10 pertaining to how and when sales and use tax refund claims are properly and timely made. The actual reference in R.C. 5739.071(A) to R.C. 5739.07 and R.C. 5741.10 states:

> Applications for refund **shall be made in the same manner** and **subject to the same statute of limitations** as provided in sections 5739.07 and 5741.10 of the Revised Code. (Emphasis added.)

By operation of this quoted language, the only language from R.C. 5739.07 incorporated into R.C. 5739.071 is contained in R.C. 5739.07(D). This incorporated language provides that an application for refund "shall be filed with the Tax Commissioner on the form prescribed by the commissioner and within four years ***." No other provisions of R.C. 5739.07 pertain to the subject of how and when applications for refund shall be properly or timely made. Similarly, R.C. 5739.071's reference to R.C. 5741.10 incorporates only that portion of R.C. 5741.10

providing that use tax refund applications "shall be made in the same manner as refunds are made to a vendor or consumer under section 5739.07 of the Revised Code." [5]

In other words, by urging that R.C. 5739.071 provides for a wholesale incorporation of the entire statutory texts of R.C. 5739.07 and R.C. 5741.10, IBM ignores the actual language of R.C. 5739.071. In fact, IBM's erroneous reading of R.C. 5739.071 is particularly unsupportable given the manifest purpose and effect of R.C. 5739.071's selective incorporation of the statutory language of R.C. 5739.07 and R.C. 5741.10. That is, through that selective incorporation, the General Assembly provided a unified system for facilitating the administration by the Tax Commissioner of sales and use tax refund claims. Such objective is quintessentially "procedural" and, thus, laws pertaining to such procedural matters are "procedural" laws. By contrast, statutes granting the right to recover interest on refund claims are quintessential "substantive" laws. [6]

In sum, the BTA reasonably and lawfully held that the language of R.C. 5739.071 is not an "across-the-board," wholesale incorporation of the provisions of R.C. 5739.07. It does not, for example, provide that refunds granted pursuant to R.C. 5739.071 shall be "payable" in accordance with R.C. 5739.07. Rather, by its plain terms, R.C. 5739.071 incorporates the provisions of R.C. 5739.07 in the two limited, procedural ways described above. Thus, a plain reading of R.C. 5739.071 in conjunction with R.C. 5739.07 provides no support whatsoever for IBM's assertion that the General Assembly expressly has provided taxpayers with a right to recover interest on the 25% partial refunds of taxes granted pursuant to R.C. 5739.071.

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[5] It is in this context that the Commissioner's final determinations granting IBM 25% partial refunds of use tax stated that the refunds of use tax "were filed pursuant to R.C. 5741.10." S. Supp. 3, 9. See also, the Statement of Case and Facts, supra.

[6] In support of its erroneous "wholesale incorporation" theory, IBM cites *Fritz v. Gongwer* (1926), 114 Ohio St. 642, but that case is wholly inapposite. There, one statute generically incorporated all other statutory provisions relating to a particular subject, without specification of those statutes. Here, by stark contrast, R.C. 5739.071 expressly limits the scope of its incorporation of the statutory language of R.C. 5739.07 and R.C. 5741.10.

3. Under the sale and use tax laws, the General Assembly has conferred sales and use taxpayers with the right to recover interest on sales and use tax refunds only when the refunded tax amounts are for sales and use taxes that were previously "illegally or erroneously" paid, not when the refunded taxes were lawfully and correctly paid, as is the case here.

Even if R.C. 5739.071 were to be misread as incorporating the subject matter of R.C. 5739.07 more broadly than the statutory language of R.C. 5739.071 itself provides, IBM's contentions would still fail. Namely, under R.C. 5739.07, the right to interest on refund claims is granted only for "illegal or erroneous" payments of sales or use tax. Thus, even if the language of R.C. 5739.071 erroneously were to be read to incorporate the entire language of R.C. 5739.07, it would be of no help to IBM here because the 25% partial refunds of sales and use taxes paid by purchasers of EIS equipment are not "illegal or erroneous payments" of sales and use taxes. *Key Servs.*, 95 Ohio St.3d at 15. Rather, R.C. 5739.071 grants a tax-reduction benefit akin to a "tax exemption" requiring the statute to be construed "strictly" against the claimant. Id.

In other words, the tax benefit/exemption conferred by R.C. 5739.071 is a reduction of 25% of the taxes **lawfully and correctly** paid by providers of "electronic information services" on equipment that such providers purchased primarily for use in the performance of that service. It is not a refund of "illegally or erroneously paid taxes." Thus, for this additional reason, IBM's statutory interpretation of the Ohio sales and use tax statutes fails.

4. The purpose and effect of the General Assembly's amendment of R.C. 5739.132 to its current version was to prospectively grant interest on refunds of illegally or erroneously paid sales and use taxes that a consumer or vendor paid voluntarily, as well as to preserve the existing right conferred on refund claimants to interest on refunds of illegally or erroneously assessed sales and use taxes, as granted under the previous version of that statute.

In its initial merit brief filed with this Court, IBM made only passing references to R.C. 5739.132, with no substantive analysis or discussion of that statute. In its BTA briefing below,

however, IBM erroneously suggested that the General Assembly amended R.C. 5739.132 to its current version for the purpose of granting interest on partial refunds of sales and use taxes on qualifying EIS purchases. A comparison of the pre-existing version of R.C. 5739.132 with the amended, current version of that statute shows that the General Assembly amended R.C. 5739.132 to its current language for a quite different purpose and effect. Thus, this sub-section rebuts IBM's erroneous suggestion.

Specifically, the General Assembly expanded the right to interest to include refunds of **voluntarily**, but illegally or erroneously, paid sales and use taxes, i.e., **without the Commissioner's issuance of an assessment**. See, Am. Sub. H.B. No. 215, 147 Ohio Laws, Part I, 909, 1831-32, effective Sept. 29, 1997 [i.e., the current version of R.C. 5739.132, which is also the version in effect for all the refund periods at issue here], T.C. Appx. 3-9. Under the prior version of R.C. 5739.132, entitlement to interest on sales and use tax refunds was limited to only those illegal or erroneous payments that arose from a Tax Commissioner **assessment**.

In fact, the current version of R.C. 5739.132 represents only the latest in a gradual extension by the General Assembly of the right to interest on sales and use tax refund claims. For the tax periods at issue in *State ex rel. Cleveland Concession*, 161 Ohio St. 31, the General Assembly had not enacted any statutory provision authorizing interest on any sales or use tax refunds. Consequently, because the General Assembly's grant of interest on refund claims is a matter of legislative grace, the *State ex rel. Cleveland Concession* Court held that sales and use tax refund claimants had no right to interest on their sales and use tax refunds.

A few decades after *State ex rel. Cleveland Concession*, the General Assembly enacted legislation entitling refund claimants the right to receive interest on a limited subset of sales and use tax refund claims by passing the first version of R.C. 5739.132. Am. Sub. H.B. No. 258 of

the 110th General Assembly, 135 Ohio Laws, Part II, 634, 637-638, effective June 25, 1974, T.C. Appx. 10-16. Specifically, the General Assembly provided that interest shall apply on sales and use tax refunds granted on "illegal or erroneous assessment[s]." Thus, the current version of R.C. 5739.132 broadened the applicability of interest on sales and use tax refunds to include refunds of any "illegal or erroneous payment," whether arising from a Commissioner assessment or not.

To summarize, reading R.C. 5739.132 in pari materia with R.C. 5739.07, R.C. 5739.071 and R.C. 5741.10 provides no support for IBM's contention that the General Assembly has provided express statutory authorization for the recovery of interest on the 25% partial sales and use tax refunds granted to IBM here. Rather, R.C. 5739.132 provides for the recovery of interest only for refunds of sales and use taxes that have been illegally or erroneously paid. By contrast, R.C. 5739.132 does not provide for the recovery of lawfully paid sales and use taxes for which a partial 25% refund is granted pursuant to R.C. 5739.071. [7]

5. Because R.C. 5739.071 is a tax-reduction statute granting a tax benefit akin to an exemption, the partial 25% refunds of sales and use tax granted thereunder must be strictly construed, including for purposes of determining whether the General Assembly has authorized interest on such partial tax refunds.

In a much more fundamental way, the General Assembly has manifested its intent that refunds granted under R.C. 5739.071 shall be treated differently from those granted under R.C. 5739.07: the General Assembly granted only partial 25% refunds under R.C. 5739.071 whereas it granted full 100% refunds under R.C. 5739.07. The logical extension of IBM's position is that the General Assembly could not have reasonably intended that the tax refunds granted under R.C. 5739.071 should be limited to only 25% of the taxes paid, rather than 100%. Yet, the General Assembly did just that.

[7] Notably, the IBM appellants do not disagree with the conclusion that they are not entitled to interest on their sales and use tax refunds regarding the sales and use taxes on qualifying EIS-purchases they had paid prior to January 1, 1998. See *BTA Decision and Order* at 7, f.n. 2.

The reasonableness of the General Assembly's distinct treatment of refunds granted under R.C. 5739.071 from those granted under R.C. 5739.07 arises from one of the most basic principles of taxation: an exemption, credit, or deduction from taxation is "in derogation of the rights of all other taxpayers and necessarily shifts a higher burden upon the non-exempt." *Parma Hts. v. Wilkins* (2005), 105 Ohio St.3d 463, 2005-Ohio-2818, ¶10 (quoting with approval, *Joint Hosp. Serv., Inc. v. Lindley* (1977), 52 Ohio St.2d 153, 155); *Key Servs.*, 95 Ohio St.3d at 15; *Ares, Inc. v. Limbach* (1990), 51 Ohio St.3d 102, 104.

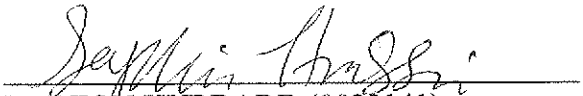
The reasonableness of the General Assembly's choice to deny interest on the tax refunds at issue here follows from this "derogation of equal rights" principle. That is, if the state were to be required to make payments of interest to refund claimants under R.C. 5739.071, the increased amounts flowing from the state's financial coffers to those claimants simply would exacerbate the disproportionate burden placed on all non-exempt taxpayers.

IV. CONCLUSION

For the foregoing reasons, the BTA's affirmance of the Tax Commissioner's final determinations denying IBM's claims for interest on the 25% partial refunds of use taxes granted pursuant to R.C. 5739.071 should be affirmed.

Respectfully submitted,

RICHARD CORDRAY
Attorney General of Ohio



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Appellee was sent by regular U.S. mail to Edward J. Bernert, Baker & Hostetler LLP, 65 East State Street, Suite 2100, Columbus, OH 43215, attorney for appellant, on this 5th day of November, 2009.

SOPHIA HUSSAIN
Assistant Attorney General

In the

Supreme Court of Ohio

INTERNATIONAL BUSINESS MACHINES CORPORATION and IBM CREDIT CORPORATION,	:	
Appellants,	:	Case No. 2009-1296
v.	:	
RICHARD A. LEVIN, Tax Commissioner of Ohio,	:	Appeal from Ohio Board of Tax Appeals Case Nos. 2007-Z-1140, 2007-Z-1141, 2007-Z-1143
Appellee.	:	

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R.C. 5739.01(Y)(1)(c)

(Y) (1) (a) "Automatic data processing" means processing of others' data, including keypunching or similar data entry services together with verification thereof, or providing access to computer equipment for the purpose of processing data.

(b) "Computer services" means providing services consisting of specifying computer hardware configurations and evaluating technical processing characteristics, computer programming, and training of computer programmers and operators, provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems.

(c) "Electronic information services" means providing access to computer equipment by means of telecommunications equipment for the purpose of either of the following:

(i) Examining or acquiring data stored in or accessible to the computer equipment;

(ii) Placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment.

For transactions occurring on or after the effective date of the amendment of this section by H.B. 157 of the 127th general assembly, December 21, 2007, "electronic information services" does not include electronic publishing as defined in division (LLL) of this section.

HISTORY:

GC § 5546-1; 115 v PtII, 306; 116 v 41; 116 v 248; 116 v PtII, 69; 116 v PtII, 323; 119 v 389; 121 v 247; 122 v 439; 122 v 725; Bureau of Code Revision, 10-1-53; 125 v 305 (Eff 10-13-53); 126 v 157; 128 v 421; 128 v 1303 (Eff 7-29-59); 129 v 582(973) (Eff 1-10-61); 129 v 1164 (Eff 1-1-62); 132 v S 350 (Eff 9-1-67); 132 v H 919 (Eff 12-12-67); 135 v S 241 (Eff 10-30-73); 135 v S 161 (Eff 11-21-73); 135 v S 244 (Eff 6-13-74); 135 v S 544 (Eff 6-29-74); 136 v H 1 (Eff 6-13-75); 136 v H 1347 (Eff 8-27-76); 136 v H 1005 (Eff 8-27-76); 137 v H 1 (Eff 8-26-77); 138 v S 16 (Eff 10-29-79); 138 v H 904 (Eff 12-14-79); 138 v H 1032 (Eff 10-1-80); 139 v H 275 (Eff 8-1-81); 139 v H 694 (Eff 11-15-81); 139 v H 694, §§ 205, 206 (Eff 8-1-82); 139 v H 552 (Eff 11-24-81); 139 v H 552, §§ 25, 26 (Eff 8-1-82); 139 v H 671 (Eff 12-19-81); 139 v H 671, §§ 3, 4 (Eff 8-1-82); 139 v S 530 (Eff 6-25-82); 139 v S 530, §§ 28, 29 (Eff 8-1-82); 140 v H 291 (Eff 7-1-83); 140 v H 794 (Eff 7-6-84); 140 v S 112 (Eff 1-10-85); 141 v H 335 (Eff 12-11-85); 141 v H 54 (Eff 9-17-86); 142 v H 159 (Eff 3-13-87); 142 v H 171 (Eff 7-1-87); 142 v S 92 (Eff 10-20-87); 142 v H 274 (Eff 7-20-87); 142 v H 689 (Eff 2-25-88); 142 v S 386 (Eff 3-29-88); 143 v H 111 (Eff 7-1-89); 143 v H 531 (Eff 7-1-90); 143 v H 365 (Eff 4-1-90); 144 v H 298 (Eff 8-1-91); 144 v S 361 (Eff 7-1-93); 144 v H 791 (Eff 3-15-93); 144 v H 904 (Eff 1-1-93); 145 v S 122 (Eff 6-30-93); 145 v H 152 (Eff 7-1-93); 145 v H 715 (Eff 4-22-94); 145 v H 632 (Eff 7-22-94); 146 v H 61 (Eff 10-25-95); 146 v S 266 (Eff 11-20-96); 147 v H 215 (Eff 9-29-97); 147 v S 173 (Eff 1-1-2000); 148 v H 612 (Eff 9-29-2000); 149 v H 94 (Eff 9-5-2001); 149 v H 405 (Eff 12-13-2001); 149 v S 143 (Eff 6-21-2002); 149 v H 524 (Eff 6-28-2002); 149 v S 200. Eff 9-6-2002; 150 v H 95, § 1, eff. 6-26-03; 150 v S 37, §§ 1, 3, eff. 10-21-03; 151 v S 26, § 1, eff. 6-2-05; 151 v H 66, § 101.01, eff. 6-30-05, 7-1-05, 1-1-06; 151 v H 293, § 1, eff. 1-1-07; 151 v H 699, § 101.01, eff. 3-29-07; 152 v H 157, § 1, eff. 12-21-07; 152 v H 562, § 101.01, eff. 9-23-08; 153 v H 1, § 101.01, eff. 7-17-09.

R.C. 5739.132

§ 5739.132. Interest on unpaid tax or refund

(A) If a tax payment originally due under this chapter or Chapter 5741. of the Revised Code on or after January 1, 1998, is not paid on or before the day the tax is required to be paid, interest shall accrue on the unpaid tax at the rate per annum prescribed by *section 5703.47 of the Revised Code* from the day the tax was required to be paid until the tax is paid or until the day an assessment is issued under *section 5739.13* or *5739.15 of the Revised Code*, whichever occurs first. Interest shall be paid in the same manner as the tax, and may be collected by assessment.

(B) For tax payments due prior to January 1, 1998, interest shall be allowed and paid upon any refund granted in respect to the payment of an illegal or erroneous assessment issued by the department for the tax imposed under this chapter or Chapter 5741. of the Revised Code from the date of the overpayment. For tax payments due on or after January 1, 1998, interest shall be allowed and paid on any refund granted pursuant to *section 5739.07* or *5741.10 of the Revised Code* from the date of the overpayment. The interest shall be computed at the rate per annum prescribed by *section 5703.47 of the Revised Code*.

HISTORY:

135 v H 258 (Eff 7-22-74); 139 v S 530 (Eff 6-25-82); 147 v H 215. Eff 9-29-97.

THE STATE OF OHIO

VOLUME CXLVII

LEGISLATIVE ACTS

Including Appropriation Acts Passed

and

Joint And Concurrent Resolutions

Adopted

by the
One Hundred and Twenty-Second
General Assembly of Ohio

At its regular session
January 1, 1997, to December 31, 1998, Inclusive

Issued by

J. Kenneth Blackwell
Secretary of State

(122nd General Assembly)
(Amended Substitute House Bill Number 215)

AN ACT

To amend sections 3.17, 3.24, 9.06, 101.23, 101.27, 101.35, 102.02, 103.143, 103.21, 105.41, 107.30, 107.40, 111.15, 111.16, 111.18, 117.44, 119.01, 120.04, 120.33, 121.04, 121.08, 121.37, 121.38, 121.40, 121.52, 122.15, 122.151, 122.152, 122.153, 122.154, 122.17, 122.18, 122.29, 122.89, 124.136, 124.15, 124.152, 124.18, 124.181, 124.34, 124.382, 124.383, 124.385, 124.391, 125.04, 125.05, 125.13, 125.15, 125.22, 125.28, 125.42, 125.83, 125.831, 125.87, 126.07, 126.12, 126.21, 126.26, 127.16, 131.35, 131.44, 135.142, 145.73, 149.303, 164.08, 164.09, 169.02, 169.03, 169.05, 169.08, 171.05, 173.02, 175.21, 181.52, 307.86, 321.46, 329.04, 341.25, 715.691, 718.01, 924.10, 991.03, 1309.32, 1309.39, 1309.40, 1309.41, 1309.42, 1309.43, 1310.37, 1503.05, 1503.141, 1506.21, 1506.22, 1506.23, 1513.29, 1513.30, 1515.09, 1517.11, 1557.06, 1703.03, 1703.05, 1703.07, 1703.12, 1703.22, 1703.26, 1703.27, 1707.041, 1707.44, 1731.07, 1785.01, 1901.06, 1907.13, 2151.23, 2151.355, 2151.421, 2744.01, 2744.02, 2744.03, 2744.05, 2941.51, 3113.33, 3301.075, 3301.0711, 3301.0714, 3301.0719, 3301.80, 3307.01, 3309.01, 3311.053, 3311.056, 3313.172, 3313.372, 3313.843, 3313.871, 3313.975, 3316.03, 3316.04, 3317.01, 3317.02, 3317.022, 3317.023, 3317.0212, 3317.0213, 3317.03, 3317.08, 3317.10, 3317.11, 3318.02, 3318.03, 3318.041, 3319.17, 3332.07, 3333.04, 3333.12, 3333.20, 3333.27, 3334.01, 3334.03, 3334.08, 3334.09, 3334.10, 3334.11, 3334.17, 3343.08, 3345.11,

The above boxed text was disapproved June 30, 1997, by Governor Voinovich

(C) After an assessment becomes final, if any portion of the assessment remains unpaid, INCLUDING ACCRUED INTEREST, a certified copy of the commissioner's entry making the assessment final may be filed in the office of the clerk of the court of common pleas in the county in which the place of business of the party assessed is located or the county in which the party assessed resides. If the party assessed maintains no place of business in this state and is not a resident of this state, the certified copy of the entry may be filed in the office of the clerk of the court of common pleas of Franklin county.

The clerk, immediately upon the filing of such entry, shall enter a judgment for the state against the party assessed in the amount shown on the entry. The judgment may be filed by the clerk in a loose-leaf book entitled "special judgments for state, county, and transit authority retail sales tax" or, if appropriate, "special judgments for resort area excise tax~~"~~," AND SHALL HAVE THE SAME EFFECT AS OTHER JUDGMENTS. EXECUTION SHALL ISSUE UPON THE JUDGMENT UPON THE REQUEST OF THE TAX COMMISSIONER, AND ALL LAWS APPLICABLE TO SALES ON EXECUTION SHALL APPLY TO SALES MADE UNDER THE JUDGMENT EXCEPT AS OTHERWISE PROVIDED IN THIS CHAPTER.

~~From the date of the filing of the entry in the clerk's office, the unpaid~~ THE portion of the assessment NOT PAID WITHIN THIRTY DAYS AFTER THE DATE THE ASSESSMENT WAS ISSUED shall bear interest at the rate per annum prescribed by section 5703.47 of the Revised Code ~~and shall have the same effect as other judgments. Execution shall issue upon the judgment upon request of the commissioner, and all laws applicable to sales on execution shall be applicable to sales made under the judgment except as provided in sections 5739.01 to 5739.31 of the Revised Code~~ FROM THE DAY THE TAX COMMISSIONER ISSUES THE ASSESSMENT UNTIL THE ASSESSMENT IS PAID. INTEREST SHALL BE PAID IN THE SAME MANNER AS THE TAX AND MAY BE COLLECTED BY ISSUING AN ASSESSMENT UNDER THIS SECTION.

(D) All money collected by the commissioner under this section shall be paid to the treasurer of state, and when paid shall be considered as revenue arising from the taxes imposed by or pursuant to sections 5739.01 to 5739.31 of the Revised Code.

Sec. 5739.132. (A) IF A TAX PAYMENT ORIGINALLY DUE UNDER THIS CHAPTER OR CHAPTER 5741. OF THE REVISED CODE ON OR AFTER JANUARY 1, 1998, IS NOT PAID ON OR BEFORE THE DAY THE TAX IS REQUIRED TO BE PAID, INTEREST SHALL ACCRUE ON THE UNPAID TAX AT THE RATE PER ANNUM PRESCRIBED BY SECTION 5703.47 OF THE REVISED CODE FROM THE DAY THE TAX WAS REQUIRED TO BE PAID UNTIL THE TAX IS PAID OR UNTIL THE DAY AN ASSESSMENT IS ISSUED UNDER SECTION 5739.13 OR 5739.15 OF THE REVISED CODE, WHICHEVER OCCURS FIRST. INTEREST SHALL BE PAID IN THE SAME MANNER AS THE TAX, AND MAY BE COLLECTED BY ASSESSMENT.

~~If the tax imposed by this chapter or Chapter 5741. of the Revised Code or any portion of such tax, as determined by the tax commissioner, is not paid on or before the thirtieth day after service of the notice of assessment as provided by section 5739.13 of the Revised Code, such unpaid amount of tax shall bear interest as of the thirty-first day after service of the notice of assessment to the date of payment. The interest shall be computed at the rate per annum prescribed by section 5703.47 of the Revised Code. Such interest may be collected by assessment in the manner provided in section 5739.13 of the Revised Code. All interest collected by the commissioner under this section shall be paid to the treasurer of state, and when paid shall be considered as revenue arising from the taxes imposed by this chapter or Chapter 5741. of the Revised Code.~~

(B) ~~Interest~~ FOR TAX PAYMENTS DUE PRIOR TO JANUARY 1, 1998, INTEREST shall be allowed and paid upon any refund granted in respect to the payment of an illegal or erroneous assessment issued by the department for the tax imposed under this chapter or Chapter 5741. of the Revised Code from the date of the overpayment. FOR TAX PAYMENTS DUE ON OR AFTER JANUARY 1, 1998, INTEREST SHALL BE ALLOWED AND PAID ON ANY REFUND GRANTED PURSUANT TO SECTION 5739.07 OR 5741.10 OF THE REVISED CODE FROM THE DATE OF THE OVERPAYMENT. The interest shall be computed at the rate per annum prescribed by section 5703.47 of the Revised Code.

Sec. 5739.133. (A) A penalty shall be added to every amount assessed under section 5739.13 or 5739.15 of the Revised Code as follows:

(1) In the case of an assessment against a person who fails to file a return required by this chapter, fifty per cent of the amount assessed;

(2) In the case of a person whom the tax commissioner believes has collected the tax but failed to remit it to the state as required by this chapter, fifty per cent of the amount assessed;

(3) In the case of all other assessments, fifteen per cent of the amount assessed.

No amount assessed under section 5739.13 or 5739.15 of the Revised Code shall be subject to a penalty under this division in excess of fifty per cent of the amount assessed.

(B) All assessments issued under section 5739.13 and 5739.15 of the Revised Code shall include preassessment interest computed at the rate per annum prescribed by section 5703.47 of the Revised Code. Beginning January 1, 1988, preassessment interest shall begin to accrue on the first day of January of the year following the date on which the person assessed was required to report and pay the tax under ~~the provisions of~~ this chapter or Chapter 5741. of the Revised Code, and shall run until the date of the notice of assessment. If an assessment is issued within the first twelve months after the interest begins to accrue, no preassessment interest shall be assessed. WITH RESPECT TO TAXES REQUIRED TO BE PAID UNDER THIS CHAPTER OR CHAPTER 5741. OF THE REVISED CODE ON OR AFTER JANUARY 1, 1998, INTEREST SHALL ACCRUE AS PRESCRIBED IN DIVISION (A) OF SECTION 5739.132 OF THE REVISED CODE.

SECTION 265. Section 5747.98 of the Revised Code is presented in this act as a composite of the section as amended by Sub. H.B. 343, Sub. H.B. 441, and Sub. S.B. 18 of the 121st General Assembly, with the new language of none of the acts shown in capital letters. This is in recognition of the principle stated in division (B) of section 1.52 of the Revised Code that such amendments are to be harmonized where not substantively irreconcilable and constitutes a legislative finding that such is the resulting version in effect prior to the effective date of this act.

Speaker John Davidson of the House of Representatives.

President Richard H. Finan of the Senate.

Passed June 25, 1997

Approved June 30, 1997

George V. Voinovich
Governor

~~This~~ The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

Robert M Shapiro

Director, Legislative Service Commission

Filed in the office of the Secretary of State at Columbus, Ohio, on the 30th day of June, A. D. 1997.

Bob Taft

Secretary of State.

File No. 37 Effective Date June 30, 1997 However in accordance with Sec. 222 through 237 of the Act certain Codified and uncodified sections of Law Contained in the Act are effective September 29, 1997.

* The following also have been designated in the left-hand margin as proper section numbers:
67.08
99.02
120

Robert M Shapiro

Director, Legislative Service Commission

Am. Sub. H.B. 215
122nd General Assembly

Section 102.02 of the Revised Code is amended by this act and also by Sub. H.B. 269 of the 122nd General Assembly. Section 121.04 of the Revised Code is amended by this act and also by Am. Sub. S.B. 87 of the 122nd General Assembly. Section 121.08 of the Revised Code is amended by this act and also by Am. Sub. H.B. 210 of the 122nd General Assembly. Sections 125.13, 127.16, 329.04, 3301.0719, 3317.10, 4117.01, 5101.02, 5101.58, 5153.161, 5153.162, and 5709.66 of the Revised Code are amended by this act and also by Sub. H.B. 408 of the 122nd General Assembly. Section 2151.355 of the Revised Code is amended by Section 7 of this act and also by Am. Sub. H.B. 1 of the 122nd General Assembly. Section 3113.33 of the Revised Code is amended by this act and also by Am. Sub. S.B. 1 of the 122nd General Assembly. Sections 5139.04, 5139.07, and 5139.43 of the Revised Code are amended by this act and also by Am. Sub. H.B. 1 of the 122nd General Assembly. Comparison of these amendments in pursuance of section 1.52 of the Revised Code discloses that they are not irreconcilable so that they are required by that section to be harmonized to give effect to each amendment.

Director, Legislative Service Commission

THE STATE OF OHIO

VOLUME CXXXV

LEGISLATIVE ACTS

(EXCEPTING APPROPRIATION ACTS)

PASSED

AND

JOINT RESOLUTIONS

ADOPTED

BY THE

ONE HUNDRED AND TENTH GENERAL ASSEMBLY

OF OHIO

At Its Second Regular Session

JANUARY 2, 1974 TO DECEMBER 10, 1974, INCLUSIVE

Issued by

TED W. BROWN

Secretary of State

The National Graphics Corporation
Columbus, Ohio 43216
1975

(Amended Substitute House Bill No. 258)

AN ACT

To amend sections 5739.07, 5739.13, and 5741.10, and to enact section 5739.132 of the Revised Code to provide for the payment and accrual of interest on sales and use tax assessments.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 5739.07, 5739.13, and 5741.10 of the Revised Code be amended, and section 5739.132 of the Revised Code be enacted to read as follows:

Sec. 5739.07. The treasurer of state shall refund to vendors the amount of taxes paid illegally or erroneously or paid on any illegal or erroneous assessment where the vendor has not reimbursed himself from the consumer. When such illegal or erroneous payment or assessment was not paid to a vendor but was paid by the consumer directly to the treasurer of state, or his agent, he shall refund to the consumer. WHEN SUCH REFUND IS GRANTED FOR PAYMENT OF AN ILLEGAL OR ERRONEOUS ASSESSMENT ISSUED BY THE DEPARTMENT, SUCH REFUND SHALL INCLUDE INTEREST THEREON AS PROVIDED BY SECTION 5739.132 OF THE REVISED CODE. Applications shall be filed with the tax commissioner, on the form prescribed by him, within ninety days from the date it is ascertained that the assessment or payment was illegal or erroneous; provided, however, that in any event such application for refund must be filed with the commissioner within four years from the date of the illegal or erroneous payment of the tax. On filing of such application the commissioner shall determine the amount of refund due and certify such amount to the auditor of state and treasurer of state. The auditor of state shall draw a warrant for such certified amount on the treasurer of state to the person claiming such refund. The treasurer of state shall make such payments from the tax refund rotary fund created by section 5703.052 of the Revised Code; provided, that for payment of any refund of taxes illegally or erroneously paid to a county the treasurer of state shall place one thousand dollars collected in a separate special fund for each

county levying a tax pursuant to section 5739.021 of the Revised Code; and as required by the depletion of said funds, place to the credit thereof an amount sufficient to make the total of each county rotary fund at the time of such credit amount to one thousand dollars.

Sec. 5739.13. If any vendor collects the tax imposed by or pursuant to section 5739.02 or 5739.021 of the Revised Code, and fails to remit the same to the state as prescribed or if any motor vehicle dealer collects the tax on the sale of a motor vehicle and fails to remit payment to a clerk of a court of common pleas as provided in section 4505.06 of the Revised Code, he shall be personally liable for any amount collected which he failed to remit. The tax commissioner may make an assessment against such vendor based upon any information in his possession.

If any vendor fails to collect the tax or any consumer fails to pay the tax imposed by or pursuant to section 5739.02 or 5739.021 of the Revised Code, on any transaction subject to the tax, such vendor or consumer shall be personally liable for the amount of the tax applicable to the transaction. The commissioner may make an assessment against either the vendor or consumer, as the facts may require, based upon any information in his possession.

An assessment against a vendor in cases where the tax imposed by or pursuant to section 5739.02 or 5739.021 of the Revised Code has not been collected or paid, shall not discharge the purchaser's or consumer's liability to reimburse the vendor for the tax applicable to such transaction.

In each case the commissioner shall give to the person assessed written notice of such assessment. Such notice may be served upon the person assessed personally or by registered or certified mail. An assessment issued against either, pursuant to the provisions of this section, shall not be considered an election of remedies, nor a bar to an assessment against the other for the tax applicable to the same transaction, provided that no assessment shall be issued against any person for the tax due on a particular transaction if said tax has actually been paid by another.

The commissioner may make an assessment against any vendor who fails to file a return required by section 5739.12 of the Revised Code or fails to remit the proper amount of tax in accordance with the provisions of section 5739.12 of the Revised Code. When information in the possession of the commissioner indicates that the amount required to be collected under the provisions of section 5739.02 of the Revised Code is, or should be, greater than the amount remitted by the vendor, the commissioner may upon the basis of test checks of a vendor's business for a representative period, which are hereby authorized, determine the ratio which the tax required to be collected under section 5739.02 of the Revised Code bears to the receipts from the vendor's taxable retail sales, which determination shall be the basis of an assess-

ment as herein provided in this section. Notice of such assessment shall be made in the manner prescribed in this section.

Unless the vendor or consumer, to whom said notice of assessment is directed, files within thirty days after service thereof, either personally or by registered or certified mail a petition in writing, verified under oath by said vendor, consumer, or his authorized agent, having knowledge of the facts, setting forth with particularity the items of said assessment objected to, together with the reasons for such objections, said assessment shall become conclusive and the amount thereof shall be due and payable, from the vendor or consumer so assessed, to the treasurer of state. When a petition for reassessment is filed, the commissioner shall assign a time and place for the hearing of same and shall notify the petitioner thereof by registered or certified mail, but the commissioner may continue the hearings from time to time if necessary.

A penalty of fifteen per cent shall be added to the amount of every assessment made under this section. The commissioner may adopt and promulgate rules and regulations providing for the remission of penalties added to assessments made under this section.

[~~When any vendor or consumer files a petition for reassessment as provided in this section, the assessment made by the commissioner, together with penalties thereon, shall become due and payable within three days after notice~~] NOTICE of the finding made at the hearing [~~has been~~] SHALL BE served, either personally or by registered or certified mail, upon the party assessed.

The vendor or consumer may appeal from an assessment, [~~after it is due and payable~~] AFTER NOTICE OF THE FINDINGS OF THE COMMISSIONER, to the board of tax appeals in the same time and manner as that provided in section 5717.02 of the Revised Code.

ALL ASSESSMENTS, EXCLUSIVE OF PENALTIES, SHALL, IF NOT PAID WITHIN THIRTY DAYS AFTER SERVICE OF THE NOTICE OF ASSESSMENT, BEAR INTEREST AS PROVIDED IN SECTION 5739.132 OF THE REVISED CODE.

After the expiration of the period within which the person assessed may appeal to the board of tax appeals, OR IF NO PETITION FOR REASSESSMENT IS FILED, AND IF THE ASSESSMENT REMAINS UNPAID, a certified copy of the entry of the commissioner making the assessment final may be filed in the office of the clerk of the court of common pleas in the county in which the vendor's or consumer's place of business is located or the county in which the party assessed resides. If the party assessed maintains no place of business in this state and is not a resident of this state, the certified copy of the entry may be filed in the office of the clerk of the court of common pleas of Franklin county.

The clerk, immediately upon the filing of such entry, shall enter a judgment for the state against the vendor or consumer in

the amount shown on the entry. The judgment may be filed by the clerk in a loose-leaf book entitled "special judgments for state and county retail sales tax."

From the date of the filing of the entry in the clerk's office, the assessment, which includes taxes and penalty, [~~shall bear the same rate of interest and~~] shall have the same effect as other judgments. Execution shall issue upon such judgment upon request of the commissioner and all laws applicable to sales on execution shall be applicable to sales made under such judgment except as provided in sections 5739.01 to 5739.31 [~~, inclusive,~~] of the Revised Code.

All money collected by the commissioner under this section shall be paid to the treasurer of state, and when paid shall be considered as revenue arising from the taxes imposed by or pursuant to sections 5739.01 to 5739.31 [~~, inclusive,~~] of the Revised Code.

Sec. 5739.132. (A) IF THE TAX IMPOSED BY THIS CHAPTER OR CHAPTER 5741. OF THE REVISED CODE OR ANY PORTION OF SUCH TAX, AS DETERMINED BY THE TAX COMMISSIONER, IS NOT PAID ON OR BEFORE THE THIRTIETH DAY AFTER SERVICE OF THE NOTICE OF ASSESSMENT AS PROVIDED BY SECTION 5739.13 OF THE REVISED CODE, SUCH UNPAID AMOUNT OF TAX SHALL BEAR INTEREST AT THE RATE OF SIX PER CENT PER ANNUM AS OF THE THIRTY-FIRST DAY AFTER SERVICE OF THE NOTICE OF ASSESSMENT TO THE DATE OF PAYMENT. SUCH INTEREST MAY BE COLLECTED BY ASSESSMENT IN THE MANNER PROVIDED IN SECTION 5739.13 OF THE REVISED CODE. ALL INTEREST COLLECTED BY THE COMMISSIONER UNDER THIS SECTION SHALL BE PAID TO THE TREASURER OF STATE, AND WHEN PAID SHALL BE CONSIDERED AS REVENUE ARISING FROM THE TAXES IMPOSED BY THIS CHAPTER OR CHAPTER 5741. OF THE REVISED CODE.

(B) INTEREST SHALL BE ALLOWED AND PAID UPON ANY REFUND GRANTED IN RESPECT TO THE PAYMENT OF AN ILLEGAL OR ERRONEOUS ASSESSMENT ISSUED BY THE DEPARTMENT FOR THE TAX IMPOSED UNDER THIS CHAPTER OR CHAPTER 5741. OF THE REVISED CODE AT THE RATE OF SIX PER CENT PER ANNUM FROM THE DATE OF THE OVERPAYMENT.

Sec. 5741.10. The treasurer of state shall refund to sellers the amount of tax levied under or pursuant to section 5741.02 or 5741.021 of the Revised Code paid on any illegal or erroneous payment or assessment, where the seller has reimbursed the consumer. When such payment or assessment was not paid to a seller, but was paid directly to the treasurer of state, or his agent, by the consumer, the treasurer of state shall make refund to the consumer. WHEN SUCH REFUND IS GRANTED FOR PAYMENT OF AN

ILLEGAL OR ERRONEOUS ASSESSMENT ISSUED BY THE DEPARTMENT, SUCH REFUND SHALL INCLUDE INTEREST THEREON AS PROVIDED BY SECTION 5739.132 OF THE REVISED CODE. An application shall be filed with the tax commissioner on the form prescribed by him, within ninety days from the date it is ascertained that the payment or assessment was illegal or erroneous; provided, that in any event such application for refund must be filed with the commissioner within four years from the date of the illegal or erroneous payment of the tax. On filing such application, the commissioner shall determine the amount of refund due and shall certify such amount to the auditor of state and treasurer of state. The auditor of state shall thereupon draw a warrant for such certified amount on the treasurer of state to the person claiming such refund. The treasurer of state shall make such payments from the tax refund rotary fund created by section 5703.052 of the Revised Code; provided, that for payment of any refund of taxes illegally or erroneously paid to a county the treasurer of state shall place five hundred dollars collected in a separate special fund for each county levying an additional use tax pursuant to section 5741.021 of the Revised Code; and as required by the depletion of said funds, place to the credit thereof an amount sufficient to make the total of each county rotary fund at the time of such credit amount to five hundred dollars.

SECTION 2. That existing sections 5739.07, 5739.13, and 5741.10 of the Revised Code are hereby repealed.

Speaker of the House of Representatives.

President of the Senate.

Passed April 3, 1974

Approved April 19, 1974

Governor.

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

David A. Johnston
Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 22nd day of April, A. D. 1974.

Ted W. Brown
Secretary of State.

File No. 264. Effective Date July 22, 1974.

Sections 5739.07 and 5741.10 of the Revised Code are amended by this act and also by Am. H. B. 261 of the 110th General Assembly. Comparison of these amendments in pursuance of section 1.52 of the Revised Code discloses that they are not irreconcilable, so that they are required by that section to be harmonized to give effect to each amendment.

David A. Johnston
Director Legislative Service Commission.

Brown and Williamson Tobacco, Corp., Appellant, vs. Roger W. Tracy, Tax Commissioner of Ohio, Appellee.

CASE NO. 95-M-1008 (FRANCHISE TAX)

STATE OF OHIO -- BOARD OF TAX APPEALS

1996 Ohio Tax LEXIS 1077

September 6, 1996

[*1]

APPEARANCES

For the Appellant - Nancy Sturgeon, Attorney at Law, Brown & Williamson Tobacco Corp., 1500 Brown and Williamson Tower, Louisville, Kentucky 40202

For the Appellee - Betty D. Montgomery, Attorney General of Ohio, By: Richard C. Farrin, Assistant Attorney General, State Office Tower, 30 East Broad Street, 16th Floor, Columbus, Ohio 43266-0410

OPINION:

DECISION AND ORDER

This cause and matter comes on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein on September 18, 1995, by appellant, Brown & Williamson Tobacco Corp. ("BWT"), from a decision of the Tax Commissioner, appellee herein, wherein the Commissioner affirmed in part and denied in part claims for refund requested by BWT. The refund claims relate to franchise tax years 1988 and 1989; the sole issue determined by the Commissioner through said claims was the date from which statutory interest due the appellant would appropriately accrue.

The matter is considered by the Board of Tax Appeals upon the Statutory Transcript and the hearing held on June 6, 1996. Both appellant and appellee were represented at hearing. While neither party put forth any further factual evidence, both attempted to [*2] persuade the Board as to the correctness of their position.

The refund claims here in issue were filed after a federal income tax audit of tax years 1985 through 1988 was completed. Pursuant to R.C. 5733.031, BWT was required to file amended franchise tax returns for any year in which the tax charged was altered as a result of a federal tax audit. For tax years 1988 and 1989, the adjustments to federal income caused a reduction in franchise tax due the state.

The amount of overpaid tax to be refunded for the years in issue is not contested. Both parties agree that the amount of tax appropriately refunded is $ 47,573.00 for tax year 1988 and $ 51,649.00 for tax year 1989. The issue in this case involves the correct amount of statutory interest to be refunded pursuant to R.C. 5733.26(B). The section provides for interest payments to be made upon refunds of franchise tax in the following manner:

> "(B) Interest shall be allowed and paid at the rate per annum prescribed by section 5703.47 of the Revised Code upon amounts refunded with respect to the tax imposed by this chapter. The interest shall run from whichever of the following dates is the latest until the date the refund is [*3] paid: the date of the illegal, erroneous, or excessive payment; the ninetieth day after the final date the annual report under section 5733.02 of the Revised Code was required to be filed; or the ninetieth day after the date that report was filed."

The above statute provides both a beginning point and ending point for the calculation of interest included with a refund. Interest is to run from the latest of the following dates: 1) the date of the illegal, erroneous, or excessive payment of tax; 2) the ninetieth day after the final date the annual report is required to be filed pursuant to R.C. 5733.02; or 3) the ninetieth day after the report was actually filed.

The dispute in this matter arises because BWT's franchise tax returns for 1988 and 1989 were audited by the Tax Commissioner and an assessment issued. That assessment was paid on January 13, 1993. The Tax Commissioner utilizes the date of the payment of the assessment as the beginning point from which interest runs. Calculating interest from January 13, 1993 to the date of refund of December 23, 1995, the Commissioner concluded that interest was due in the amounts of $ 6,468.62 for 1988 and $ 7,022.83 for 1989.

BWT's [*4] calculation of interest due on the refunds utilizes a different starting point. BWT argues that the date of the "erroneous" payment of tax was May 31, 1988 for the 1988 return and May 31, 1989 for the 1989 return, and not January 13, 1993, the assessment payment date, because the tax paid by BWT upon the assessment was not "erroneous."

BWT supports its claim that the tax paid upon assessment was not erroneous by distinguishing between the statutory bases of the adjustments made to its return through both audits. BWT claims, and the Commissioner does not dispute, that all adjustments made through the subsequent state audit resulted from BWT's incorrect application of the state franchise tax code in its returns. In contrast, the federal audit reduced federal taxable income from which the franchise tax is then calculated. BWT acknowledges that federal income is the starting point of calculating franchise tax due the state, but contends that the federal taxable income reported by the corporation was not modified by the subsequent state audit.

BWT argues that case law requires a review of the source of both the additional tax due upon state audit as well as the refund due as a result [*5] of the federal audit. BWT cites *Gen. Motors Corp. v. Limbach (1993), 67 Ohio St. 3d 90* as support. In that case, the Supreme Court refused to allow General Motors to deduct income it originally included in its timely filed franchise tax return after a subsequent federal income tax audit. The Court reasoned that adjustments made through an amended franchise tax report must relate to federal adjustments. The Court held that an amended franchise tax report cannot reopen "facts, figures, computations or attachments" which are not either directly or indirectly affected by the adjustments to the corporation's federal income tax return.

In the present case, BWT argues that the Commissioner's utilization of the assessment payment as the starting point for the interest calculation, in effect, reopens a "fact, figure or computation" which was not affected by the federal audit. BWT, in essence, argues that the Commissioner should be held to the same standards as a taxpayer -- if a taxpayer could not receive a refund because the federal audit did not open a certain source, then the Commissioner should not be permitted to rely upon a state audit payment date as the date upon which taxes [*6] were "erroneously" paid when the state audit did not consider the income source which was eventually found to have been over-returned.

While this Board finds BWT's arguments persuasive, given the statutory language, we are unable to agree that such arguments are dispositive of this appeal. As stated above, R.C. 5733.26(B) requires that interest run from the latest of the dates listed. However, the first provision denotes that a payment of tax may be illegal, erroneous or excessive. In order to give effect to each word of the statute, which appear in the disjunctive, we must consider that each adjective describes a different circumstance.

"Erroneous" is defined in Webster's New World Dictionary, 2d College Edition, 1976, as "containing or based on error; mistaken; wrong." "Excessive" is defined as "characterized by excess; being too much or too great." BWT has aptly supported its contention that the tax paid on January 13, 1993 was not "erroneous." However, the Commissioner's representative at hearing correctly noted that tax was not overpaid to the state until that time. The franchise tax returns as originally filed, upon which tax was paid, under-reported its taxable income [*7] for state franchise tax purposes. For the 1988 return, the Ohio adjustment increased the apportionable income by $ 41.5 million and the subsequent federal adjustments reduced such income by the lesser amount of $ 20.7 million. Similarly, for the 1989 return, the Ohio adjustment increased apportionable income by $ 44.5 million and the federal adjustment reduced such income by the lesser amount of $ 23.3 million. Thus, the original returns upon which BWT predicates a refund actually significantly under-reported tax due.

The record reflects that the assessment due on January 13, 1993 for year 1988 was tax in the amount of $ 102,365.75 (exclusive of penalty). The refund for that same year was $ 47,573.00. The refund due for 1989 was in the amount of $ 51,649.00, also less than the assessment of $ 109.696.69 (exclusive of penalty). As the refunds granted were less than the assessment, this Board must find that tax paid was not excessive until January 13, 1993.

Refund of interest on overpaid taxes is a matter of legislative grace. *General Electric Co. v. DeCourcy (1979), 60 Ohio St. 2d 69.* Moreover, equity does not apply to the state as to taxing statutes. *Gen. Motors, supra;* [*8] *Weiss v. Limbach (1992), 64 Ohio St. 2d 79.* Thus, we must remain unpersuaded by BWT's argument that equity requires the

refund of interest in this case to run from a date earlier than the payment of assessment. It was within the General Assembly's power to identify the starting point from which interest should run.

Thus, considering the statutes and case law, this Board is constrained to find that the Commissioner correctly identified the latest event from which to compute interest. Therefore, it is the decision and order of the Board of Tax appeals that the final order of the Tax Commissioner must be, and hereby is, affirmed.

NATIONAL AMUSEMENTS, INC., Plaintiff-Appellee, Cross-Appellant, v. CITY OF SPRINGDALE and DOYLE H. WEBSTER, CLERK-TREASURER, Defendants-Appellants, Cross-Appellees

Nos. C-870627, C-870634

Court of Appeals of Ohio, First Appellate District, Hamilton County

1989 Ohio App. LEXIS 1681

May 10, 1989, Decided and Filed

PRIOR HISTORY: [*1] Civil Appeal from: Court of Common Pleas, TRIAL NO. A-8405635

DISPOSITION: Judgment Appealed from is: Reversed and Final Judgment Entered as to C-870627; Affirmed as to C-870634

COUNSEL: Strauss & Troy and Charles G. Atkins, Esq., Cincinnati, Ohio, for Plaintiff-Appellee, Cross-Appellants

Wood & Lamping, David A. Caldwell, Esq., and Albert H. Neman, Esq., Cincinnati, Ohio, for Defendants-Appellants, Cross-Appellees

JUDGES: HILDEBRANDT, P.J., KLUSMEIER and UTZ, JJ.

OPINION

DECISION.

PER CURIAM.

This cause came on to be heard upon the appeals, the transcripts of the docket, journal entries and original papers from the Hamilton County Common Pleas Court, the transcript of the proceedings, the briefs and the arguments of counsel.

In an earlier appeal, [1] we upheld the facial constitutionality of the ordinance [2] of The City of Springdale that imposed a 3% cinema admissions tax. In the earlier case there was no express claim of discriminatory application.

1 *National Amusements, Inc. v. Springdale* (Nov. 18, 1981), Hamilton App. No. C-800842, unreported.

2 Ordinance No. 67-1978, enacted Nov. 15, 1978, effective Jan. 1, 1979, Springdale Code of Ordinances, Chap. 97.

In the case presently on review, National [*2] Amusements alleged in its amended complaint that Ordinance No. 67-1978 is unconstitutional as applied to National Amusements and sought a declaratory judgment that the ordinance is void and unenforceable as applied to the plaintiff. The complaint was filed July 10, 1984, and the amended complaint was filed January 9, 1985.

On October 1, 1984, the City of Springdale enacted an ordinance titled "Entertainment Admissions Tax." This measure was codified as Chapter 98 of the Springdale Code of Ordinances. This admissions tax applied to all places in Springdale offering entertainment and demanding an admission price, except cinemas. The tax imposed was 3% of the admission price, the same rate imposed in the cinema admissions tax.

By an amended judgment entry dated June 29, 1987, the trial court found in favor of National Amusements and ordered Springdale to refund to National Amusements $ 535,139.14 for the cinema admissions tax previously collected for the period from November 15, 1978, to October 28, 1984. [3] An interlocutory entry that is dated February 8, 1985 granted Springdale's motion for summary judgment to the extent of National Amusement's claim for relief based on events occurring [*3] after October 1, 1984, the effective date, we presume, of the entertainment admissions tax.

3 We are not advised of nor does the record reflect any concern of the parties relative to the beginning and ending dates of the period for which a refund was ordered. Ordinance No. 67-1978, the Cinema Admissions Tax, was enacted on November 15, 1978, but not effective until January 1, 1979. The written opinion of the trial judge specified the terminal date to be October 1, 1984.

Both parties have appealed, independently: the City of Springfield and Doyle H. Webster, its Clerk-Treasurer, are the appellants in case number C-870627, and National Amusements, Inc. is the appellant in case number C-870634. Although the two appeals were not formally consolidated, in the interest of judicial economy we address them together.

C-870627

The appellants in this case present three assignments of error. The first assignment protests the failure of the trial court to find that the doctrine of *res judicata* is a bar to the prosecution of this case by National Amusements. This assignment has merit.

In the earlier case involving the same parties and numbered on the docket of the trial court as A-8711145, [*4] we affirmed the judgment finding the cinema admissions tax to be facially constitutional. [4] The case presently on review bears the trial court number A-8405635 and the judgment in this case, as previously observed, was that the cinema admissions tax had been unconstitutionally applied to National Amusements. The trial court concluded it was "evident that Springdale singled out the movie theatre business for an admissions tax, even though another competing business, protected by the First Amendment, was not subjected to the tax." [5]

4 *National Amusements, Inc. v. Springdale (1981), 3 Ohio App. 3d 70, 443 N.E.2d 1016*, motion to certify record overruled (Feb. 17, 1982), No. 82-42.

5 T.d. 48, Opinion, June 3, 1987, pg. 9.

In our earlier opinion finding the cinema admissions tax to be facially constitutional, we were called upon to determine the propriety of the grant of summary judgment upholding the constitutionality of the cinema admissions tax. On the case therein made, we observed that if National Amusements had submitted permissible evidentiary documentation of discriminatory application, a "factual dispute might arise" making summary judgment inappropriate. [*5] The trial court in the case on review concluded that since National Amusements now alleges discriminatory application, our earlier opinion authorized the appellee to maintain the instant action. That statement, upon which the trial court relied, was made to make clear that a summary disposition of the earlier case was proper, there being no genuine issues of material fact; it was not an advisory opinion that should National Amusements bring another action alleging discriminatory application (having failed in its earlier attempt to have the ordinance declared unconstitutional), it would stand against a defense of *res judicata.*

The complaint in the earlier case, A-7811145, is a part of the record in the case on review, A-8405635, as Exhibit A attached to appellants' motion for summary judgment. A comparison of the complaints in the two cases leads to the conclusion that there is no substantive difference in the complaints. Each complaint alleges constitutional provisions, state and federal, that are allegedly violated by the cinema admissions tax. The evidence shows that all the facts upon which the appellee relies to show an alleged discriminatory application of the tax existed [*6] and were known at the time of the first action. They could have been litigated in the first action.

The Supreme Court of Ohio within the last three years stated:

The doctrine of *res judicata* is an integral part of the law of this state. For purposes of the matters before us, this doctrine is that an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit.

Rogers v. Whitehall (1986), 25 Ohio St. 3d 67, at 69, 494 N.E.2d 1387, 1388. We are aware that, by footnote 3, the Supreme Court observed that Rogers did not present a question relative to that portion of the doctrine applicable to claims which "might have been litigated" in the earlier case. That question does confront this court and we hold, on the facts present in the two cases, that the claims made in the case on review should have been presented in the earlier case.

In *Henderson v. Ryan (1968), 13 Ohio St. 2d 31, 233 N.E.2d 506*, the court held that the doctrine of *res judicata* would not be applied to "might have been litigated" situations where a statute, *R.C. 2309.06* applicable at the time but since [*7] repealed, prevented the joinder of causes not affecting all the parties to the action. In the case on review we have no problem of identity of the parties. We find this statement in Henderson to be apposite:

To save time and to relieve court congestion, parties are encouraged, if not commanded, to litigate all their claims in one action, except to the extent that joinder of multifarious and complex issues would produce confusion and prejudice. Defendants and the courts are thus saved from vexation caused by multiple ligitation.

Henderson v. Ryan, supra at 38, 233 N.E.2d at 511.

The first assignment of error is valid; the trial court erred in failing to apply the doctrine of *res judicata.*

The second assignment in number C-870627 claims error in the finding that the ordinance was unconstitutionally applied to the appellee from its enactment on November 15, 1978, to October 1, 1984. This assignment of error is undoubtedly subsumed in our resolution of the first assignment of error; however, pursuant to the mandate of *App. R. 12(A)* we take the opportunity to reiterate a part of our holding in *National Amusements, Inc. v. Springdale, supra.*

The appellants particularize [*8] this assignment with the following issue for review:

Can a court hold a tax on all cinemas in a municipality to be unconstitutional when all cinemas are taxed at the same rate and when there is evidence showing justification for the tax?

This assignment and issue was directly addressed in *National Amusements, Inc. v. Springdale, supra,* in the following terms:

A taxing authority may discriminate between trades and activities and is not required to follow any predetermined method of classifying those which it selects for taxation, provided the classification rests "upon some ground of difference having a fair and substantial relation to the object of the legislation." *F. S. Royster Guano Co. v. Commonwealth of Virginia (1920), 253 U.S. 412, 415, 40 S. Ct. 560, 561-562.*

We further stated, citing the authority of *Brown-Forman Co. V. Kentucky (1910), 217 U.S. 563, 573, 30 S. Ct. 578, 580,* that if the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of differences or policy, there is no denial of the equal protection of law.

We find none of the prohibiting conditions or circumstances to be present in the [*9] case on review. Accordingly, we find the second assignment of error to be well-made.

The third and final assignment of error in case number C-870627 is directed to the awarding of interest to National Amusements on the amount of taxes alleged to have been unconstitutionally imposed. We sustain this assignment of error.

Our determination of the first and second assignments of error undoubtedly renders moot appellant's third assignment. We elect, however, to respond to the third assignment in compliance with *App. R. 12(A).*

A review of statutory and case law reveals no precedent for the specific problem raised by the third assignment of error. The Supreme Court of Ohio has held that the payment of interest on refunded ad *valorem* taxes illegally collected is precluded in the absence of any statutory authority for interest. *General Electric Co. v. DeCourcy (1979), 60 Ohio St. 2d 68, 397 N.E.2d 397.* The appellee contends that it is entitled to interest as consequential damages for the illegal collection of an excise tax. We disagree.

Appellee charcterizes the interest award as consequential damages. In view of the fact that the admissions tax allegedly wrongfuly collected [*10] is an excise tax not due until the admission has been paid, we find that the borrowing of money to pay the admission tax is too remote to be considered compensable as interest on the excise tax.

We therefore conclude that the trial court erred in awarding interest to the appellee and sustain the third assignment of error.

C-870634

In its independent appeal, National Amusements, Inc. presents as its solitary assignment of error the granting of Springdale's motion for summary judgment on the ground that the cinema admissions tax was constitutionally valid after October 1, 1984. We find the assignment is not well-made.

Based upon our reasoning in Springdale's appeal, we find that there is no genuine issue of material fact as to the constitutionality of the cinema admissions tax after October 1, 1984, and that Springdale is entitled to judgment in its favor as a matter of law.

The judgment appealed from in C-870627 is reversed and final judgment is entered in favor of the City of Springdale and Doyle H. Webster, its Clerk-Treasurer.

The judgment appealed from in C-870634 is affirmed.

HILDEBRANDT, P.J., KLUSMEIER and UTZ, JJ.