IN THE
SUPREME COURT OF OHIO

Hazel M. Willacy,	)	
Appellant,	)	Case No. 2020-0795
	)	
vs.	)	Appeal from the Ohio
	)	Board of Tax Appeals
City of Cleveland Board of	)	BTA Case No. 2018-758
Income Tax Review and	)	
Nassim M. Lynch, Administrator,	)	
Central Collection Agency,	)	
Appellees.	)	

MERIT BRIEF OF APPELLANT, HAZEL M. WILLACY

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I. Table of Contents

I. Table of Contents *(cont'd)*

	I. Table of Contents *(cont'd)*	**Appx. Page**
	Assessment of the Administrator of the Central Collection Agency	**15**
	Communication from the Auditor of the Central Collection Agency	**18**
	Ohio Administrative Code, § 5703-7-18	**19**
	Ohio Administrative Code, § 5703-7-18, Rescinded	**22**
	Central Collection Agency, Rule No. 3:01 (eff. 1/1/2016)	**23**
	Central Collection Agency, Rule No. 3:02 (eff. 1/1/2016)	**25**
	Central Collection Agency, Rule No. 3:01 (eff. prior to 1/1/2016)	**27**
	Central Collection Agency, Rule No. 3:02 (eff. prior to 1/1/2016)	**30**
	Central Collection Agency, Rule No. 13:01 (eff. 1/1/2016)	**32**
	Ohio Department of Taxation, IT 2001-01, "Nexus Standards & Filing Safe Harbors for Individuals" (January 10, 2014 revision)	**34**
	Cleveland Codified Ordinances, §191.0901	**37**
	Cleveland Codified Ordinances, §191.1701	**38**
	Cleveland Codified Ordinances, §192.06	**39**
	Cleveland Codified Ordinances, §192.41	**49**
	Ohio Revised Code, §1.58	**50**

I. Table of Contents *(cont'd)*

II. Table of Authorities

II. Table of Authorities *(cont'd)*

II. Table of Authorities *(cont'd)*

II. Table of Authorities *(cont'd)*

III. Statement of the Facts

The two main issues in this municipal income tax case – (i) whether appellant Hazel Willacy's rights to due process under the federal and Ohio constitutions were violated by Cleveland's extraterritorial taxation of her stock sales proceeds and (ii) whether the collateral estoppel aspect of administrative *res judicata* arising from Cleveland's having previously determined in three successive years that such stock sales proceeds were not taxable precluded it and Cleveland's Board of Income Tax Review ("BOR") from making a diametrically opposite determination in later years – were previously briefed to this Court. See, *Willacy v. Cleveland Board of Income Tax Review*, __ Ohio St.3d __, 2020-Ohio-314. ("*Willacy I*.") In that case regarding appellant's 2014 and 2015 municipal income taxes, the due process issue was decided in Cleveland's favor, but the collateral estoppel issue was left undecided. Id., at {¶17.} In the instant case those two issues, along with others, arise out of Cleveland's having similarly taxed appellant's 2016 stock sales proceeds.

This case arises from appellees' denials of appellant Hazel Willacy's requests that Cleveland's Central Collection Agency ("CCA") refund the amount which her former employer, The Sherwin-Williams Company, withheld and remitted to CCA as withholdings for municipal income taxes for calendar year 2016. (Appx. 1-2; 10-11.) The parties dispute two key issues: *first*, whether Cleveland's taxing the proceeds of Mrs. Willacy's stock sales which were generated some seven years after she retired from Sherwin-Williams' employ and became a Florida domiciliary violated her right to substantive Due Process or was otherwise unlawful; *second*, whether Cleveland was

collaterally estopped from taxing those 2016 proceeds because it had previously determined that Mrs. Willacy's status as a non-resident during tax years 2010, 2011, and 2012 precluded it from taxing identically derived proceeds. The operative facts giving rise to those issues are as follows.

From November 19, 1976, through 2018, appellant was a duly licensed Ohio attorney. (Supp. 1, at ¶1.) From June 1976 until August 1980, appellant was employed by the law firm, Baker, Hostetler & Patterson, in Cleveland, Ohio, as an associate attorney. (Id. at ¶4.) In August 1980, appellant was employed by The Sherwin-Williams Company in its Corporate Human Resources Department, where she remained for the next twenty-nine years. Initially she was employed as a Labor Relations Attorney and thereafter in progressively higher positions until her March 31, 2009, retirement; at which last-mentioned time her title was "Corporate Vice-President of Employment Policies and Labor Relations." (Id. at ¶5.)

On at least two occasions during her Sherwin-Williams employment, and prior to calendar year 2007, Mrs. Willacy was awarded options to purchase shares of that company's stock. (Id. at ¶8.)

On October 19, 2007, Mrs. Willacy was granted additional options to purchase two thousand seven hundred and fifteen (2715) shares of common stock in The Sherwin-Williams Company with an exercise price of sixty-three dollars and forty-four cents ($63.44) per share; which grant included Incentive Stock Options ("ISOs") authorizing her to purchase one thousand four hundred and twenty-four (1424) shares of The Sherwin-Williams Company's common stock at said exercise price and Non-Qualified Options

("NQs") authorizing her to purchase one thousand two hundred and ninety-one (1291) shares of The Sherwin-Williams Company's common stock at the same exercise price.[1] (Id. at ¶28.) By their terms, both the ISO's and the NQ's in the 2007 grant could not be exercised before the first anniversary of the grant date and would expire after the tenth anniversary of that grant date. (Id. at ¶29.) Using the Black-Scholes algorithm, Sherwin-Williams determined that the monetary value of the options which Mrs. Willacy received in the 2007 grant was sixteen dollars and twenty-eight cents ($16.28) per optioned share when they were granted on October 19, 2007.[2] (Id. at ¶¶30 and 31.) Thus, the fair market value of the options which Mrs. Willacy received in that 2007 grant was $44,200.20 – *i.e.*, $16.28 per share times 2715 shares. If the City of Cleveland had subjected that $44,200.20 amount to its 2% nonresident income tax for the tax year ending December 31, 2007, that city would have received the amount of $884.00; *viz.*, the equivalent of roughly thirty-six and six tenths cents ($0.366) per share as income tax predicated upon the actual monetary value of the options as income in the year in which Mrs. Willacy received them. (Id. at ¶32.)

On February 19, 2009, Mrs. Willacy changed the state of her residence and domicile from Ohio to Florida. (Id. at ¶6.) On March 31, 2009, she retired from Sherwin-Williams' employ. (Id. at ¶5.)

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[1] That October 19, 2007, grant is hereinafter referred to as the "2007 grant."

[2] Sherwin-Williams not only published that value figure in its "2007 Annual Report," but also filed same with the United States Securities Exchange Commission as an annexure to its 2010 10-K form. (Id. at ¶¶30-31.)

At no point in time between October 19, 2008, when the options awarded to Mrs. Willacy in that 2007 grant first became exercisable, and the date of her February 19, 2009, change of her residence and domicile to the State of Florida did the per share market price at which shares of common stock in The Sherwin-Williams Company were traded exceed the 2007 grant's sixty-three dollars and forty-four cents ($63.44) per share exercise price. (Id. at ¶33.) Rather, it was not until the month of March 2010 that the per share market price at which shares of common stock in The Sherwin-Williams Company were traded exceeded the 2007 grant's sixty-three dollars and forty-four cents ($63.44) per share exercise price. (Id. at ¶34.)

After becoming a Florida resident, Mrs. Willacy exercised some of her *pre*-2007 options between March 1, 2009, and December 31, 2013, and thereafter applied to the City of Cleveland's Central Collection Agency for refunds of such income taxes as it had caused Sherwin-Williams to withhold from the proceeds of her dispositions of those options. (Id. at ¶8.)

In calendar year 2011, Mrs. Willacy applied for the refund of $2,002.18 which had been withheld during 2010 as income tax upon one such option transaction and advised the City of Cleveland's Central Collection Agency that she was entitled to be refunded that amount because she, "*Did not live, work, or perform services in Cleveland, OH or the State of Ohio*," because she was, "*a Florida resident effective April 2009*." In response to CCA's June 21, 2011, request therefor, Mrs. Willacy further supported her 2011 request for a refund with a letter dated July 5, 2011, from The Sherwin-Williams Company's "Assistant

Manager, Corporate Payroll," which additionally stated that she had, "retired 05/08/2009 from The Sherwin-Williams Company" and that her:

> 2010 W2 includes only income from the exercise of stock options ($18,213.31), restricted stock dividends ($5,083.20), restricted stock lapse payout ($76,811.49) and the imputed income relative to her participation in the Executive Group Life Insurance Program ($4,367.30). Total W2 wages are $104,475.30.

CCA granted her request for such refund on that basis. (Id. at ¶¶9 and 10.) [Emphasis throughout is supplied, unless the contrary is noted.]

Likewise, on or about April 16, 2012, Mrs. Willacy applied to the City of Cleveland's Central Collection Agency for the refund of $1,983.79 withheld as income tax upon yet another set of option exercise and other transactions which had occurred during calendar year 2011 and, in order to support that April 16, 2012, request for a refund, again advised the City of Cleveland's Central Collection Agency that she was entitled to be refunded that amount because she had, "Relocated to Florida in 2009." Appellant further supported that request for a refund with an April 16, 2012 certification from The Sherwin-Williams Company's "Dir – Tax Counsel," together with a copy of the aforementioned July 5, 2011, letter from The Sherwin-Williams Company's "Assistant Manager, Corporate Payroll" attesting that affiant's income was not from earnings but from the exercise of stock options, dividends and a lapse payout referable to restricted stock, and imputed income; which request for a full refund of that $1,983.79 amount the City of Cleveland's Central Collection Agency thereafter sustained and, based thereon, issued its refund payment to affiant in the amount of $1,983.79. (Id. at ¶11.)

Yet again, this time on or about February 13, 2013, Mrs. Willacy applied to CCA for the refund of $9,068.91 withheld as income tax upon yet another such set of options and other transactions which had occurred during calendar year 2012 and, in order to support that request for a refund, advised the City of Cleveland's Central Collection Agency that she was entitled to be refunded that amount because she had, "Relocated to Florida in 2009." She further supported that February 13, 2013, request for a refund with a February 8, 2013, certification from The Sherwin-Williams Company's "Dir Tax Counsel," together with a January 23, 2013, letter from The Sherwin-Williams Company's "Assistant Manager, Payroll Compliance," attesting that appellant's:

> 2012 W2 includes only income from the exercise of stock options ($323,172.59), restricted stock lapse ($130,272.95) and the imputed income relative to her participation in the Executive Group Life Insurance Program ($2,859.70). Total W2 wages are $465,305.24.

(Id. at ¶12.) And once again, CCA sustained and granted appellant's February 13, 2013, request for a full refund of the $9,068.91 amount which it had caused to be withheld from the proceeds of her option transactions and Sherwin-Williams' other payments to her during calendar year 2012 by issuing its check in the amount of $9,068.91 as its refund payment to her. (Id. at ¶13.)

After sustaining appellant's three non-residency based refund requests and making those three refund payments, neither the City of Cleveland nor its Central Collection Agency appealed from, otherwise challenged, nor sought to set aside the administrative determinations which CCA made upon Mrs. Willacy's 2011, 2012, and 2013 requests for full refunds of the amounts which the City of Cleveland had caused to be withheld from

the payments Sherwin-Williams made to her during calendar years 2010, 2011, and 2012. By that inaction, the City and CCA permitted not only those non-taxability determinations themselves but also the *legal bases* upon which those non-taxability determinations were premised to become final, binding, and *res judicata* between and among the parties thereto and their privies. (Id. at ¶14.)

During calendar year 2013 no tax withholding amounts were withheld from appellant on Cleveland's behalf. Accordingly, it was not necessary for her to apply to that Cleveland or CCA for any refund during calendar year 2014. (Id. at ¶15.) However, during calendar years 2014 and 2015, the City of Cleveland and its Central Collection Agency again caused certain amounts to be withheld from payments made to affiant on account of her exercises of additional employee stock options which Sherwin-Williams had previously given to her in the 2007 grant. (Id. at ¶16.)

On or about April 22, 2015, Mrs. Willacy applied to CCA for the refund of $817.00 withheld as income tax upon yet another such set of option exercises and other transactions which had occurred during calendar year 2014, again asserting as her ground therefor that she had, "Relocated to Florida in 2009." (Id. at ¶17.) Similarly, on or about April 25, 2016, she applied to CCA for the refund of $7,555.00 withheld as income tax upon yet another such set of option exercises and other transactions which had occurred during calendar year 2015, again asserting as her ground therefor that she had, "Relocated to Florida in 2009." (Id. at ¶18.) Cleveland and CCA denied those refund requests (id. at ¶18) which eventually resulted in this Court's February 4, 2020, decision in *Willacy I*.

Two additional factual circumstances must be noted at this point. *First*, CCA's *grants* of Mrs. Willacy's requests for full refunds of the 2010, 2011, and 2012 withholdings due to her nonresident status was congruent with the State of Ohio's identically based *grants* of appellant's separate refund requests to it for the State tax withholdings which Sherwin-Williams had not only taken from her stock sales proceeds for those three years but also for the withholding taken during the three next-following tax years as well; Ohio's grants of refunds being as follows:

TAX YEAR	**AMOUNT WITHHELD**	**AMOUNT REFUNDED**
2010	$3,589.00	$3,589.00
2011	$3,472.00	$3,472.00
2012	$15,871.00	$15,871.00
2013	$0.00	$0.00
2014	$1,430.00	$1,430.00
2015	$13,222.00	$13,222.00
2016	$4,369.00	$4,369.00

(Id. at ¶19.) *Second*, the record presented to this Court in *Willacy I* reveals several instances in which Mrs. Willacy was denied of a full and fair opportunity to litigate the issues which this Court ultimately addressed in that case. Those instances included (i) being denied an oral hearing before CCA's administrator, despite CCA's rule guaranteeing same to her and despite her counsel's timely, written request for such hearing; (ii) Cleveland's counsel's deleting certain documents which supported Mrs. Willacy's contentions from the administrative record certified to Cleveland's Income Tax Board of Review, the BTA, and to this Court; and (iii) Mrs. Willacy's being required to choose between *either* (a) traveling from Florida or California to Cleveland or Columbus in order to appear in person before that Board of Review and/or BTA *or* (b) entirely forego her rights to such personal

appearance(s). Emblematic of the type of unfairness which the impracticality of appellant's traveling from Florida or California to Ohio in order to attend exceptionally short administrative hearings is CCA's counsel's taking undue advantage of appellant's absence from those hearings by presenting their own, groundless, *post hoc* rationalizations for CCA's 2011, 2012, and 2013 non-residency-based *grants* of refunds to those arbiters as if they were fact. (See, Transcript of May 7, 2018, BOR hearing at 41 to 43.)

During calendar year 2016, Mrs. Willacy exercised all of the 600 remaining options to purchase shares which had been awarded to her in that 2007 grant in three separate exercise and sale transactions as follows:

DATE OF TRANSACTION	NUMBER OF SHARES	GRANT PRICE PER SHARE	SALE PRICE PER SHARE	CLEVELAND TAX WITHHELD
02/26/2016	300	$63.44	$300.00	$1,249.56
11/28/2016	150	$63.44	$274.6518	$631.83
12/21/2016	150	$63.44	$270.74	$615.41

(Supp. 1, at ¶37.) When those transactions occurred, appellant was still a Florida resident and domiciliary (id. at ¶38) and continually exercised and applied her own independent judgment and knowledge pertaining to investing in equities, capacity for risk-taking, skill and savvy toward the goal of maximizing the gain she could realize by exercising a portion of the options which had been awarded to her in that 2007 grant. (Id. at ¶39.) Further, throughout 2014, 2015, and 2016, appellant neither resided in nor performed any services in the State of Ohio for any entity; nor did she own any real estate, personalty, or intangible property within Ohio; nor did she receive any compensation in the form of stock options from Sherwin-Williams or any other employer. (Id. at ¶¶ 46 and

47.) Indeed, at no time during calendar year 2016 did Mrs. Willacy even enter the City of Cleveland or the State of Ohio. (Id. at ¶50.)

On or about April 23, 2017, Mrs. Willacy applied to CCA for the refund of the $2,496.80 which had been withheld as income tax upon her three 2016 option exercise and sale transactions and, supported that refund request by advising CCA that she was entitled to a full refund because she had, "Relocated to Florida in 2009." Appellant further supported her request for a refund with an April 27, 2017, certification from one Pamela M. Johnson, Esq., The Sherwin-Williams Company's "Sr. Tax Counsel," attesting that the entirety of affiant's so-called "income" was "Not Subject to Tax." (Id. at ¶54.) Appellant's April 23 refund request was initially passed upon on September 5, 2017, by CCA's "Income Tax Auditor," Lan T. Tin, whose form letter response stated:

> The city income tax return which you submitted has been reviewed for the year 2016. Your tax return has been adjusted for the following reason(s):
>
> [**X**] Your employer withheld the tax correctly.
>
> [**X**] Stock options, when exercised, are fully taxable to the former employment city.

However, that form letter's *third* pre-printed, check-blank response, "[] *The above adjustment results in your refund request being denied*," was *not* checked; leaving the question of what the "adjustment" in appellant's return that Ms. Tin had made actually was completely unanswered. (Appx. at 18.) Ms. Tin's September 5 form letter closed with the statement, "Should you have any questions concerning this matter, please contact the undersigned." (Id.)

On September 28, 2017, appellant responded to Ms. Tin's September 5 form letter, in a writing dually addressed both to her and to CCA's Administrator, appellee Lynch, which:

> (i) objected to Ms. Tin's failure to state whether she had granted, partially granted, or denied appellant's refund request as being "fundamentally unfair" and requested an intelligible decision on that issue;
>
> (ii) disputed and disagreed with Ms. Tin's conclusion that Mrs. Willacy's former "*employer withheld the tax correctly*," asserting not only that "Fourteenth Amendment Due Process *** precludes Ohio from taxing '**the proceeds of a nonresident's out-of-state sale of intangible property**'" [emphasis *sic*.] but also that additional state, and local law reasons further supported her view on that point;
>
> (iii) disputed both the *characterization* as "wages" and the *amount* of what Sherwin-Williams had labeled as such in her 2016 "W-2";
>
> (iv) reiterated her request for a full refund of the amount withheld; and
>
> (v) lodged a separate, "procedural Due Process" objection to CCA's penchant for concealing the factual and legal reasons for the conclusory decisions it places into its decisions, and requested that appellee Lynch provide his factual findings and legal reasons in whatever order he issued in response to appellant's objections and request for a ruling.

(See, BOR's Amended Transcript to the BTA at "Exhibit A.")

In an "Assessment" dated November 9, 2017, Mr. Lynch denied appellant's request for a refund; stating, "stock options are taxable qualifying wages pursuant to state and local

laws," and citing R.C. 718.01(R)(2)(b), Cleve. Cod. Ord. 192.06(hh)(2)(B), Article 3:01(B)(8) of CCA's Rules and Regulations, and *Wardop v. City of Middletown Income Tax Review Board*, 2008-Ohio-5298 (Butler App. No. CA2007-09-235). (Appx. at 15 to 17.) On December 18, 2017 – thirty-nine days after appellee Lynch's "Assessment" was issued – appellant filed her notice of appeal to Cleveland's Board of Income Tax Review asserting, among other points, that the "Assessment":

> (iii) primarily due to the fact that she has neither resided nor been domiciled in the State of Ohio since March 2009, [was] violative of Mrs. Willacy's rights under, among others –
>
> (a) the Due Course of Law provision of the Ohio Constitution,
>
> (b) the Due Process clause of the Fourteenth Amendment to the United States Constitution,
>
> (c) the public policy and statutes of the State of Ohio,
>
> (d) clearly applicable principles of law declared by the Supreme Court of Ohio, and
>
> (e) various Ordinances of the City of Cleveland –
>
> all as was heretofore detailed to the Administrator in writing.

(See, BOR's Amended Transcript to the BTA at "Exhibit A.")

As of December 18, 2017, at least twenty-one days of the sixty day appeal period still remained outstanding. Accordingly, on December 22, 2017 – the forty-third day after appellee's assessment was issued – appellant duly amended her notice of appeal by mailing same to Mr. Lynch, who received it on or before December 28, 2017.[3] (Ibid.)

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[3] Such amendment was authorized by R.C. §718.11 and CCA's Rule No. 13:01(A)(2) because the sixty day, statutory appeal period had not expired.

In her amended notice of appeal, appellant not only re-asserted the five bases specified in her original notice of appeal but also added the following additional grounds:

> (a) as applied to her, the Administrator's reliance upon R.C. §718.01(R)(2)(b) [as added by the 130th General Assembly's H.B. 5 (2014)] and Cleve. Cod. Ord. §192.01(hh)(2)(B) [passed November 23, 2015] was and is violative of Ohio's constitutional prohibition against retroactive legislation as set forth in Section 28, Article II, Ohio Constitution, and R.C. §§1.48 and 1.58(A)(2),(4), all of which prohibit Cleveland's enactment of retroactive time-shifting ordinances whereby that city authorizes itself to use old facts to claim jurisdiction over the person and the option grant, but current facts — over which that city has no taxable jurisdiction — to retroactively fix a value upon that grant;
>
> (b) the statute of limitations set forth in Cleve. Cod. Ord. §191.1701, predicated upon the time lapse between the grant event in 2007 and the imposition of a tax upon it in tax year 2016;
>
> (c) the doctrines of r*es judicata* and administrative *res judicata* based on Cleveland's repeated determinations in prior years that the undersigned was entitled to refunds of income taxes withheld on account of her exercises of stock options because she was a non-resident of the State of Ohio when such exercises occurred;
>
> (d) Cleveland's knowing and voluntary waiver of its right to tax the subject stock option grant in the year 2007 when it was made by (1) refusing to accept Sherwin-Williams' Black-Scholes statement of the options' fair market value and (2) refusing to follow their own rule, as set forth in both the former and current versions of Cleveland's Central Collection Agency's "Rules & Regulations" §3:01(b)(6), regarding when and how to tax non-cash income/wages;
>
> (e) the public policy of the State of Ohio evidenced by Ohio's having consistently refunded all sums it caused to be withheld from Mrs. Willacy as putative income taxes on account of her exercises of the same options which are at issue in this appeal; and
>
> (f) the public policy of the City of Cleveland as evidenced by the newly added second paragraph of §3:01(B)(8) of Cleveland's Central Collection Agency's Rules and Regulations[.]

(Id.)

Although a Board of Review hearing date was initially scheduled for February 9, 2018, it was thereafter continued to May 7, 2018, per appellant's counsel's requests. (See, BOR's "Transcript on Appeal to the Board of Tax Appeals [*etc*.]" at "Exhibit No. B-1.") On May 1, 2018, Mrs. Willacy executed an affidavit attesting to the facts pertinent to her then pending appeal. (Supp. 1.) On May 3, 2018, appellant's counsel served counsel for the Board and counsel for Mr. Lynch with copies of that affidavit by email as well as by ordinary mail because Mrs. Willacy and her counsel had moved from Florida to California and were unable to attend the scheduled BOR hearing in person due to the distance to be traveled and attendant expense required to do so. (See, BOR's "Transcript on Appeal to the Board of Tax Appeals [*etc*.]" at Exhibit No. C-2.) Without objection nor any request for continuance from CCA, the scheduled BOR hearing went forward on May 7, 2018, and was stenographically recorded. (Id. at Exhibit No. C-1.)

Without objection from either of CCA's attorneys, the board's chairman read Mrs. Willacy's affidavit aloud into the record. (Id. at pp. 4, line 25, to 35, line 15.) Shortly thereafter, the following discussion occurred:

> CHAIRMANMOSS: What do you think happened before 2011, 2012?
>
> MR.GAREAU: She got lucky, got the right auditor who simply didn't catch it.
>
> CHAIRMANMOSS: *It wasn't a change of opinion?*
>
> MS. BUSSER: *No.* Furthermore, she raises the objection that res judicata prevents us from denying her this refund because *we had previously granted her refund in error.* Well, res judicata in its simplest terms means a final legal ruling. *Those refunds that were granted were not a final legal ruling. That was an error.*

MR. GAREAU: There was no legal dispute. She made an application and unfortunately for us, we're barred by statute of limitations, so we can't revisit those years. That's unfortunate for us, fortunate for her.

MR. BADALAMENTI: *So CCA has never changed their stance on this particular thing ever?*

MS. BUSSER: *No.*

MR. GAREAU: As far as I'm aware, I can't speak to what prior individuals may or may not have thought.

MR. BADALAMENTI: *In your tenure you guys have not changed?*

MR. GAREAU: I've only been involved in the determination of one of these cases more recently. *Since I've become involved, we've always held the opinion and that is probably because of the case law.*

Even if we had a prior opinion, once the case law had developed, as it is, we would have had to change our opinion.

CHAIRMAN MOSS: So when something like this comes before an auditor, they look at it, they have a question, they take it to someone else I assume, says what do we do with this?

MR. GAREAU: They just go through an approval process. *Whoever was approving it said they were in Florida.* Sometimes, unfortunately, they don't look more closely at what the real issue is and sometimes it gets missed.

(Id. at pp. 41, line 7, to 43, line 4.) Notably, CCA's counsel twice repeated the same *three "mistakes" in a row* factual assertion in her post-hearing Brief. (See, BOR's Transcript to the BTA at unnumbered pages 9-10 of "Exhibit No. B-5.")

Having thus been repeatedly assured by both of CCA's counsel of the supposed fact that CCA's granting serial, 2010, 2011, and 2012 refunds to appellant were merely three "mistakes" in a row, as opposed to the result of CCA's earlier view of what the law required in circumstances where (i) three or more years had elapsed between the grant of employee

stock options and their exercise and (ii) the former employee no longer worked or resided within the jurisdiction in which the options had been earned, by order dated June 5, 2018, the BOR denied Mrs. Willacy's appeal and affirmed appellee Lynch's November 9, 2017, "Assessment." (Appx. at 10 to 14.) In so doing, however, the BOR not only reiterated Mr. Lynch's local law reasoning but also, *sua sponte*, created a fiction in order to avoid having to address appellant's submissions that Mr. Lynch's November 9 "Assessment" ran afoul of *res judicata*, collateral estoppel, and Cleveland's own statute of limitations, CCO §191.1701; stating:

> Taxpayer further argues in her Affidavit submitted to this Board that collateral estoppel and res judicata apply based upon the City's previous granting of refunds for Tax Years 2010 and 2011 for income tax withheld on stock option sales. Taxpayer also argues that the Tax Administrator's actions are barred by the statute of limitations. This Board's jurisdiction is set forth in Ohio Revised Code Section 718.11 as permitting the Board to "affirm, reverse, or modify the tax administrator's assessment or any part of that assessment."
>
> Taxpayer failed to raise the arguments of collateral estoppel, res judicata and statute of limitations in her September 28, 2017 Request for Refund. Accordingly, these arguments were not addressed by the Tax Commissioner in the Assessment in this case. Because there is no ruling or decision of the Tax Administrator with respect to collateral estoppel, res judicata and statute of limitations, this Board is unable to perform any review with a view toward affirming, reversing or modifying the Commissioner's ruling with respect to these arguments, and, thus, this Board has no jurisdiction to address them[.] Additionally, these arguments were not set forth in Taxpayer's notice of appeal to this Board, and were submitted to the Board on [*sic.*, "only"?] a few days before the hearing, thereby not affording the Tax Administrator the opportunity to prepare for those arguments.

Mrs. Willacy then appealed to the Board of Tax Appeals from the BOR's said decision; identifying therein fifteen individualized claims of error for that board to review

and additionally including "all further claims of error heretofore submitted to the aforesaid Board of Income Tax Review in her amended notice of appeal submitted to that municipal board." (Id. at Exhibit Nos. E and F.) Before that appeal could be briefed, appellees' filing corrections to the record was necessary, inasmuch as documents supporting *appellant's* position had been omitted from the record which appellees originally certified. (See, BTA's "Abstract of Docket" at "Document 4.") In the same filing appellant also requested that CCA produce whatever evidence its counsel had to support their claims that CCA's refunding her 2010, 2011, and 2012 withholdings resulted from errors. (Ibid.) In response to appellant's last-mentioned requests that CCA disclose whatever evidence its counsel had to support their claims that CCA's refunding appellant's tax years 2010, 2011, and 2012 withholdings resulted from "errors" and "mistakes," appellees' counsel grudgingly admitted that *no such evidence existed*, stating:

> There's no additional evidence to support an error was made outside of the fact that Appellant admits she had received refunds for said tax years. Thus, delving into the thought process of the auditor who granted the refund [*sic*., "refunds"?] in error in an attempt to support such an untenable position serves no purpose.

(BTA's "Abstract of Docket" at "Document 5," CCA's "Objection to Motion to Supplement the Record" at 3.)

Between October 12, and October 15, 2018, the parties briefed the case to the BTA, addressing every error assigned and issue presented. (See, BTA's "Abstract of Docket" at Documents 9 and 10.) The BTA then withheld its decision for more than a year; not releasing it until May 27, 2020. (Appx. at 1.) Notably, in its decision the BTA assayed the merits of one of the three issues which the BOR erroneously concluded Mrs. Willacy

had not appealed – *i.e*., appellant's collateral estoppel assignment – although the BTA did not sustain that assignment. (Id. at 2.) Incongruously, however, the BTA wholly failed to address appellant's identically presented statute of limitations assignment; affirmed the BOR's decision; and overruled appellant's application for reconsideration. (Appx. at 4.) This appeal followed.

IV. Argument

Synopsis of the Argument

In simple terms, this case arises out of Cleveland's taxing the proceeds of three stock sales which Mrs. Willacy received during calendar year 2016. Those three sales occurred roughly seven years after her (i) March 2009 resignation from Sherwin-Williams' employ, (ii) termination of all residential, property ownership, and employment connections with the State of Ohio, and (iii) becoming a Florida domiciliary. Among others, this case presents issues which were not decided in *Willacy I* – issues arising out of Cleveland's own statute of limitations, CCO §191.1701; the collateral estoppel aspect of the doctrines of *res judicata* and administrative *res judicata*; and ways in which both Cleveland's and Ohio's tax laws and public policies point towards conclusions opposite to those which this Court reached in *Willacy I*.

Succinctly stated, Mrs. Willacy's appeal in this case makes plain that (i) Cleveland's issuing an "assessment" against appellant in 2017, in an attempt to justify its unlawful refusal to return the withholding tax collected from her in 2016 on the ground that she had worked in Cleveland for, and been paid by, Sherwin-Williams during 2007, was barred by

the *April 15, 2011*, expiration of Cleveland's three year statute of limitations applicable to appellant's 2007 earnings (CCO §191.1701). This case also makes plain that (ii) the issue preclusion aspect of administrative *res judicata* which arose from Cleveland's having previously refunded all withholding amounts taken from appellant's 2010, 2011, and 2012 stock sales proceeds was binding upon, and should have been honored by, CCA in ruling upon her 2017 refund request; and (iii) that Cleveland's self-imposed, statutory requirement that it conform its income tax policies to those of the State of Ohio required it to adhere to the same policies which Ohio imposed upon itself when dealing with the question of whether profits made *by nonresidents* from selling option-derived stocks were or were not taxable. Further, appellant also re-asserts the Due Process submissions which this Court rejected in *Willacy I*; noting that clear and cogent reasons warranting this Court's reversing itself on the points of law decided in that case have already been pointed out by one justice of this Court. See, *Willacy I* at {¶¶36-61}.

In short, given (i) the temporal strictures imposed by CCO §191.1701 upon taxable events which occurred during calendar year 2007; (ii) the impossibility of Cleveland's satisfying or complying with the foundational requisites of Due Process noted in *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344-345, 74 S.Ct. 535, 98 L.Ed. 744 (1954) that "*due process requires some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax,*" insofar as calendar year 2016 is concerned; (iii) Cleveland's statutory restriction of its taxing powers to those restrictions set forth in the State of Ohio's tax laws; and (iv) the collateral estoppel effect of Cleveland's

having repeatedly upheld appellant's exemption from taxation on non-residency grounds, we submit that appellees are unavoidably in a four-way "whipsaw" position in this case.

Our reasons for those submissions are presented under Propositions of Law Nos. 1 through 3.

***Proposition of Law No. 1*:**

Because CCA allowed more than three years to pass from the April 15, 2008, date on which appellant's 2007 tax return was required to be filed before it attempted to tax her upon the grant of options which she received in October 2007, and which grant Cleveland classified as "wages," CCO §191.1701 barred them from asserting any assessment against appellant in 2016 and the BTA's failure to review that issue was erroneous, unreasonable, and constituted an abuse of discretion, as the record plainly shows that appellant appropriately raised that period of limitations issue in her amended notice of appeal to the BOR and in her subsequent appeal to the BTA.

Although appellant's instant case was submitted to the Board of Tax Appeals ("BTA") in October 2018 – long before July 9, 2019, when *Willacy I* was argued to this Court – it raised several dispositive issues which were not reviewed in *Willacy I*. One such issue involves CCO §191.1701, Cleveland's own "statute of limitations." By that ordinance Cleveland's City Council put a time limit on its power to assert that an individual owes Cleveland an amount of income tax; confining same to a three year period, measured from the later of the date on which a taxpayer's tax return was filed or the date on which it was required to be filed; that ordinance providing:

> All taxes imposed by this chapter shall be collectible, together with any interest and penalties thereon, as other debts of like amount are recoverable, including, but not limited to, collection by suit. Any suit shall be brought within three (3) years after the city income tax was due or the return was filed, whichever is later. *Except in the case of fraud, of omission of twenty-five percent (25%) or more of taxable income required to be reported, or of*

> *failure to file a return, no additional assessment shall be made after three (3) years from the time the city income tax was due or the city income tax return was filed, whichever is later*.
>
> (Ord. No. 2208-04. Passed 12-13-04, eff. 12-17-04)

Where a statute prescribes a specific limitation upon the time within which a party is entitled to commence a legal proceeding, that party's failure to do so within that time limit causes its right to commence such proceeding at a later date to be forever precluded and "*barred*." See, *e.g.*, *Cleveland Metropolitan Bar Association v. Callahan*, 150 Ohio St.3d 227, 2017-Ohio-5700 at {¶3}: "***Callahan failed to file a lawsuit before the statute of limitations expired on Moore's claim. Consequently, Moore's action is time barred." The same type of bar also arises in tax cases. See, *Schoenrade v. Tracy*, 74 Ohio St.3d 200, 203, 1996-Ohio-139, 658 N.E.2d 247 (1996): "*After the statute of limitations expires* ***the taxpayer has a right*** *to plead the statute as an affirmative defense*, but until the statute expires the taxpayer has no rights under the statute of limitations in question." Notably, the "right" to the bar of the statute of limitations thus conferred is a substantive right. See, *Nestle R & D Center, Inc. v. Levin*, 122 Ohio St.3d 22, 2009-Ohio-1929, 907 N.E.2d 714 (2009) at {¶ 21}, citing and quoting fn. 2 of *Coca-Cola Bottling Corp. v. Lindley*, 54 Ohio St.2d 1, 5, 8 O.O.3d 1, 374 N.E.2d 400 (1978).

In the administrative proceedings below, just as they did in *Willacy I*, appellees claimed that despite appellant's total lack of contact with Ohio for seven years, Cleveland's CCA had jurisdiction to tax appellant's stock sales income during 2016 because she had earned the 2007 options grant, through which she acquired the stock she sold in 2016, by working in Cleveland for Sherwin-Williams:

> In response to your request for a refund of your 2016 withholdings for stock options granted to you via your former employer, Sherwin Williams Co., your refund request is denied and an assessment is issued.
>
> This assessment is due to the fact that stock options are taxable qualifying wages pursuant to State and local laws, specifically: Ohio Rev. Code Sec. 718.0 l(R)(2)(b) and Cleveland Codified Ordinances Sec. 718.0 l (hh)(2)(B), both of which [] set forth the definition of qualifying wages which includes "stock options."
>
> ***
>
> In the present case, you received stock options as compensation for services performed for Sherwin Williams Corp and earned this compensation while employed in the City of Cleveland. As in *Wardrop*[*v. Middletown Income Tax Review Board*, 2008 WL 4541996 (Ohio App. 12 Dist.)], the proceeds of the options are valued when they are exercised but still subject to taxation where they were earned.
>
> *** [W]here value can't be determined at the time of deferral due to restrictions placed on the compensation, it can be valued when the stock sale or gain is realized and at that time subject to taxation in the jurisdiction where it was earned.
>
> ***
>
> Cleveland Income Tax is assessed against both residents and non-residents for work performed or wages earned within the city's jurisdiction. Sherwin Williams granted these stock options for work performed within the City of Cleveland, and hence, the earnings from said options are subject to Cleveland Income Tax.

Due to this Court's adoption of that theorem in {¶10} of *Willacy I*, the nub of appellant's "statute of limitations" submission is that ***if*** the *jurisdictional foundation* of Cleveland's and CCA's claimed right to tax her 2016 option-derived, stock sales income – *i.e.*, that the October 19, 2007, *grant* of options constituted compensation *paid in 2007* – is accepted as true, ***then*** the time within which the city was obliged to exercise its claimed right to tax her upon the value of that grant expired on *April 15, 2011*, roughly four years

after the options grant was given and nearly five years *before* the beginning of tax year 2016. Here, it was not until 2016 that CCA received the withholding amount which is now in issue and not until 2017 that it entered an assessment regarding same.

Cleveland's and *Willacy I*'s view that appellant's *receipt* of the 2007 grant itself constituted a receipt of compensation is diametrically opposite to the holding of the seminal case upon which they rely; the Court in *Commissioner of Internal Revenue v. LoBue*, 351 U.S. 243, 76 S.Ct. 800, 100 L.Ed. 1142 (1956) stating at 351 U.S. 248, "We hold that LoBue realized taxable gain when he purchased the stock[,]" and at 249 that, "The taxable gain to LoBue should be measured as of the time the options were exercised, and *not the time they were granted*." Other courts have similarly so held. See, e.g., *Wisconsin Central Ltd. v. United States*, 585 U.S. __, 138 S.Ct. 2067, 201 L.Ed.2d 490 (2018) (Employee stock options are not taxable "compensation" under the Railroad Retirement Tax Act because they are not "money remuneration"); *Hartman v. City of Cleveland Heights*, 94-LW-4245, Cuya. App. No. 66074 (1994) ("[I]n the view of this court, plaintiff's exercise of the stock option *** yielded him earned compensation which took the form of stock attained at lower than market price. Accordingly, the exercise of the stock option was taxable by the city"); *In re Appeal of Whitpain Township Board of Supervisors*, 942 A.2d 959, 964 (Pa.Cmwlth. 2008):

> [W]e hold that the taxable income from Mr. Unruh's stock options was received when those options were exercised and could be taxed upon a readily ascertainable value. Because Mr. Unruh neither lived nor worked in the Township at that time, it had no authority to tax such income.

However, if it is postulated that Sherwin-Williams paid compensation to appellant on October 19, 2007, then the conclusion is inescapable that due to CCO §191.1701 Cleveland's failure to act before April 15, 2011, barred and precluded Cleveland's right to enter an assessment against appellant premised upon those 2007 options on any later date. This is so because Cleveland's subject assertion of its claimed right to tax appellant's 2016 options grant proceeds took place roughly five years after April 15, 2011, when the three year limitations period applicable to the 2007 options grant ran out.

As a simple matter of law, the fact that Cleveland and CCA made no assessment referable to Mrs. Willacy's receipt of Sherwin-Williams' 2007 options grant during the three year period from April 15, 2008 [CCO §191.1701] through April 15, 2011, gave rise to the bar against their making any assessments referable to appellant's 2007 income *after* April 15, 2011.[4] *Callahan*, *Schoenrade*, and *Nestle*, supra. Here, appellant did exactly what *Schoenrade* says should be done in such a circumstance. After the statute of limitations expired, appellant "*pleaded the statute as an affirmative defense*" when she appealed to the BOR from Mr. Lynch's November 9, 2017, assessment; and, since then has reiterated her assertion of that bar to the BTA (Appx. 1) and now to this Court.

As we see it, Cleveland and CCA cannot have it both ways. They cannot be heard to claim that Mrs. Willacy's receipt of options in 2007 constituted a payment of wages when she worked in Cleveland and, thus, afforded them the right to tax its monetary value

[4] Looking retrospectively from a 2017 perspective, that bar arose due to "the prior operation of" CCO §191.1701 and, therefore, was "not *** affect[ed]" by Cleveland's 2015 amendatory reenactment of CCO §191.1701 as new CCO §192.41. See, R.C. §1.58(A). *Cf*., CCO §191.2702.

as income, but that neither Cleveland nor CCA was obliged to make its assessment of tax based on that payment before the three year period of limitations ran out and barred their right to do so. Appellees' predictable assertion that Cleveland and CCA could not assign a monetary value to the options thus granted before appellant exercised them and sold some of the shares thereby acquired is not only negated by the facts that (i) Sherwin-Williams published the value of that grant in its Annual Report; (ii) both the Black-Scholes algorithm and binomial options pricing model ("BOPM") noted in appellant's May 1, 2018, affidavit were also available to them (Supp. 1 at ¶¶20-23); but also, and more importantly (iii) by the commonly known fact that shares of Sherwin-Williams' common stock have long been publicly traded on the New York Stock Exchange, with the per share market value of that stock having long been readily discernible at any time, both in newspapers such as the Cleveland Plain Dealer as well as through the internet. Thus, even if one assumes that CCA's placing a value upon appellant's options grant was not possible during the first year following her receiving them – *i.e.*, from October 19, 2007, through October 19, 2008 – no such impossibility precluded CCA from determining the actual value thereof on any day between October 19, 2008, and the April 15, 2011, date on which the three year limitations period ran out.

One key point necessitating reversal here, however, is not simply that the BOR and BTA affirmed appellee Lynch's assessment, but that they did so without even addressing the dispositive issue of the statute of limitations. Obviously, a time-barred assessment, objected to as such, cannot serve as the basis for the imposition of a tax upon income. Thus, the BOR and BTA should have addressed and answered the question of whether Mr.

Lynch's subject assessment was time-barred. Accordingly, their failures – particularly, the BTA's failure – to address that question constitutes both an error of law and an abuse of the decisional discretion reposed in that body. This Court has repeatedly so held in closely analogous cases in which an administrative tribunal fails to address an outcome determinative question before rendering its decision. See, e.g., *State ex rel. LTV Steel Co. v. Industrial Commission*, 85 Ohio St.3d 75, 82, 1999-Ohio-205, 706 N.E.2d 1245 ("[W]e agree with the magistrate that the commission abused its discretion in not addressing the question of whether claimant's 1991 retirement was voluntary"); *State ex rel. Noll v. Industrial Commission*, 57 Ohio St.3d 203, 567 N.E.2d 245 (1991) at the syllabus ("In any order of the Industrial Commission granting or denying benefits to a claimant, the commission must specifically state what evidence has been relied upon, and briefly explain the reasoning for its decision"); *State ex rel. Chrysler Corp. v. Industrial Commission*, 62 Ohio.St.3d 193, 196, 580 N.E.2d 1082 (1991) (affirming the court of appeals' order returning the matter to the industrial commission because the commission failed to address the issue of voluntary retirement).

Accordingly, the BTA's May 27, 2020, decision in this case must either be reversed with a final judgment being entered in appellant's favor on the basis of the statute of limitations or reversed and remanded to that board with instructions for it to consider and address appellant's statute of limitations assignment of error.

***Proposition of Law No. 2*:**

Because "due process requires some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax," an Ohio municipality's imposing an income tax in 2016 upon a non-resident whose only connection with it is that she had received a grant of stock options from her former employer while working in that municipality in 2007, last worked there in 2009, left Ohio and retired to Florida in 2009, and exercised the last of those options in 2016, violates her rights to Due Process under the Fourteenth Amendment to the United States Constitution and the Due Course of Law Clause of Section 16, Article I of the Ohio Constitution.

The facts underlying this proposition of law are clear, simple, and undisputed. On October 19, 2007, appellant received a grant of stock options from her then-current employer in Cleveland, Ohio. Because those options' per share exercise price remained greater than the stock's per share market price throughout the time appellant remained so employed, she did not exercise any of them.

In March 2009, appellant retired, relocated to Florida, and became a Florida domiciliary. Not until the following year, in March of 2010, did the stock's market price exceed the options' per share exercise price. When appellant exercised the last of her options during 2016 and simultaneously sold them, her Cleveland-headquartered, former employer withheld two percent of her sales proceeds and remitted that amount to the City of Cleveland as withholdings for Cleveland's income taxes.

Appellant's request for a refund of the withholding amount was refused by Cleveland's income tax agent, "CCA," on the ground that its municipal ordinances authorized it to collect income taxes upon the exercise of options regardless of whether the options' holder was an employee and a nonresident when the options were exercised. That refusal was affirmed through two rounds of administrative appeals on the grounds that in

a prior case involving options she had exercised and sold in 2014 and 2015, Ohio's Supreme Court had (i) held "that Cleveland's taxation of Willacy's compensation in 2014 and 2015 was required under municipal law[,]" and (ii) that Ohio's Supreme Court had "also decided the constitutional arguments in favor of Cleveland." (Appx. 1.) This appeal ensued.

Appellant submits that both United States and Ohio constitutional law decisions compel the conclusion that, as applied to her, Cleveland's taxing ordinance, CCO §192.06(hh)(2)(B), which putatively authorized taxing the proceeds of her sales of option-derived stock was in derogation of the Due Process clause of the Fourteenth Amendment to the United States Constitution and the Due Course of Law clause of Section 16, Article I, of the Ohio Constitution. We so submit not only because numerous decisions from the United States Supreme Court and this Supreme Court of Ohio have so held in closely analogous cases but also because Ohio's public policy and at least one Cleveland ordinance all point towards the same conclusion.

The U.S. Supreme Court decision which unmistakably states the governing principles is *North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust*, __ U.S. __, 139 S.Ct. 2213, 2219-2221, 204 L.Ed.2d 621 (2019), which pronounces:

> In the context of state taxation, the Due Process Clause limits States to imposing only taxes that "bea[r] fiscal relation to protection, opportunities and benefits given by the state." *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444, 61 S.Ct. 246, 85 L.Ed. 267 (1940). The power to tax is, of course, "essential to the very existence of government," *McCulloch v. Maryland*, 4 Wheat. 316, 428, 4 L.Ed. 579 (1819), but the legitimacy of that power requires drawing a line between taxation and mere unjustified "confiscation."

> *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 342, 74 S.Ct. 535, 98 L.Ed. 744 (1954). That boundary turns on "[t]he simple but controlling question ... whether the state has given anything for which it can ask return." *Wisconsin*, 311 U.S. at 444, 61 S.Ct. 246.
>
> The Court applies a two-step analysis to decide if a state tax abides by the Due Process Clause. First, and most relevant here, there must be " 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' " *Quill*, 504 U.S. at 306, 112 S.Ct. 1904. Second, "the 'income attributed to the State for tax purposes must be rationally related to "values connected with the taxing State." ' " Ibid.[5]
>
> To determine whether a State has the requisite "minimum connection" with the object of its tax, this Court borrows from the familiar test of *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). *Quill*, 504 U.S. at 307, 112 S.Ct. 1904. A State has the power to impose a tax only when the taxed entity has "certain minimum contacts" with the State such that the tax "does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co.*, 326 U.S. at 316, 66 S.Ct. 154; see *Quill*, 504 U.S. at 308, 112 S.Ct. 1904. The "minimum contacts" inquiry is "flexible" and focuses on the reasonableness of the government's action. *Quill*, 504 U.S. at 307, 112 S.Ct. 1904. Ultimately, only those who derive "benefits and protection" from associating with a State should have obligations to the State in question. *International Shoe*, 326 U.S. at 319, 66 S.Ct. 154.

Notably, all of the decisional criteria which the Court set forth in those three paragraphs speak in the *present – not* the past – *tense*. In other words, the *Kaestner* court's focus was upon *contemporaneously existing contacts and connections* to permit taxation – *not* upon temporally remote contacts and connections which no longer exist. And, as shown below, that focus upon current, rather than past, indicia of contacts between the individual and the taxing governmental entity is congruent with what Ohio's and Cleveland's laws and policies required.

In 2007, Ohio's tax department noted a gap which created ambiguity in R.C. §5747.01; that ambiguity being, "Nothing in division (A) of section 5747.01 of the Revised Code allows a deduction for income or gain of a non-liable MFJ [married filing jointly] spouse solely because such income or gain is neither earned nor received in this state." (See, former Ohio Admin. Code §5703-7-18(C)(1)(b).) Thus, from March 17, 2007, through September 7, 2018, Ohio's Department of Taxation prohibited the taxation of a *nonresident's* profits from, among other things, the sale of stock in publicly-traded companies; Ohio Admin. Code §5703-7-18(E)(3) directing that:

> *With respect to the income [wife] earned after establishing residency in another state and with respect to the capital gain [wife] recognized after establishing residency in another state, [husband] and [wife] can claim the nonresident credit allowed by division (A) of section 5747.05 of the Revised Code.*[5]

As we see it, the apparent purpose of that rule was to insure that Ohio would not inadvertently violate nonresidents' Fourteenth Amendment Due Process rights by taxing them or their spouses for income not earned or received in Ohio. The existence of this rule readily explains *why* the State of Ohio refunded every cent of the withholding tax amounts

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[5] A rule duly promulgated by an administrative agency pursuant to statutory authority has the force and effect of law. *Krehnbrink v. Testa*, 148 Ohio St.3d 129, 2016-Ohio-3391, 69 N.E.3d 656, at {¶34}, Kennedy, J., concurring; *Lyden Co. v. Tracy*, 76 Ohio St.3d 66, 69, 1996-Ohio-112, 666 N.E.2d 556; *Ohio Council 8, Am. Fedn. of State, Cty. & Mun. Emp., AFL-CIO v. Cincinnati*, 69 Ohio St.3d 677, 680, 1994-Ohio-366, 1994-Ohio-367, 635 N.E.2d 361 (1994). Courts may also look to such rules as sources of "clear public policy." *Painter v. Graley*, 70 Ohio St.3d 377, 1994-Ohio-334, 639 N.E.2d 51, at paragraph 3 of the syllabus. Accord, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Ohio had received from Sherwin-Williams referable to Mrs. Willacy's option-derived stock sale profits in tax years 2010, 2011, 2012, 2014, 2015, and 2016.

The fact that Ohio Admin. Code §5703-7-18(E)(3) remained in full force and effect throughout 2010, 2011, and 2012 just as readily explains *why* Cleveland's taxing agent, CCA, likewise refunded every cent of the withholding tax amounts which Cleveland had received from Sherwin-Williams referable to the same option-derived stock sale profits in tax years 2010, 2011, and 2012. That is so because CCO §191.0901(o)'s expressly exempted from Cleveland's taxing power, "compensation, net profits and other income earned and/or received by a taxpayer" the taxation of which is "prohibited by ***State*** *or federal* law[.]"[6] In this regard we remind this Court that the glibly articulated representations of three serial "mistakes" which CCA urged to the BOR were later admitted to be utterly groundless when the matter arrived at the BTA level.

Also worthy of note insofar as guidance from administrative rules is concerned is the fact that effective January 1, 2016, CCA itself amended its own rule regarding collecting withholding taxes upon *former* employees' sales of option-derived shares through disqualifying dispositions; the following newly added amendment to CCA's former Rule 3:01(B)(8) now appearing as the second sub-paragraph of what is now numbered as CCA's Rule 3:01(B)(9):

[6] To the extent that *Willacy I* rejected appellant's assertion that CCO §191.0901(o) required Cleveland to refund her 2014 and 2015 withholdings on federal law grounds, we respectfully submit that Ohio Admin. Code §5703-7-18(E)(3) warrants this Court's overruling same in the case at bar.

> An employer, agent of an employer, or other payer is not required to withhold municipal income tax with respect to an individual's disqualifying disposition of an incentive stock option if, at the time of the disqualifying disposition, the individual is not an employee of either the corporation with respect to whose stock option has been issued or of such corporation's successor entity." [Appx. 23 at 25. Punctuation *sic*.]

Notably, nothing in that rule requires that the former employee be a nonresident of Cleveland in order to be entitled to its benefit. (See, CCA Rule 3:02.) Given appellant's *nonresident* retired former employee status throughout 2016 and CCA's status as Cleveland's tax collection agent, we look forward to reading appellee's explanation of why that amendment to their own rules did not prompt CCA to grant appellant's 2017 refund request for the withholding taxes taken from her three, 2016 option-exercise transactions.

Moreover, reference to those of Ohio's tax department's published "Income Tax - Information Release[s]" which bear upon the issues in this case reinforces appellant's submissions that in and before 2016 Ohio's interpretations of its own tax laws was congruent with Mrs. Willacy's views and opposite to those which CCA took in tax years 2014, 2015, and 2016.[7] For example, on page 2 of the January 10, 2014 revision of IT 2001-01, "Nexus Standards & Filing Safe Harbors for Individuals," the department stated:

> *** Based on R.C. 5747.02, a nonresident individual has nexus with Ohio when s/he engages in one or more of the following activities:
> - The nonresident earns compensation (e.g., wages, salary, tips, bonuses) for services performed in Ohio;

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[7] Although they are not entitled to the kind of "*Chevron* deference" which courts ordinarily afford to formally adopted administrative rules, an administrative agency's less formal pronouncements of its own policies may still be accorded persuasive effect, as "they do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

- The nonresident has real, tangible, or intangible property in Ohio;
- The nonresident, either directly or indirectly (e.g., via an investment in a pass-through entity) engages in a trade or business operating in Ohio.

***

Once a nonresident has nexus *for a given tax year*, s/he is generally required to file returns and pay the appropriate tax *for that tax year*. *** **Nexus is determined on a tax year by tax year basis; if the taxpayer has nexus for a given tax year, then filing and payment is generally required.**

[Appx. at 34. Bold face type shown above appears in the original. Italics added.] Here, it cannot be over emphasized that not only does the department's policy speak in present tense terms – *i.e.*, in terms of the critical events taking place within the same year for which the tax is charged – but also that appellant had no nexus whatsoever with Cleveland after she relocated to Florida in early 2009. The latter fact is inescapable not only because she performed no services in Ohio for anyone after March 2009 but also because she did not avail herself of governmental services provided by Ohio nor any of its political subdivisions after relocating to Florida in March 2009.

In this regard, the salient point remains that appellant had *no* "minimum contacts" and *no* "nexus" with Ohio in 2016 and, accordingly, was not subject to being taxed by Cleveland in that year. Therefore, due to CCO §191.0901(o)'s exemption from Cleveland's taxing power of "*compensation*, net profits and other income *earned and/or received* by a taxpayer" the taxation of which is "prohibited by ***State*** *or federal* law[,]" Cleveland and CCA's taxing of her 2016 stock sales proceeds was likewise unauthorized.

Appellant reiterates that CCA could have avoided this controversy by taxing her 2007 option-based "income" in late 2008 or before appellant moved to Florida in early 2009, instead of permitting Cleveland's three year statute of limitations to expire. Of

course, if CCA had done that, Cleveland would have received much less money, but it would not have later felt compelled to mislead the BOR with fancied tales of "mistakes" nor to devise the kinds of "angels dancing on pinheads" arguments which we have seen to date in order to evade Mrs. Willacy's clear constitutional right to Due Process.

For all of the foregoing reasons appellant's instant second Proposition of Law is well taken and should be sustained.

***Proposition of Law No. 3*:**

Because the issue of whether the issue preclusion aspect of administrative *res judicata* arising from its having conceded in 2011, 2012, and 2013 that appellant's status as a non-resident, Florida-domiciled, former Sherwin-Williams employee required CCA to refund all withholdings taken from her 2010, 2011, and 2012 option exercise and sale transactions estopped CCA from contesting an identical refund request in 2016 was a dispositive issue, BTA erred and abused its decisional discretion by refusing to consider and decide that issue.

The record in this case is undisputed that in 2011, 2012, and 2013 appellant applied to Cleveland's CCA for refunds of withholding taxes which Sherwin-Williams had taken from the proceeds of so-called "cashless" option exercise transactions in 2010, 2011, and 2012 and remitted to CCA.[8] The record is also undisputed that the sole basis appellant cited for the requested refunds was that she had retired from Sherwin-Williams employ and relocated to Florida. And the record is similarly undisputed that upon verifying the truth

[8] The term "cashless exercise" refers to an agreed upon method of exercising stock options whereby a broker ordinarily agrees to advance the strike price of the options to his client, purchases them on that client's behalf, and immediately sell them on the market at a higher price, resulting in the client's receiving the difference between the strike price and the market price. See, e.g., *Miller v. United States*, 345 F.Supp.2d 1046, 1047 (N.D. Cal. 2004).

thereof, CCA granted each of those refund requests on the basis of appellant's non-residence.

However, in 2014 and 2015, CCA refused to issue similar refunds of the withholdings taken from essentially identical "cashless" option exercise transactions. In proceedings starting in 2017 and continuing into early 2020, Appellant contested those refusals administratively and ultimately before this Court. While those prior proceedings were pending and undetermined, CCA again refused to refund withholdings taken from yet another, essentially identical, "cashless" option exercise transaction – this one referable to tax year 2016 – as to which CCA issued its refusal in 2017. At the time CCA entered that 2017 refusal, no change in the applicable statutory or decisional law had occurred. Appellant's subsequent appeals to Cleveland's BOR and to BTA from that refusal resulted in CCA's 2017 refusal's being affirmed. The matter is now before this Supreme Court upon appellant's appeal as a matter of right.

Appellant submits that CCA's 2011, 2012, and 2013 administrative grants of her refund requests gave rise to administrative *res judicata's* collateral estoppel bar upon the question of whether her continued status as a retired, non-resident, domiciled in Florida required CCA, Cleveland's BOR, and BTA to sustain her 2016 refund request. She so submits because Ohio law is well settled that where the same parties are involved, collateral estoppel does arise from the first adjudication upon a question of law. See, *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, 653 N.E.2d 226, at the syllabus and at 381-384. The fact that the first three determinations resulted from CCA's voluntary concessions that appellant's status as a non-resident retiree precluded Cleveland from

taxing the proceeds of her "cashless" option exercise transactions, as opposed to having resulted from contested administrative or judicial determinations is of no moment whatsoever. This is so because, as the court held in *Ohio State Medical Bd. v. Zwick*, 59 Ohio App.2d 133,139-140, 392 N.E.2d 1276, (Medina App. 1978):

> A consent decree is valid even though the court fails to deliberate and pass upon the matters in controversy, 47 America Jurisprudence 2d 144, Judgments, Section 1089, and even if all charges are withdrawn by either party, 32A Ohio Jurisprudence 2d 347, Judgments, Section 836. The effect of a consent decree is noted in 32A Ohio Jurisprudence 2d 350, Judgments, Section 840:
>
> > " * * * The law has been broadly laid down that as between parties Sui juris, and in the absence of fraud, a judgment or decree of a court having jurisdiction of the subject matter, rendered by consent of the parties, though without any ascertainment by the court of the truth of the facts averred, is binding and conclusive between the parties and their privies and may be used as a basis for the application of the doctrine of res judicata. Such a judgment is considered as binding and conclusive as one rendered in an adversary suit, in which the conclusions embodied in the decree had been based upon controverted facts and due consideration thereof by the court." * * *

It is also so because:

> A judgment entered by agreement or consent is an adjudication as effective as if the merits had been litigated and remains, therefore, just as enforceable as any other validly entered judgment for res judicata purposes. However, a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it.

63 Ohio Jurisprudence 3d, Judgments § 399 (2020) (footnotes omitted).

And it is indisputably so because of the holdings in *Warrensville Heights City School District Board of Education v. Cuyahoga County Board of Revision*, 152 Ohio St.3d 277, 2017-Ohio-8845, 95 N.E.3d 359 at {¶¶8-10}:

> {¶ 9} Collateral estoppel "precludes the relitigation, in a second action, of an issue that has been actually and necessarily litigated and determined in a prior action." *Whitehead v. Gen. Tel. Co.*, 20 Ohio St.2d 108, 112, 254 N.E.2d 10 (1969). Although each tax year presents a different "ultimate issue of tax

> value," "the determination in an earlier year of a discrete factual/legal issue that is common to successive tax years may bar relitigation of that discrete issue in the later years." *Olmsted Falls Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 122 Ohio St.3d 134, 2009-Ohio-2461, 909N.E.2d 597, ¶ 17, citing *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 10th Dist. Franklin No. 92AP-1715, 1993 WL 540285, *3 (Dec. 28, 1993)[,]

and *Aspinwall v. Mentor Board of Tax Review*, 146 Ohio App.3d 466, 2001-Ohio-8896, 766 N.E.2d 1034 (Lake App. 2001) at {¶13}:

> {¶13} Next, we address appellants' argument that res judicata is not applicable to the December 2, 1998 denial. The doctrine of res judicata is applicable to quasi-judicial decisions by administrative agencies from which no appeal is taken. *Cole v. Complete Auto Transit, Inc.* (1997), 119 Ohio App.3d 771, 777, 696 N.E.2d 289; *Wade v. Cleveland* (1982), 8 Ohio App.3d 176, 8 OBR 236, 456 N.E.2d 829, paragraph two of the syllabus. In order for res judicata to apply, the parties and issues in the proceedings must be identified. *Id*. Res judicata precludes relitigation of the same issue when there is mutuality of the parties and when a final decision has been rendered on the merits. *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 653 N.E.2d 226. In the case sub judice, a decision, involving appellants, Mentor, and CCA and concerning appellants' CCA refund application for taxes paid on their 1995 lottery winnings, was rendered on December 2, 1998, from which appellants did *not* appeal. Clearly, appellants' June 4, 1999 letter, requesting another review of their original CCA refund application, involved the same parties and issue. Appellants' June 4, 1999 request is barred by the doctrine of res judicata. [Italics *sic*.]

Any lingering doubt regarding the applicability of appellant's foregoing issue preclusion submissions to tax cases is dispelled by this Court's recent, albeit somewhat cryptic, decision in *Christian Voice of Central Ohio v. Testa*, 147 Ohio St.3d 217, 2016-Ohio-1527, 63 N.E.3d 1153 (2016):

> [¶39] The tax commissioner's failure to consider whether Christian Voice exhibits the essential qualities of a church in determining whether it is a " [h]ous[e] used exclusively for public worship" resulted in an overly narrow construction based on an incorrect legal conclusion. *We agree with Christian Voice's first argument--namely, that the primary use of its*

> *property is for public worship*. Because we allow the exemption under R.C. 5709.07(A)(2), we do not address Christian Voice's remaining arguments.

Reference to the parties' briefs in that case quickly reveals that Christian Voice's *first* argument was set forth in its Proposition of Law No. 1, as follows: "The BTA's decision to ignore a property owner's prior tax exemption violates the doctrine of collateral estoppel when no material facts or circumstances changed since the prior determination." In the case at bar, Mrs. Willacy's instant proposition of law, although stated in different words, is to exactly the same effect. Accordingly, we submit that the same rule must be applied to her case as well and that since the BTA failed to rule upon appellant's contention that the issue preclusion aspect of administrative *res judicata* required her refund request to be granted, that failure constituted both legal error and an abuse of discretion. See, *LTV Steel Co*., *Noll*, and *Chrysler Corp*., supra.

In closing, we observe that in the earlier administrative proceedings which culminated with this Court's decision in *Willacy I*, appellant was not afforded a full and fair opportunity to present her case to the agencies below, nor to this Court, as she was hampered by being compelled to litigate in a venue far from either of the two (Florida and California) in which she resided and was further hampered by being compelled to litigate questions arising out of minute factual details regarding events in 2007 more than six years after they occurred. Her counsel was also denied the right to appear at an in-person hearing before CCA's administrator even though he had asked for same in his appeal to the administrator from Ms. Tin's initial determinations. And, as has occurred in this case, in that former case she was also victimized by appellee's counsel's bowdlerizing the record

certified to this Court by conveniently omitting documents which supported her side of the case; necessitating her filing one or more motions seeking to correct the record in such regards which appellee forcefully – and successfully – opposed. We point those facts and circumstances out at this juncture in order to put all concerned on notice not only that the application of collateral estoppel arising from the resolution in *Willacy I* may well be viewed as inappropriate but also, that the ultimate constitutional and state law determinations in that former case may well deserve being overruled by this Court in the case at bar precisely for the reasons Justice Fischer pointedly noted in paragraph {60} of his dissenting opinion in *Willacy I*.

V. CONCLUSION

For all of the foregoing reasons the Board of Tax Appeals' May 27, 2020, Decision and Order must be vacated and reversed and this cause remanded to that Board with instructions to grant a refund to Mrs. Willacy for the full amount withheld as and for income taxes for the year 2016 and make such further orders as may be warranted in the premises.

Respectfully Submitted,

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Email: cyberion12@aol.com

Counsel for Appellant,
Hazel M. Willacy

VI. CERTIFICATE OF SERVICE

On August 24, 2020, the undersigned served copies of the foregoing Merit Brief of Appellant Hazel M. Willacy, and all attachments set forth in the following Appendix thereto, by electronic mail transmission, upon counsel for appellees, the Cleveland Board of Income Tax Review, and Nassim M. Lynch, Administrator, Central Collection Agency, as follows: upon Donna M. Busser, Esq., and William E. Gareau, Jr., Esq., co-counsel for appellee, Central Collection Agency.

/s/Aubrey B. Willacy .
Aubrey B. Willacy, Esq.

VII. APPENDIX TO THE MERIT BRIEF OF APPELLANT HAZEL M. WILLACY

OHIO BOARD OF TAX APPEALS

HAZEL M. WILLACY, (et. al.), Appellant(s), vs. CITY OF CLEVELAND, (et. al.), Appellee(s).	)	CASE NO(S). 2018-758 (MUNICIPAL INCOME TAX) DECISION AND ORDER

APPEARANCES:

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Entered Wednesday, May 27, 2020

Mr. Harbarger, Ms. Clements, and Mr. Caswell concur.

Appellant Hazel M. Willacy challenges a decision issued by the City of Cleveland Income Tax Board of Review ("Board of Review") regarding the taxation of income derived from stock options that were received as compensation while working in Cleveland but exercised after the employee retired and moved out of state. In its decision, the Board of

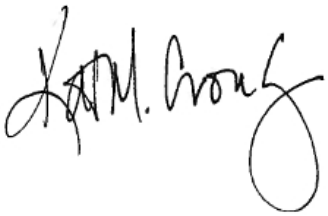
Review affirmed the tax administrator's denial of Willacy's requested refund for her 2016 income taxes, asserting that she moved out of state so the income from the exercise of her stock options were not taxable.

While this case was pending, the Supreme Court issued its decision regarding the taxability of the stock options that Willacy exercised during tax years 2014 and 2015. *Willacy v. Cleveland Bd. of Income Tax Rev.*, Slip Opinion No. 2020-Ohio-314. In this decision, the court concluded that Willacy's exercise of the stock options generated taxable "qualifying wages" and that Cleveland's taxation of Willacy's compensation in 2014 and 2015 was required under municipal law. The court also decided the constitutional arguments in favor of Cleveland. The court declined to address, however, Willacy's argument that Cleveland must refund the tax under the doctrine of res judicata, which she raised in the present appeal. Nevertheless, we find that Willacy has failed to establish that Cleveland should be estopped from denying the refund request in this case. See *Crown Communication, Inc. v. Testa*, 136 Ohio St.3d 209, 2013-Ohio-3126, ¶21 (estoppel generally does not apply against the state, though it may be applied "in a very limited context" where the taxing authority committed himself in writing over an extended period of time to a particular construction of tax law as applied to the taxpayer).

Accordingly, we conclude that Willacy failed to establish that the qualifying wages derived from the exercise of stock options were not properly taxed by the City of Cleveland and hereby affirm the decision of the Board of Review.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Harbarger		
Ms. Clements		
Mr. Caswell		

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.



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Kathleen M. Crowley, Board Secretary

OHIO BOARD OF TAX APPEALS

HAZEL M. WILLACY, (et. al.), Appellant(s), vs. CITY OF CLEVELAND, (et. al.), Appellee(s).	)	CASE NO(S). 2018-758 (MUNICIPAL INCOME TAX) ORDER

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Entered Thursday, June 25, 2020

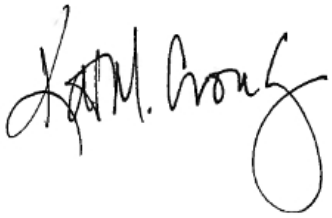
Mr. Harbarger, Ms. Clements, and Mr. Caswell concur.

This matter is now considered upon appellant's motion for reconsideration of this board's decision and order issued on May 6, 2020, in which we affirmed the decision of the Board of Review. In *Matthews v. Matthews*, 5 Ohio App.3d 140 (1981), the court indicated the test to be applied when considering a motion for reconsideration is whether it calls to the

attention of the tribunal an obvious error in the decision, or raises an issue for consideration that was either not considered or was not fully considered. Upon consideration, the appellant's motion fails to meet such standard and is therefore denied.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Harbarger		
Ms. Clements		
Mr. Caswell		

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.



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Kathleen M. Crowley, Board Secretary

OHIO BOARD OF TAX APPEALS

HAZEL M. WILLACY, (et. al.),

Appellant(s),

vs.

CITY OF CLEVELAND, (et. al.),

Appellee(s).

CASE NO(S). 2018-758

(MUNICIPAL INCOME TAX)

ORDER

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Entered Wednesday, September 26, 2018

This matter is now considered upon appellant's motion to supplement the record. At the outset, it appears the City of Cleveland Board of Review does not dispute that several pages of Exhibit A of the statutory transcript certified to this board on August 29, 2018, were inadvertently omitted, and, indeed, it filed a supplement containing the omitted pages on September 21, 2018. It therefore appears that appellant's first two requests to supplement the record are now moot.

Appellant's remaining requests involve evidence she believes should be included in the statutory transcript certified in this matter. R.C. 5717.011 provides:

> "Upon the filing of a notice of appeal with the board of tax appeals, the local board of tax review shall certify to the board of tax appeals a transcript of the record of the proceedings

before it, together with all evidence considered by it in connection therewith."

See also Ohio Adm. Code 5717-1-10. Appellant moves to supplement the certified statutory transcript with evidence to support representations made during the hearing by counsel for the City of Cleveland and the Central Collection Agency regarding prior refunds approved for tax years 2011 and 2012 (requests 3-5). However, appellant makes no assertion that the local board of review relied on anything more the assertions made by counsel during the hearing. The motion to supplement the transcript with evidence in support of such assertions is therefore denied. Appellant's requests are more properly made in the form of discovery issued on the appellee.

Appellant also asks that the transcript be supplemented with copies of her 2010, 2011, and 2012 City of Cleveland tax returns. Again, there is no indication that such documentation was considered by the local board of review in making the determination from which appellant has appealed. The request is denied.

Finally, appellant asks for any memoranda, reports, and/or policy papers regarding the effect of the Supreme Court's decisions in *Saturday v. Cleveland Bd. of Rev.*, 142 Ohio St.3d 528, 2015-Ohio-1625, and *Hillenmeyer v. Cleveland Bd. of Rev.*, 144 Ohio St.3d 165, 2015-Ohio-1623, might have on the City of Cleveland's ability to collect income taxes from non-residents. Once again, there is no indication that the local board of review relied on any such papers in rendering its decision on this matter. Such request is more properly made in the form of discovery on appellee.

Based upon the foregoing, appellant's request, to the extent not already complied with by the September 21, 2018 supplement to the transcript, is hereby denied. As indicated herein, several of appellant's requests appear to be more appropriately directed to the appellee in the form of discovery requests. This board notes that the discovery deadline in this matter, as set in the case management schedule in Ohio Adm. Code 5717-1-07(A)(1), has passed. Further, this board notes that appellant did not request a hearing at which to present new evidence. See Ohio Adm. Code 5717-1-07(A), 5717-1-16(A). Should appellant wish to issue discovery and/or present evidence at a hearing before this board, she should file a motion to extend the case management schedule in accordance with this board's rules. In the absence of any such motion, this matter will be considered ripe for decision after the current deadline to submit written argument, i.e., October 15, 2018.

On behalf of the Board of Tax Appeals,
pursuant to Ohio Adm. Code 5717-1-11

Attorney Examiner

BEFORE THE
INCOME TAX BOARD OF REVIEW
FOR THE CITY OF CLEVELAND, OHIO

Hazel M. Willacy, Taxpayer	)	Case No. 2017-002
	)	
Appellant	)	**ORDER**
	)	
vs.	)	
	)	
Nassim Lynch, Tax Administrator	)	
	)	
Appellee	)	
	)	
	)	

On May 21, 2018, Taxpayer filed a Motion for Extension of Time to file paper copies of her Post-Hearing Brief along with an electronic copy of Taxpayer's Post-Hearing Brief. On May 30, the Tax Administrator filed an electronic copy of his brief. The Board hereby denies Taxpayer's Motion as moot and finds that the Taxpayer's and Tax Administrator's briefs and reply briefs to be moot.

ADOPTED:

Frank M. Badalamenti

James E. Hicks

John M. Moss

June 5, 2018
Date

CERTIFICATE OF SERVICE

A copy of this Order was sent this 5th day of June, 2018 electronically and by regular U.S. mail to:

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Counsel for Board of Income Tax Review

BEFORE THE
INCOME TAX BOARD OF REVIEW
FOR THE CITY OF CLEVELAND, OHIO

Hazel M. Willacy, Taxpayer	)	Case No. 2017-002
	)	
Appellant,	)	
	)	**DECISION**
vs.	)	
	)	
Nassim Lynch, Tax Administrator	)	
	)	
Appellee.	)	
	)	
	)	

SCOPE OF APPEAL

Appellant Hazel M. Willacy ("Taxpayer") appeals from the November 9, 2017 ruling of Nassim M. Lynch, Tax Administrator for the Division of Taxation, City of Cleveland, denying Taxpayer's request for refund of tax attributable to income derived from the exercise of non-qualified stock options exercised during Tax Year 2016.

QUESTION PRESENTED

Whether a non-resident taxpayer's gain representing the difference between the option price and the fair market value of underlying stock when the option is exercised is considered to be compensatory income, and if so, is appropriately sourced to the City of Cleveland when the taxpayer is a non-resident at the time of exercise.

INTRODUCTION

This case was convened by the Board of Income Tax Review, City of Cleveland, on May 7, 2018. The Taxpayer submitted written evidence by affidavit, and the Tax Administrator's representative presented her case by oral argument.

We find the facts to be as follows. From 1980 to 2009, Taxpayer was employed by the Sherwin-Williams Company in the City of Cleveland. As part of Taxpayer's compensation package, Taxpayer was issued non-qualified stock options from time to time. Taxpayer retired on May 8, 2009, and during the same year the Taxpayer moved from Ohio to Florida. During Tax Year 2016, on February 26, 2016, November 28, 2016, and December 21, 2016, Taxpayer exercised non-qualified stock options issued by her former employer, Sherwin-Williams Company. Taxpayer's employer withheld and remitted to the City an amount that included appreciation in the value of the underlying stock, which appreciation occurred after the Taxpayer had left both the City of Cleveland and the State of Ohio.

On September 28, 2017, Taxpayer filed requests for refund, seeking refunds of the full amount of the tax, stating that non-residency was the reason for the refund requests. On November 9, 2017, the Tax Administrator denied Taxpayers refund requests by way of an Assessment. On December 12, 2017, Taxpayer appealed the denial of the refund.

For reasons stated below, we AFFIRM the Tax Administrator's denial of Taxpayer's request for refund.

It is Well-Settled in Ohio that Exercise of a Stock Option Granted by an Employer Is Subject to Municipal Taxation as Compensation.

Citing Corrigan v. Testa, 149 Ohio St.3d 16, Taxpayer argues that the City is not permitted to tax intangible income earned by a non-resident. However, as the Tax Administrator notes on the second page of his November 9, 2017 Assessment, Taxpayer received the stock options for services performed for her employer while employed in the City of Cleveland. The Ohio Board of Tax Appeals recently examined the identical issue involving the same Taxpayer, but for a different year ("Willacy I"). The BTA observed that the Corrigan case involved the imposition of Ohio income tax on capital gain realized by a non-resident investor in a pass-through entity that conducted business in Ohio. Under those circumstances, Corrigan found that taxation of the gain in that case violated due process principles, but in Willacy I, the BTA disagreed that Corrigan controlled under the facts presented to both the BTA and this Board in Willacy I because Corrigan was premised under a different statutory scheme under Ohio Revised Code Chapter 5747 and involved a gain unrelated to stock options granted as a form of compensation. Rather, in Willacy I, the BTA found Hartman v. Cleveland Heights, 8th Dist. No. 66074 (Aug. 11, 1994) (employee's receipt of stock options was a form of compensation taxable under the city's income tax rules and regulations), Salibra v. Mayfield Hts. Mun. Bd. of Appeal, 10th Dist. Franklin No. 14P-890, 2016-Ohio-276, Para. 14 (U.S. Supreme Court treated stock options as compensation includible in taxable income), and Wardrop v. Middletown Income Tax Review Bd., 12th Dist. Butler No. CA2007-09-235, 2008-Ohio-5298 (City where taxpayers worked could tax the taxpayers on income received from stock options exercised when they no longer worked or lived in the city) to be instructive. See Willacy v. Cleveland Bd. of Income Tax Review, 8th Dist. No. 2017-513 (April 23, 2018). Based upon the BTA Willacy I decision and the cases cited therein, we find that the income received upon exercise of the stock options to be compensatory in nature, and are, accordingly, properly includible in Taxpayer's taxable income for municipal income tax purposes.

Taxpayer also objects to the Tax Administrator valuing stock option compensatory income at the time of exercise. Instead, Taxpayer argues that the stock options should be valued at the time they are granted under the "Black-Scholes" algorithm or under other pricing models, including using her employer's annual report. When presented with this question, the BTA in Willacy I, supra, rejected Taxpayer's position, noting that "governing ordinances and regulations clearly state that employee stock options are taxed at the time of exercise," and specifically declined to depart from

established case law on the timing of valuation of compensatory stock option income (citing the Codified Ordinances of the City and the Rules and Regulations issued thereunder).

During 2016, the City of Cleveland taxed "qualifying wages," which included stock options granted as compensation under relevant State and local laws Ohio Revised Code Section 718.02(R)(2)(b) and Cleveland Codified Ordinance No. 192.06(hh)(2)(B). Under the authority of BTA's Willacy I case and the cases cited therein, this Board finds that the stock options granted by Taxpayer's employer were compensatory in nature and, as such, income from the exercise of the options was properly subject to taxation by the City of Cleveland as "qualifying wages" at the time or exercise.

Income Earned from the Exercise of the Options is Appropriately Sourced to the City of Cleveland Regardless of Taxpayer's Residence at the Time of Exercise.

In response to Taxpayer's argument that the appreciation in value of the stock options occurred after Taxpayer left Ohio and should, therefore, not be subject to taxation by the City, the BTA in Willacy I found that such an argument ignores the scheme established by City ordinances and case law that stock options granted as a form of compensation are taxable at the time they are exercised. Willacy I, supra, p.3. The BTA also relied upon Rice v. City of Montgomery, 104 Ohio App.3d 776 (1995) ("The I.R.S. resolves the difficulty of valuing a nontransferable stock option by waiting until the option is exercised, at which time there is a recognition of income equal to the difference between the option price and the fair market value of the stock at the time of exercise"). We note that in Wardrop v. Montgomery, supra, the Court held that the city where taxpayers had worked could tax the Taxpayers income received from stock options exercised when they no longer worked or lived in the city. See also Boyer v. St. Bernard Mun. Bd. of Appeal, (June 23, 2009, BTA 2007-2-139, unreported). Under the authority of Willacy I, and the cases cited therein, we reject Taxpayer's argument in favor of following established Ohio law on taxation of compensatory stock options. For these reasons, this Board finds the approach used by the City of valuing stock options received as compensation at the time of exercise to be legally permissible. To the extent Taxpayer raises additional arguments under the Due Process Clause of the federal Constitution, this Board makes no findings as such arguments can only be addressed on appeal by a court having the authority to decide constitutional challenges.

This Board Lacks Jurisdiction to Consider Arguments Not Raised Before the Tax Administrator.

Taxpayer further argues in her Affidavit submitted to this Board that collateral estoppel and res judicata apply based upon the City's previous granting of refunds for Tax Years 2010 and 2011 for income tax withheld on stock option sales. Taxpayer also argues that the Tax Administrator's actions are barred by the statute of limitations. This Board's jurisdiction is set forth in Ohio Revised Code Section 718.11 as permitting the Board to "affirm, reverse, or modify the tax administrator's assessment or any part of that assessment."

Taxpayer failed to raise the arguments of collateral estoppel, res judicata and statute of limitations in her September 28, 2017 Request for Refund. Accordingly, these arguments were not addressed by the Tax Commissioner in the Assessment in this case. Because there is no ruling or decision of the Tax Administrator with respect to collateral estoppel, res judicata and statute of limitations, this Board is unable to perform any review with a view toward affirming, reversing or modifying the Commissioner's ruling with respect to these arguments, and, thus, this Board has no jurisdiction to address them.. Additionally, these arguments were not set forth in Taxpayer's notice of appeal to this Board, and were submitted to the Board on a few days before the hearing, thereby not affording the Tax Administrator the opportunity to prepare for those arguments.

Based on the foregoing, this Board finds that the income from exercise of employee stock options in 2016 was properly taxed by the City of Cleveland at the time of exercise at the difference between the option price and the fair market value at the time of exercise. Accordingly, the decision of the Tax Administrator, set forth in his Assessment is hereby affirmed in full.

Frank M. Badalamenti

James E. Hicks

John M. Moss

June 5, 2018
Date

CERTIFICATE OF SERVICE

A copy of this Decision was sent this 5th day of June, 2018 electronically and by regular U.S. mail to:

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Nassim Lynch, Tax Administrator

Debra D. Rosman
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Counsel for
Board of Income Tax Review

11/13/17

DIVISION OF TAXATION

Serving Member Communities throughout the State of Ohio since 1967

ASSESSMENT

November 9, 2017

Hazel Willacy
70 Spyglass Way
Palm Beach Gardens, Florida 33418-5804
Re: Assessment Request

Dear Ms. Willacy,

In response to your request for a refund of your 2016 withholdings for stock options granted to you via your former employer, Sherwin Williams Co., your refund request is denied and an assessment is issued.

This assessment is due to the fact that stock options are taxable qualifying wages pursuant to State and local laws, specifically: Ohio Rev. Code Sec. 718.01(R)(2)(b) and Cleveland Codified Ordinances Sec. 192.06(hh)(2)(B), both of which which set forth the definition of qualifying wages which includes "stock options." Further, IRS Publication 957 requires that any income included in Medicare wages have no substantial risk of forfeiture. When your employer included your stock option income in your Medicare withholding base, it concluded that this income was not subject to a substantial risk of forfeiture.

Article 3:01 (B) (8) of the CCA Rules and Regulations imposes taxation on "[s]tock options given as compensation. When exercised, regardless of the treatment by the Internal Revenue Service, the employer is required to withhold on the difference between the fair market value and the amount paid by the employee." Further, the rules require that "[e]mployers must withhold municipal income tax on the exercise of stock options (qualified or nonqualified) if the employee acquired the option as compensation or in lieu of wages."

In *Wardrop v. Middletown Income Tax Review Board*, 2008 WL 4541996 (Ohio App. 12 Dist.), the court used similar reasoning in determining that stock options exercised after termination were subject to the Middletown income tax. The *Wardrop* Court reasoned that Wardrop:

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205 W Saint Clair Ave
Cleveland, Ohio 44113-1503
Phone: 216.664.2070; Fax: 216.420.8299

Dayton Office
371 W Second Street, Suite 110
Dayton, Ohio 45402
Toll Free: 800.223.6317

Hamilton Office
345 High Street, Floor 3
Hamilton, Ohio 45011
www.ccatax.ci.cleveland.oh.us

> Earned compensation in the form of stock options while working for AK Steel. Middletown could tax this compensation to the extent it constituted "income earned ... by nonresidents for work done or services performed or rendered in the City." MCO § 890.03(a)(2). Middletown necessarily had to wait until the option-exercise date to assign a value to the compensation, however, because the value of the options could not be determined until then. Although Wardrop and Hritz did not reside or work in Middletown when they exercised the options, the fact remains that they *earned* the stock-option compensation while working for AK Steel. Therfore, MCO § 890.03(a)(2) authorized Middletown to tax the resulting gain, which could be calculated only when appellants exercised the options. Id. At 10. (Emphasis added by the Court).

In the present case, you received stock options as compensation for services performed for Sherwin Williams Corp and earned this compensation while employed in the City of Cleveland. As in *Wardrop,* the proceeds of the options are valued when they are exercised, but still subject to taxation where they were earned.

The *Wardrop* Court provides additional reasoning in this matter:

> Appellants stress that they did not realize the income at issue until after the termination of their employment. Therefore, they assert that it is not subject to Middletown tax. The applicable ordinance imposes a tax on "income earned or received" by nonresidents "for work done or services performed or rendered in the City." MCO § 890.03(a)(2). The trial court concluded that the critical issue was when appellants earned the income, not when they received it. We agree. Compensation earned by a nonresident employee cannot evade municipal taxation by the simple expedient of being deferred into a subsequent year when the nonresident no longer works in the taxing jurisdiction. *Wardrop* At 3.

It is CCA's position that regardless of whether the compensation is a stock option, grant of stock or some other deferral that can't be valued at the time it is earned, it is still taxable to the jurisdiction where it is earned. Additionally, where value can't be determined at the time of deferral due to restrictions placed on the compensation, it can be valued when the stock sale or gain is realized and at that time subject to taxation in the jurisdiction where it was earned.

The Ohio Rev. Code Sec. 718.01(R)(1) does grant Ohio municipalities the authority to exempt stock options from taxation. However, the City of Cleveland has not exempted stock options from taxation.

In addition, you have provided no evidence that your Stock Options were granted for work performed outside of Cleveland.

Cleveland Income Tax is assessed against both residents and non-residents for work performed or wages earned within the city's jurisdiction. Sherwin Williams granted these stock options for work performed within the City of Cleveland, and hence, the earnings from said options are subject to Cleveland Income Tax.

You have 60 days to appeal this assessment to the City of Cleveland Board of Review.

Sincerely,

Nassim Michael Lynch
CCA Tax Administrator

DIVISION OF TAXATION

Serving Member Communities throughout the State of Ohio since 1967

September 5, 2017

Willacy, Hazel M.
70 Spyglass Way
Palm Beach Gardens, FL 33418

Taxpayer I.D. W54166891

To the Taxpayer:

The city income tax return which you submitted has been reviewed for the year 2016. Your tax return has been adjusted for the following reason(s):

☒ Your employer withheld the tax correctly.

☒ Stock options, when exercised, are fully taxable to the former employment city.

☐ The above adjustment results in your refund request being denied.

Should you have any questions concerning this matter, please contact the undersigned.

Respectfully,
Lan T. Tin
Income Tax Auditor
216-664-2181
216-420-8316 fax

Ohio Administrative Code

5703. Department of Taxation

Chapter 5703-7. Income Tax

All rules passed and filed through December 25, 2015

5703-7-18. Nonresident married filing jointly

(A)

For purposes of this rule a "non-liable MFJ spouse" is an individual who for the taxable year meets all the requirements in paragraphs (A)(1) to (A)(3) of this rule.

(1)

The individual's filing status for federal income tax purposes is "**m**arried **f**iling **j**ointly;"

(2)

For purposes of Chapters 5747. and 5748. of the Revised Code, the individual is a full-year nonresident of this state; and

(3)

The individual did not directly, or indirectly on account of either (or both) an equity investment in a pass-through entity or a distribution from a trust, earn or receive income which, for purposes of computing the nonresident credit allowed by division (A) of section 5747.05 of the Revised Code, would be apportioned or allocated to this state under sections 5747.20 to 5747.231 of the Revised Code.

(B)

Section 5747.08 of the Revised Code requires that an individual's filing status for the taxable year for Ohio personal income tax purposes and for school district income tax purposes be the same as the individual's filing status for federal income tax purposes (Title 26 of the United States Code) for that taxable year. As such, each individual whose filing status for federal income tax purposes is "married filing jointly" for the taxable year must use the "married filing jointly" status for that taxable year for both Ohio personal income tax purposes and school district income tax purposes. This requirement applies even if one or both of the "married filing jointly" taxpayers are full-year nonresidents of Ohio.

(C)

(1)

(a)

Except as set forth in paragraph (C)(1)(c) of this rule, when computing Ohio adjusted gross income less exemptions, no individual is allowed a deduction for any item of income or gain unless division (A) of section 5747.01 of the Revised Code expressly provides for the deduction.

(b)

Nothing in division (A) of section 5747.01 of the Revised Code allows a deduction for income or gain of a non-liable MFJ spouse solely because such income or gain is neither earned nor received in this state.

(c)

Paragraph (C)(1)(a) of this rule does not apply to military service compensation described in the Servicemembers Civil Relief Act of 2003, 50 U.S.C. 501 (hereineafter, "Servicemembers Act") as it existed on November 1, 2006. Pursuant to that act a nonresident, when computing Ohio adjusted gross income less exemptions, can deduct such compensation.

(2)

All items of income and gain which are not allowed as a deduction under division (A) of section 5747.01 of the Revised Code, and all compensation which is not deducted pursuant to the Servicemembers Act, will enter into the computation of the nonresident credit. Paragraph (C)(2) of this rule applies even if the items and compensation are those of a non-liable MFJ spouse.

(D)

(1)

The non-liable MFJ spouse shall not be liable for any tax, interest penalty, or penalty due for the taxable year by the spouse of the non-liable MFJ spouse.

(2)

The non-liable MFJ spouse shall not be required to sign the personal income tax return or the school district income tax return required to be filed for the taxable year by the spouse of the non-liable MFJ spouse.

(3)

The non-liable MFJ spouse shall not be required to file the personal income tax return or the school district income tax return required to be filed for the taxable year by the spouse of the non-liable MFJ spouse.

(E)

Paragraphs (E)(1), (E)(2), and (E)(3) of this rule each set forth an example illustrating the application of this rule.

(1)

H and W are a married couple with no dependents. H is a full-year resident of Ohio with wages of $40,000 earned in this state. W is a full-year resident of Pennsylvania with wages of $60,000 earned in that state. They have no other sources of income. They file a joint federal income tax return reporting federal adjusted gross income of $100,000.

H is liable for Ohio tax, both as a resident of this state and as an individual with income earned or received from sources within this state. Since H and W filed a joint federal income tax return, H must compute tax beginning with the $100,000 joint federal adjusted gross income. Accordingly, H must calculate Ohio income tax on $100,000 less the deduction allowed under section 5747.025 of the Revised Code for two personal exemptions. H can then reduce the tax so calculated by two exemption credits allowed by section 5747.022 of the Revised Code and then reduce the net amount by the joint filing credit allowed by division (G) of section 5747.05 of the Revised Code. From that second net amount H can then claim, under division (A) of section 5747.05 of the Revised Code, the nonresident credit. In this example the nonresident credit will be sixty per cent ($60,000/$100,000) of the Ohio income tax after reduction for the exemption credit and for the joint filing credit. The remaining forty per cent of the calculated Ohio income tax after reduction for the exemption credit and for the joint filing credit is the net Ohio income tax that H owes before reduction for refundable credits such as estimated tax payments made.

Because for the taxable year W meets the definition of "non-liable MFJ spouse" set forth in paragraph (A) of this rule, W is not liable for any Ohio income tax and related interest, interest penalty, or penalty due for that taxable year; W is not required to sign the Ohio "married filing jointly" income tax return, and W is not required to file the Ohio "married filing jointly" income tax return (but H is required to sign and file the Ohio "married filing jointly" income tax return).

(2)

H and W, a married couple with no dependents, are both full-year residents of a state other than Ohio. They are rental property owners in that state and earn profits from their rental activities of $50,000 and $30,000, respectively. W is also a limited partner in a partnership conducting business in Ohio (assume the partnership's property, payroll, and sales Ohio apportionment ratio is .500000). For the taxable year W has a $20,000 distributive share of ordinary income from the limited partnership. Other than H's profit from rental properties located outside Ohio, H has no other sources of income. H's and W's filing status for federal income tax purposes for the year is married filing jointly. They have no other income and no adjustments to gross income; so, their adjusted gross income for federal income tax purposes is $100,000.

Because W has a distributive share of income from a pass-through entity doing business in Ohio, W is liable for Ohio's personal income tax. Since H and W filed a joint federal income tax return, W must compute tax beginning with the $100,000 joint federal adjusted gross income. Accordingly, W must calculate Ohio income tax on $100,000 less the deduction allowed under section 5747.025 of the Revised Code for two personal exemptions. W can then reduce the tax so calculated by two exemption credits allowed by section 5747.022 of the Revised Code. From that net amount W can then claim, under division (A) of section 5747.05 of the Revised Code, the nonresident credit. For purposes of computing the nonresident credit, only $10,000 of W's $20,000 distributive share of partnership income is apportioned to Ohio; so, the nonresident credit will be ninety per cent ($90,000/$100,000) of the Ohio income tax after reduction for the exemption credit. The remaining ten per cent of the calculated Ohio income tax after reduction for the exemption credit is the net Ohio income tax that W owes before reduction for refundable credits such as estimated tax payments made.

Because for the taxable year H meets the definition of "non-liable MFJ spouse" set forth in paragraph (A) of this rule, H is not liable for any Ohio income tax and related interest, interest penalty, or penalty due for that taxable year; H is not required to sign the Ohio "married filing jointly" income tax return, and H is not required to file the Ohio "married filing jointly" income tax return (but W is required to sign and file the Ohio "married filing jointly" income tax return).

(3)

For the taxable year immediately preceding the current taxable year, H and W were full-year residents of Ohio. At some time during the current taxable year W, but not H, leaves Ohio and establishes residency in another state. Meanwhile, H continues to reside full-time in Ohio. For the current taxable year their federal income tax return shows the following:

Their filing status is married filing jointly and they have no dependents. H has wages of $25,000 earned in Ohio. W has wages of $20,000 earned in Ohio (prior to establishing residency in the other state) and wages of $30,000 earned in the other state (subsequent to establishing residency in the other state). W also has $10,000 of long-term capital gain from the sale of publicly-traded securities (the sale occurred prior to W's establishing residency in the other state) and has $15,000 of long-term capital gain from the sale of publicly-traded securities (the sale occurred subsequent to W's establishing residency in the other state). They have no other items of income or deductions, so their federal adjusted gross income and their Ohio adjusted gross income is $100,000.

For the taxable year H and W must file an Ohio income tax return and indicate a filing status of married filing jointly. They must enter on line 1 of their Ohio form IT-1040 for the taxable year the "married filing jointly" adjusted gross income of $100,000 as shown on their federal income tax return. They can claim two personal exemption deductions and the credit allowed by sections 5747.025 and 5747.022 of the Revised Code, respectively. They then can claim the joint filing credit allowed by division (G) of section 5747.05 of the Revised Code. With respect to the income W earned after establishing residency in another state and with respect to the capital gain W recognized after establishing residency in another state, H and W can claim the nonresident credit allowed by division (A) of section 5747.05 of the Revised Code. In this example the nonresident credit will be forty-five per cent ([$15,000 + $30,000]/$100,000) of the Ohio income tax after reduction for the exemption credit and for the joint filing credit.

Because for the taxable year neither W nor H meets the definition of "non-liable MFJ spouse" set forth in paragraph (A) of this rule, W are [*sic.*, “and”?] H are jointly and severally liable for any Ohio income tax and related interest, interest penalty, or penalty due. W and H are both required to sign the Ohio income tax return, and they are both required to file the "married filing jointly" Ohio income tax return.

Cite as Ohio Admin. Code 5703-7-18

History. Effective: 03/17/2007

R.C. 119.032 review dates: Exempt

Promulgated Under: 5703.14

Statutory Authority: 5703.05

Rule Amplifies: 5747.01, 5747.02, 5747.022, 5747.05, 5747.08.

Ohio Administrative Code

5703. Department of Taxation

Chapter 5703-7. Income Tax

Current through All Regulations Filed and Passed through April 17, 2020

5703-7-18. *[Rescinded]* Nonresident "married filing jointly"

Cite as Ohio Admin. Code 5703-7-18

History. Effective: 9/7/2018

Five Year Review (FYR) Dates: 6/21/2018

Promulgated Under: 119

Statutory Authority: 5703.05

Rule Amplifies: 5747.01, 5747.02, 5747.022, 5747.05, 5747.08

Prior Effective Dates: 03/17/2007

Rules & Regulations

Central Collection Agency
Effective January 1, 2016

ARTICLE 3:00 IMPOSITION OF TAX TOP

[3:01] Resident Employee

1. The location of the place from which payment subject to municipal income tax is made or where payment is received is immaterial.
2. The following are items subject to the tax imposed by the rate and income taxable sections of the member municipalities' ordinances:
    1. All income, salaries, qualifying wages, bonuses, other compensation and incentive payments earned by an individual whether directly or through an agent, and whether in cash or in property, and whether received or deferred, as well as the resident's distributive share of the net profit of pass-through entities owned directly or indirectly by the resident and any net profit of the resident (as provided in RC Chapter 718), for services rendered during the taxing period as:
        1. An officer, director or employee of a corporation (including charitable and other non-profit organizations), joint stock associations, or joint stock company, or any other type of entity;
        2. An employee (as distinguished from a partner, member or owner) of a partnership, limited partnership, S Corporation, Limited Liability Partnership and Limited Liability Corporation or any form of unincorporated enterprise;
        3. An employee (as distinguished from a proprietor) of a business, trade, or profession conducted by an individual owner;
        4. An officer or employee (whether elected, appointed or commissioned) of the United States Government or of a corporation created and owned or controlled by the United States Government, or any of its agencies; or of the State of Ohio or any of its political subdivisions or agencies thereof; or any foreign country or dependency except as provided in the section of the ordinance indicating sources of income not taxable;
        5. An employee of any other entity or person, whether based upon hourly, daily, weekly, semi-monthly, annual, unit of production or piecework rates; and whether paid by an individual partnership, association, corporation (including charitable and other non-profit corporations and associations), governmental administration, agency, authority, board, body, branch, bureau, department, division, subdivision, section or unit or any other entity.
    2. Commissions earned by a taxpayer whether directly or through an agent and whether in cash or in property for services rendered during the

3:01

effective period of the ordinance, regardless how computed or by whom or wheresoever paid.

1. If the amounts received as a drawing account exceed the commissions earned and the excess is not subject to the demand of the employer for repayment, the tax is payable on the amounts received as a drawing account.
2. Amounts received from an employer for expenses and used as such by the individual receiving them are not deemed to be compensation if the employer deducts such expenses or advances as such from his gross income for the purpose of determining his net profits taxable under Federal law, and the employee is not required to include such receipts as income (or has directly off-setting business expenses) on his Federal Income Tax return.
3. If commissions are included in the net earnings of the trade, business, profession, enterprise, or activity, carried on by an unincorporated entity of which the individual receiving such commission is owner or part owner and therefore subject to the tax on the net profits provision of the ordinance, they shall not be taxed under provisions relating to salaries, qualifying wages, or commissions earned.

3. Fees, unless such fees are properly included as part of the net profits of a trade, business, profession, or enterprise regularly carried on by an unincorporated entity owned or partly owned by said individual (i.e. fees which are taxable are those fees received by a director or officer of a corporation).
4. Other compensation and other income.
5. Vacation, sickness, or any other types of payments made under a wage or salary continuation plan including 'sub pay' received from a union or other third party in lieu of wages during periods of absence from work are taxable when paid. Payments made by an employer to an employee during periods of absence from work are taxable when paid and at the tax rate in effect at the time of payment. Sick leave or sick pay, vacation pay, terminal pay, supplemental unemployment pay, and severance pay may not be excluded from taxable income.
6. Payments made to an employee under a wage continuation plan, either directly or by an insurance company or another third party may not be excluded from taxable income. Such payments are attributable to the city of employment. However, payment on account of a disability related to sickness or an accident paid by a party unrelated to the employer, agent of an employer, or other payer are not to be included in qualifying wages or taxable income.
7. Where compensation is paid or received in property, its fair market value at the time of receipt shall be subject to the tax and to withholding. Board, lodging and similar compensation shall be included in earnings at fair market value.

8. Group term life insurance protection not paid by the employee if the coverage paid by the employer exceeds $50,000.
9. Stock options given as compensation. When exercised, regardless of the treatment by the Internal Revenue Service, the employer is required to withhold on the difference between the fair market value and the amount paid by the employee.
10. Employers must withhold municipal income tax on the exercise of stock options (qualified or nonqualified) if the employee acquired the option as compensation or in lieu of wages.
11. An employer, agent of an employer, or other payer is not required to withhold municipal income tax with respect to an individual's disqualifying disposition of an incentive stock option if, at the time of the disqualifying disposition, the individual is not an employee of either the corporation with respect to whose stock option has been issued or of such corporation's successor entity."
12. Losses from the operation of a business or profession are not deductible from qualifying wages and employee income. Rental and business losses may not be used to offset qualifying wages and wage income.
13. In the case of domestics and other employees whose duties require them to live at their place of employment or assignment, board and lodging shall not be considered as taxable compensation.
14. Intrastate, over-the-road drivers and others with similar situations reporting to a terminal, office, etc. in a member municipality shall allocate to the taxing municipality where the terminal, warehouse, or office is located that portion of income earned or received in said municipality.
15. Income generated from any illegal Federal, State or municipal transaction.

[3:02] Non-Resident Employee

1. In the case of non-residents of the taxing municipality there is imposed under the ordinance, a tax (see tax rate schedule) on all income, salaries, qualifying wages, commissions, and other compensation from whatever source earned or received by the non-resident for work done, services performed or rendered, or activities conducted in the municipality, including any net profit of the non-resident, but excluding the non-resident's distributive share of the net profit or loss of only pass-through entities owned directly or indirectly by the non-resident.
2. The items subject to tax under the rate and income taxable section of the ordinance are the same as those listed and defined in Article 3:01B, hereof. For the methods of computing the extent of such work or services performed within a taxing municipality, in cases involving compensation for personal services partly within and partly without said taxing municipality, See Article 8:02 hereof.

3:02

Rules & Regulations

Central Collection Agency

Effective prior to January 1, 2016

ARTICLE 3:00 IMPOSITION OF TAX

3:01 Resident Employee

In the case of residents of member taxing municipalities, an annual tax (see ordinance) is imposed on all salaries, wages, commissions, other income, and other compensation earned and received, earned and accrued, or earned and deferred during the effective period of the ordinance.

(A) For purposes of determining the tax on the earnings of resident taxpayers under the rate and taxable income section of the ordinance, the source of earnings and the place or places in or at which the services were rendered are immaterial. All such earnings wherever earned are taxable. The location of the place from which payment is made, or where payment is received is immaterial.

(B) The following items are subject to the tax imposed by the rate and taxable income sections of the member communities' ordinances.

1. Salaries, wages, bonuses and incentive payments earned by an individual whether directly or through an agent, and whether in cash, or in property, and whether received or deferred, for services rendered during the tax period as:
   a. An officer, director or employee of a corporation (including charitable and other non-profit organizations), joint stock associations, or joint stock company, or any other type of entity;
   b. An employee (as distinguished from a partner, member or owner) of a partnership, limited partnership, S Corporation, Limited Liability Partnership and Limited Liability Corporation or any form of unincorporated enterprise;
   c. An employee (as distinguished from a proprietor) of a business, trade, or profession conducted by an individual owner;
   d. An officer or employee (whether elected, appointed or commissioned) of the United States Government or of a corporation created and owned or controlled by the United States Government, or any of its agencies; or of the State of Ohio or any of its political subdivisions or agencies thereof; or any foreign country or dependency except as provided in the section of the ordinance indicating sources of income not taxable.
   e. An employee of any other entity or person, whether based upon hourly, daily, weekly, semi-monthly, annual, unit of production or piecework rates; and whether paid by an individual, partnership, association, corporation (including charitable and other non-profit corporations and associations), governmental administration, agency, authority, board, body, branch, bureau, department, division, subdivision, section or unit or any other entity.
2. Commissions earned by a taxpayer whether directly or through an agent and whether in cash or in property for services rendered during the effective period of

the ordinance, regardless how computed or by whom or wheresoever paid.
a. If the amounts received as a drawing account exceed the commissions earned and the excess is not subject to the demand of the employer for repayment, the tax is payable on the amounts received as a drawing account.
b. Amounts received from an employer for expenses and used as such by the individual receiving them are not deemed to be compensation if the employer deducts such expenses or advances as such from his gross income for the purpose of determining his net profits taxable under Federal law, and the employee is not required to include such receipts as income (or has directly off-setting business expenses) on his Federal Income Tax return.
c. If commissions are included in the net earnings of the trade, business, profession, enterprise, or activity, carried on by an unincorporated entity of which the individual receiving such commission is owner or part owner and therefore subject to the tax on the net profits provision of the ordinance, they shall not be taxed under the provisions relating to salaries, wages, or commissions earned.

3. Fees, unless such fees are properly included as part of the net profits of a trade, business, profession, or enterprise regularly carried on by an unincorporated entity owned or partly owned by said individual (i.e. fees which are taxable are those fees received by a director or officer of a corporation).
4. Other compensation and other taxable income shall include but are not limited to:
    - Tips received by waiters, waitresses and others;
    - Bonuses, the entire amount of which shall be allocated to and taxable by the employment city;
    - Gifts and gratuities in connection with employment;
    - Compensation paid to domestic servants, casual employees and other types of employees;
    - Benefits resulting from employers assuming a tax;
    - Fellowships, grants, or stipends paid to a graduate student in the full amount except that any amount allocated in writing for tuition, books and laboratory fees shall be excluded;
    - Dismissal pay which is demandable as a matter of right by virtue of the contract of employment, the entire amount of which shall be allocated to and taxable by the employment city;
    - Incentive payments, the entire amount of which shall be allocated to and taxable by the employment city;
    - Contributions by employees and/or employers on behalf of employees to retirement plans are not deductible by such employee. If such contributions are deducted by an employer from the earnings of an employee, such amounts are subject to withholding tax;
    - If an employer pays into a retirement or deferred compensation plan on behalf of an employee in lieu of paying said amount as wages, said payments are considered additional compensation to the employee and are subject to withholding tax.
    - Contributions by employers to a pension, annuity, retirement or deferred compensation plan, including simplified pension plans and similar plans, are deemed to be other compensation subject to withholding and;

- Income received on account of covenants not to compete;
- Lottery winnings, gambling and gaming winnings, sports winnings;
- Severance pay, the entire amount of which shall be allocated to and taxable by the employment city;
- Jury fees, if not paid over to a taxpayer's employer;
- Contributions made by or on behalf of employees to cafeteria plans and profit sharing plans;
- Income deemed taxable per Federal Code Section 89 or its substantial equivalent;
- Ordinary gains reported on Federal Form 4797 or its substantial equivalent;
- Punitive damages on account of personal injury;
- Hobby income

5. Vacation, sickness, or any other types of payments made under a wage or salary continuation plan including 'sub pay' received from a union or other third party in lieu of wages during periods of absence from work are taxable when paid and the entire amount of all such payments shall be allocated to and taxable by the employment city. Payments made by an employer to an employee during periods of absence from work are taxable when paid and at the tax rate in effect at the time of payment and the entire amount of all such payments shall be allocated to and taxable by the employment city. Sick leave or sick pay, disability pay, vacation pay, terminal pay, supplemental unemployment pay, and severance pay may not be excluded from taxable income and the entire amount of all such payments shall be allocated to and taxable by the employment city.
   Payments made to an employee under a wage continuation plan, either directly or by an insurance company or another third party may not be excluded from taxable income and the entire amount of all such payments shall be allocated to and taxable by the employment city.
6. Where compensation is paid or received in property, its fair market value at the time of receipt shall be subject to the tax and to withholding on the total fair market value amount and such entire amount shall be allocated to and taxable by the employment city. Board, lodging and similar compensation shall be included in earnings at fair market value amounts and such entire amount shall be allocated to and taxable by the employment city.
7. Group term life insurance protection not paid by the employee, the entire amount of which shall be allocated to and taxable by the employment city or if the coverage paid by the employer exceeds $50,000.00, the entire amount of which shall be allocated to and taxable by the employment city.
8. Stock options given as compensation. When exercised, regardless of the treatment by the Internal Revenue Service, the employer is required to withhold on the difference between the fair market value and the amount paid by the employee. Employers must withhold municipal income tax on the exercise of stock options (qualified or nonqualified) if the employee acquired the option as compensation or in lieu of wages.
9. Losses from the operation of a business or profession are not deductible from employee earnings. Rental and business losses may not be used to offset wage income.

10. In the case of domestics and other employees whose duties require them to live at their place of employment or assignment, board and lodging shall not be considered as taxable compensation.
11. Intrastate, over-the-road drivers and others with similar situations reporting to a terminal, office, etc. in a member community must have a minimum of 25% of wages withheld and allocated to the city where their terminal, office, etc. is located.
12. Income generated from any illegal Federal, State or municipal transaction.
13. Any and all other wages, salaries, other compensation and taxable income not specifically exempted from the tax imposed by the ordinance. Unless specifically attributable to a place or location worked that is outside the city, the entire amount of all such wages, salaries and other compensation shall be allocated to and taxable by the employment city.

3:02 Non-Resident Employee

In the case of individuals who are not residents of the taxing community there is imposed under the ordinance, a tax (see ordinance) on all salaries, wages, commissions and other compensation earned and received, earned and accrued, or earned and deferred on and

(A) after the effective date of the ordinance for work done or services rendered or performed within said taxing community whether such compensation or remuneration is received or earned directly or through an agent and whether paid in cash or in property. The location of the place from which payment is made is immaterial.

The income items subject to tax under the rate and taxable income section of the ordinance are the same as those listed and defined in Article 3:01(B) hereof and are allocated to the taxing community in the same fashion as described in Article 3:01(B).

1. For nonresidents employed at a place of business or profession within the taxing community, only those salaries, wages, commissions and other compensation earned and/or received that are specifically attributable to a place or location worked that is outside the taxing community shall be treated as earned outside the taxing community.

(B) 2. For the methods of computing the extent of work or services performed within a taxing community, and only in cases involving compensation for personal services performed partly within and partly without said taxing community, See Article 8:02(E) hereof which may or may not apply in accordance with this division (B).

3. Article 8:02(E) shall only apply to determine that portion of total salaries, wages or other compensation that is earned and attributable to work or services performed or rendered within and without the taxing community.
4. Article 8:02(E) shall only apply if salaries, wages or other compensation is specifically attributable to a place or location worked that is outside the taxing community.

5. Article 8:02(E) shall not apply where the entire amount of salaries, wages or other compensation is allocated to and taxable by the employment city in accordance with this division (B) and Article 3:01(B) of these Rules and Regulations.

CCA Rule 13:01

Appeals

1. Right to Appeal: An Appeal may be filed when a Taxpayer:
    1. Disputes an Assessment issued by the Tax Administrator regarding an underpayment of municipal income tax.
    2. Disputes a reduction in or elimination of a claim for refund, and the Tax Administrator has issued an Assessment notice.
    3. Disputes any Assessment including denial of alternative apportionment issued by the Tax Administrator.
2. A Taxpayer may appeal to the Local Board of Tax Review by filing a request with the Board. The request shall be in writing, shall specify the reason or reasons why the assessment should be deemed incorrect or unlawful, and shall be filed within sixty (60) days after receipt of the Assessment notice from the Tax Administrator.
3. The written appeal should be sent to:

    Central Collection Agency
    Tax Administrator
    205 W St. Clair Ave.
    Cleveland, OH 44113

13:01

4. Time Frame:
    1. The Local Board of Tax Review will schedule a hearing to be held within sixty (60) days after receiving the Appeal of Assessment. The Taxpayer will receive, by ordinary mail, a notice instructing the Taxpayer of the date of the Appeal Hearing, the location, and the time of the Hearing.
    2. Should the Taxpayer need additional time to prepare, the Taxpayer must request, in writing, an extension of time. This extension should specify the additional time frame necessary to prepare for the hearing. Such extension request will be sent to the same address and individual as shown in C above. The request for extension must be received no later than five working days prior to any scheduled hearing on this matter.
    3. The Taxpayer has the right to waive the hearing.
    4. The Board may allow a hearing to be continued as jointly agreed to by both the Taxpayer and the Tax Administrator. In such case, the hearing must be completed within one hundred twenty (120) days after the first day of the hearing, unless the parties agree otherwise.
5. The Taxpayer may appear before the board and may be represented by an attorney at law, a certified public accountant, or other representative.
6. The Board may affirm, reverse, or modify the Assessment or any part of the Assessment issued by the Tax Administrator.
7. The Board shall issue a Final Determination on the Appeal within ninety (90) days after the Board's final hearing on the Appeal. A copy of its Final

Determination will be sent to all parties to the Appeal, by ordinary mail, within fifteen (15) days after issuing the Final Determination.

8. The Taxpayer and the Tax Administrator both have the right to appeal the Final Determination by the Local Board of Tax Review pursuant to Section 5717.011 of the Ohio Revised Code.

Ohio | Department of Taxation

Joseph W. Testa, Tax Commissioner

Issued: September 2001 Revised: January 10, 2014 **Reissued**: February 15, 2018

Income Tax - Information Release*

IT 2001-01 – Nexus Standards & Filing Safe Harbors for Individuals

Introduction

This information release describes the standards the Department of Taxation will apply to determine whether a nonresident is subject to Ohio's individual income tax. Specifically, this information release addresses the standards used to determine if a nonresident individual has nexus with Ohio. For nexus standards for pass-through entities, see Information Release IT 2001-02; for nexus standards for trusts and estates, see Information Release IT 2001-03.

The full text of the current version of R.C. 5747.01 can be found at: http://codes.ohio.gov/orc/5747.01
The full text of the current version of R.C. 5747.02 can be found at: http://codes.ohio.gov/orc/5747.02
The full text of 15 U.S.C. §381-384 (i.e., P.L. 86-272) can be found here.
The full text of the MTC Statement of Information on P.L. 86-272 can be found here.

Observation/ Law

Ohio Law. Division (A) of R.C. 5747.02 levies an annual income tax on "every individual":

- Residing in Ohio;
- Earning or receiving income in Ohio;
- Earning or receiving Ohio-sourced lottery winnings, prizes, awards or winnings on casino gaming; or
- Otherwise having nexus with or in Ohio under the Constitution of the United States.

The tax applies to both Ohio residents and nonresidents. Division (I) of R.C. 5747.01 defines "resident" as an individual who is domiciled in Ohio, subject to section 5747.24 of the Revised Code. The concepts of residency for individuals are outlined in Information Releases IT 2015-02 and IT 2007-08. Conversely, a "nonresident" is defined as one who is not a resident. R.C. 5747.01(J).

Federal Law. Sections 381-384 of 15 U.S.C., better known as Public Law 86-272 (or P.L. 86-272), restrict a state from imposing a tax on or measured by income derived within the state's borders **if** the only business activity of the nonresident within the state consists of **the solicitation of orders** for sale of **tangible personal property**. This restriction is limited to orders sent outside the state for acceptance or rejection and, if accepted, filled by shipment or delivery from a point outside the state.

* An information release does not create legal obligations by its own force. Only an administrative rule can "confer the force of law on a requirement." *See Progressive Plastics, Inc. v. Testa,* 133 Ohio St.3d 490, 2012-Ohio-4759.

P.L. 86-272 **does not** prohibit Ohio from asserting that a nonresident has nexus; in fact, P.L. 86-272 acknowledges that said nonresident does have nexus with the state. Instead, P.L. 86-272 exempts certain income from state taxation, **even though** nexus exists. In determining what activities are protected by P.L. 86-272 and what activities are still subject to Ohio's taxing power (i.e., "unprotected activities"), Ohio follows the *Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States under Public Law 86-272*, last revised on July 27, 2001.

Guidance

Nexus. An Ohio resident always has nexus with Ohio. Based on R.C. 5747.02, a nonresident individual has nexus with Ohio when s/he engages in one or more of the following activities:

- The nonresident earns compensation (e.g., wages, salary, tips, bonuses) for services performed in Ohio;
- The nonresident has real, tangible, or intangible property in Ohio;
- The nonresident, either directly or indirectly (e.g., via an investment in a pass-through entity) engages in a trade or business operating in Ohio.

A business is "operating in Ohio" if it has property, payroll, and/or sales in the state. *See* R.C. 5733.05(B)(2) via R.C. 5747.21.

Activities performed in Ohio on behalf of a nonresident individual by a non-employee professional (e.g., lawyer, accountant, investment banker) will not, in and of themselves, create nexus for the nonresident individual. However, it is important to note that the activities performed in Ohio will create Ohio nexus for the non-employee professional.

Once a nonresident has nexus for a given tax year, s/he is generally required to file returns and pay the appropriate tax for that tax year. The taxpayer(s) would file the Ohio income tax return starting with all of his/her/their federal adjusted gross income. A nonresident is entitled to a "nonresident credit" for any income "that is not allocable or apportionable to this state pursuant to sections 5747.20 to 5747.23 of the Revised Code." R.C. 5747.05(A). **Nexus is determined on a tax year by tax year basis; if the taxpayer has nexus for a given tax year, then filing and payment is generally required.**

Safe Harbor Provisions. Even if a nonresident individual has nexus with Ohio, if the **nonresident individual's** only contacts with Ohio are limited to the contacts listed below, the Department of Taxation will not require the filing of a return and/or the payment of the individual income tax. Generally, unless otherwise cited below, safe harbors are not mandated by statute or case law. Instead, they are provided for the purposes of administrative convenience.

A. The individual has property or representatives on the premises of a commercial printer in Ohio. *See* R.C. 5747.30.
B. The individual is a resident of Kentucky, Indiana, Michigan, Pennsylvania and West Virginia for tax purposes and earns wage or salary income in Ohio. Based on "reciprocity agreements" that the state of Ohio has with these states, the wages and salary income of such nonresidents are subject to tax in the individual's state of residence. All non-wage and salary income earned in Ohio is still subject to Ohio's filing and payment requirements.
C. The individual owns or uses in Ohio intangible property, but the use of such property in Ohio does not develop, maintain or enlarge the marketplace for the individual.

D. The individual grants a license to use software in Ohio, but only if the individual and his/her agents or representatives do not provide from or at a location in Ohio any technical assistance or other support.
E. The individual maintains a website on a server or similar electronic equipment in Ohio, unless the equipment itself is owned, leased or rented by the individual.
F. The individual conducts meetings in Ohio with suppliers of goods or services.
G. The individual conducts meetings in Ohio with government representatives in their official capacity.
H. The individual enters Ohio for the purposes of bringing or defending a lawsuit in a court of law in Ohio.
I. The individual has employees or others acting on the individual's behalf attend meetings, retreats, seminars, conferences, schools or other training in Ohio, sponsored by others.
J. The individual holds, for the benefit of his/her employees, retreats, seminars, conferences or other training in Ohio.
K. The individual holds recruiting or hiring events in Ohio.
L. The individual advertises in Ohio through various electronic or print media.
M. The individual rents customer lists to or from an entity located in Ohio.
N. The individual has a presence in Ohio for no more than 20 days, which need not be consecutive, in a calendar year and the individual's activities in Ohio generate no more than $10,500 in gross income in that same calendar year.
O. The individual participates in one or more trade shows in Ohio as an exhibitor provided that the individual does not have employees present in Ohio for more than 20 days in a calendar year and the individual's activities in Ohio generate no more than $10,500 in gross income in that same calendar year.
P. The individual attends trade shows in Ohio as a consumer.
Q. The individual engages in activities that, when considered in the aggregate, are protected under P.L. 86-272.

Please note, if a taxpayer voluntarily files a return and/or pays tax, even though one or more safe harbors apply, then the safe harbors are considered waived as to that filing or payment. The taxpayer cannot later use the safe harbor provisions to request a refund of taxes previously paid or to negate a billing based on the filing.

Voluntary Disclosure Program. A nonresident with a filing responsibility under these nexus guidelines who has failed to file and who has not been contacted by the Department with respect to an unpaid liability is eligible to participate in the Voluntary Disclosure Agreement (VDA) program. The VDA guidelines for each of the respective taxes are available at https://www.tax.ohio.gov/other/voluntary_disclosure.aspx.

Questions?

Taxpayers may visit www.tax.ohio.gov. Questions may be submitted by clicking on the "Contact" link found at the top right of the page and then choosing the "Email Us" option. Taxpayers with additional questions regarding this subject may contact Individual Income Taxpayer Services at 1-800-282-1780, or at 1-800-750-0750 for the hearing impaired.

§ 191.0901 Sources of Income Not Taxed

The tax provided for in this chapter shall not be levied on the following:

(a) Military pay or allowance of members of the armed forces of the United States and of members of their reserve components, including the Ohio National Guard;

(b) Income of religious, fraternal, charitable, scientific, literary, or educational institutions to the extent that such income is derived from tax exempt real estate, tax exempt tangible or intangible property or tax exempt activities;

(c) Proceeds from welfare benefits, unemployment benefits, social security benefits;

(d) Proceeds of insurance paid by reason of the death of the insured; pensions, disability benefits, annuities, or gratuities not in the nature of compensation for services rendered from whatever source derived;

(e) Receipts from seasonal or casual entertainment, amusements, sports events, and health and welfare activities when any such are conducted by bona fide charitable, religious, or educational organizations and associations;

(f) Alimony received;

(g) Personal earnings of any natural person under eighteen (18) years of age;

(h) Compensation for personal injuries or for damages to property by way of insurance or otherwise;

(i) Interest, dividends, gains, and other revenue from intangible property described in RC 718.01(A)(5);

(j) Gains from involuntary conversion; cancellation of indebtedness, to the extent exempt from federal income tax; interest on Federal obligations; items of income already taxed by the State that the City is specifically prohibited from taxing; and income of a decedent's estate during the period of administration, except such income from the operation of a business;

(k) An S corporation shareholder's distributive share of net profits of the S corporation to the extent such distributive shares are allocated or apportioned to sources outside the State of Ohio other than any portion of the distributive shares of net profits that represents wages as defined in Section 3121(a) of the Internal Revenue Code or net earnings from self-employment as defined in Section 1402(a) of the Internal Revenue Service Code;

(l) The rental value of a parsonage, or the rental allowance furnished as compensation and actually used for a parsonage, by a minister;

(m) Compensation and net profits, the taxation of which is prohibited by the United States Constitution or any act of Congress limiting the power of the states or their political subdivisions to impose net income taxes on income derived from interstate commerce;

(n) Compensation and net profits, the taxation of which is prohibited by the Constitution of the State or any act of the Ohio General Assembly limiting the power of the City to impose net income tax;

(o) Only the income items listed in this Section 191.0901 are not subject to the tax imposed by this chapter. All other compensation, net profits and other income earned and/or received by a taxpayer shall be subject to the tax imposed by this chapter unless prohibited by State or federal law.

(Ord. No. 2208-04. Passed 12-13-04, eff. 12-17-04)

§ 191.1701 Unpaid Taxes Recoverable as Other Debts

All taxes imposed by this chapter shall be collectible, together with any interest and penalties thereon, as other debts of like amount are recoverable, including, but not limited to, collection by suit. Any suit shall be brought within three (3) years after the city income tax was due or the return was filed, whichever is later. Except in the case of fraud, of omission of twenty-five percent (25%) or more of taxable income required to be reported, or of failure to file a return, no additional assessment shall be made after three (3) years from the time the city income tax was due or the city income tax return was filed, whichever is later.

(Ord. No. 2208-04. Passed 12-13-04, eff. 12-17-04)

§ 192.06 Definitions

Any term used in this chapter that is not otherwise defined in this chapter has the same meaning as when used in a comparable context in laws of the United States relating to federal income taxation or in RC Title LVII, unless a different meaning is clearly required. If a term used in this chapter that is not otherwise defined in this chapter is used in a comparable context in both the laws of the United States relating to federal income tax and in RC Title LVII and the use is not consistent, then the use of the term in the laws of the United States relating to federal income tax shall control over the use of the term in RC Title LVII.

For purposes of this section, the singular shall include the plural, and the masculine shall include the feminine and the gender-neutral.

As used in this chapter:

(a) "Adjusted federal taxable income" shall be used as defined in RC Chapter 718.

(b) (1) "Assessment" means any of the following:

A. A written finding by the Tax Administrator that a person has underpaid municipal income tax, or owes penalty and interest, or any combination of tax, penalty, or interest, to the municipal corporation;

B. A full or partial denial of a refund request issued under division (b)(2) of Section 192.14 of this chapter;

C. A Tax Administrator's denial of a taxpayer's request for use of an alternative apportionment method, issued under division (b)(2) of Section 192.14 of this chapter;

D. A Tax Administrator's requirement for a taxpayer to use an alternative apportionment method, issued under division (b)(3) of Section 192.14 of this chapter; or

E. For purposes of division (b)(1) of this section, an assessment shall commence the person's time limitation for making an appeal to the Local Board of Tax Review under Section 192.40 of this chapter, and shall have "ASSESSMENT" written in all capital letters at the top of such finding.

(2) "Assessment" does not include notice(s) denying a request for refund issued under division (b)(3) of Section 192.28 of this chapter, a billing statement notifying a taxpayer of current or past-due balances owed to the municipal corporation, a Tax Administrator's request for additional information, a notification to the taxpayer of mathematical errors, or a Tax Administrator's other written correspondence to a person or taxpayer that does not meet the criteria prescribed by division (b)(1) of this section.

(c) "Audit" means the examination of a person or the inspection of the books, records, memoranda, or accounts of a person, ordered to appear before the Tax Administrator, for the purpose of determining liability for a municipal income tax

(d) "Board of Review" has same meaning as "Local Board of Tax Review".

(e) "Calendar quarter" means the three (3) month period ending on the last day of March, June, September, or December.

(f) "Casino operator" and "casino facility" have the same meanings as in RC 3772.01.

(g) "Certified mail", "express mail", "United States mail", "postal service", and similar terms include any delivery service authorized under RC 5703.056.

(h) "Compensation" means any form of remuneration paid to an employee for personal services.

(i) "Disregarded entity" means a single member limited liability company, a qualifying subchapter S subsidiary, or another entity if the company, subsidiary, or entity is a disregarded entity for federal income tax purposes.

(j) "Domicile" means the true, fixed and permanent home of the taxpayer to which, whenever absent, the taxpayer intends to return.

(k) "Exempt income" means all of the following:

(1) The military pay or allowances of members of the armed forces of the United States or members of their reserve components, including the national guard of any state;

(2) A. Except as provided in division (k)(2)B. of this section, intangible income;

B. A municipal corporation that taxed any type of intangible income on March 29, 1988, to Section 3 of S.B. 238 of the 116th General Assembly, may continue to tax that type of income if a majority of the electors of the municipal corporation voting on the question of whether to permit the taxation of that type of intangible income after 1988 voted in favor thereof at an election held on November 8, 1988.

(3) Social security benefits, railroad retirement benefits, unemployment compensation, pensions, retirement benefit payments, payments from annuities, and similar payments made to an employee or to the beneficiary of an employee under a retirement program or plan, long term disability payments received from private industry or local, state, or federal governments or from charitable, religious or educational organizations, and the proceeds of sickness, accident, or liability insurance policies. As used in division (k)(3) of this section, "unemployment compensation" does not include supplemental unemployment compensation described in Section 3402(o)(2) of the Internal Revenue Code;

(4) The income of religious, fraternal, charitable, scientific, literary, or educational institutions to the extent such income is derived from tax-exempt real estate, tax-exempt tangible or intangible property, or tax-exempt activities;

(5) Compensation paid under RC 3501.28 or 3501.36 to a person serving as a precinct election official to the extent that such compensation does not exceed one thousand dollars ($1,000.00) for the taxable year. Such compensation in excess of one thousand dollars ($1,000.00) for the taxable year may be subject to taxation by a municipal corporation. A municipal corporation shall not require the payer of such compensation to withhold any tax from that compensation;

(6) Dues, contributions, and similar payments received by charitable, religious, educational, or literary organizations or labor unions, lodges, and similar organizations;

(7) Alimony and child support received;

(8) Awards for personal injuries or for damages to property from insurance proceeds or otherwise, excluding compensation paid for lost salaries or wages or awards for punitive damages;

(9) Income of a public utility when that public utility is subject to the tax levied under RC 5727.24 or 5727.30. Division (k)(9) of this section does not apply for purposes of RC Chapter 5745;

(10) Gains from involuntary conversions, interest on federal obligations, items of income subject to a tax levied by the state and that a municipal corporation is specifically prohibited by law from taxing, and income of a decedent's estate during the period of administration except such income from the operation of a trade or business;

(11) Compensation or allowances excluded from federal gross income under Section 107 of the Internal Revenue Code;

(12) Employee compensation that is not qualifying wages as defined in division (hh) of this section;

(13) Compensation paid to a person employed within the boundaries of a United States air force base under the jurisdiction of the United States air force that is used for the housing of members of the United States air force and is a center for air force operations, unless the person is subject to taxation because of residence or domicile. If the compensation is subject to taxation because of residence or domicile, tax on such income shall be payable only to the municipal corporation of residence or domicile;

(14) Intentionally left blank;

(15) All of the municipal taxable income earned by individuals under eighteen (18) years of age;

(16) A. Except as provided in divisions (k)(16)B., C., and D. of this section, qualifying wages described in division (b)(1) or (e) of Section 192.11 of this chapter to the extent the qualifying wages are not subject to withholding for the municipality under either of those divisions.

B. The exemption provided in division (k)(16)A. of this section does not apply with respect to the municipal corporation in which the employee resided at the time the employee earned the qualifying wages.

C. The exemption provided in division (k)(16)A. of this section does not apply to qualifying wages that an employer elects to withhold under division (d)(2) of Section 192.11 of this chapter.

D. The exemption provided in division (k)(16)A. of this section does not apply to qualifying wages if both of the following conditions apply:

1. For qualifying wages described in division (b)(1) of Section 192.11 of this chapter, the employee's employer withholds and remits tax on the qualifying wages to the municipal corporation in which the employee's principal place of work is situated, or, for qualifying wages described in division (e) of Section 192.11 of this chapter, the employee's employer withholds and remits tax on the qualifying wages to the municipal corporation in which the employer's fixed location is located;

2. The employee receives a refund of the tax described in division (k)(16)D.1. of this section on the basis of the employee not performing services in that municipal corporation.

(17) A. Except as provided in division (k)(17)B. or C. of this section, compensation that is not qualifying wages paid to a nonresident individual for personal services performed in the municipality on not more than twenty (20) days in a taxable year.

B. The exemption provided in division (k)(17)A. of this section does not apply under either of the following circumstances:

1. The individual's base of operation is located in the municipality.

2. The individual is a professional athlete, professional entertainer, or public figure, and the compensation is paid for the performance of services in the individual's capacity as a professional athlete, professional entertainer, or public figure. For purposes of division (k)(17)B.2.of this section, "professional athlete", "professional entertainer", and "public figure" have the same meanings as in Section 192.11 of this chapter.

C. Compensation to which division (k)(17) of this section applies shall be treated as earned or received at the individual's base of operation. If the individual does not have a base of operation, the compensation shall be treated as earned or received where the individual is domiciled.

D. For purposes of division (k)(17) of this section, "base of operation" means the location where an individual owns or rents an office, storefront, or similar facility to which the individual regularly reports and at which the individual regularly performs personal services for compensation.

(18) Compensation paid to a person for personal services performed for a political subdivision on property owned by the political subdivision, regardless of whether the compensation is received by an employee of the subdivision or another person performing services for the subdivision under a contract with the subdivision, if the property on which services are performed is annexed to a municipal corporation under RC 709.023 on or after March 27, 2013, unless the person is subject to such taxation because of residence. If the compensation is subject to taxation because of residence, municipal income tax shall be payable only to the municipal corporation of residence;

(19) Income the taxation of which is prohibited by the constitution or laws of the United States.

Any item of income that is exempt income of a pass-through entity under division (k) of this section is exempt income of each owner of the pass-through entity to the extent of that owner's distributive or proportionate share of that item of the entity's income.

(l) "Form 2106" means Internal Revenue Service Form 2106 filed by a taxpayer under the Internal Revenue Code.

(m) "Generic form" means an electronic or paper form that is not prescribed by a particular municipal corporation and that is designed for reporting taxes withheld by an employer, agent of an employer, or other payer, estimated municipal income taxes, or annual municipal income tax liability, including a request for refund.

(n) "Income" means the following:

(1) A. For residents, all income, salaries, qualifying wages, commissions, and other compensation from whatever source earned or received by the resident, including the resident's distributive share of the net profit of pass-through entities owned directly or indirectly by the resident and any net profit of the resident, except as provided in division (w)(4) of this section.

B. For the purposes of division (n)(1)A. of this section:

1. Any net operating loss of the resident incurred in the taxable year and the resident's distributive share of any net operating loss generated in the same taxable year and attributable to the resident's ownership interest in a pass-through entity shall be allowed as a deduction, for that taxable year and the following five (5) taxable years, against any other net profit of the resident or the resident's distributive share of any net profit attributable to the resident's ownership interest in a pass-through entity until fully utilized, subject to division (n)(1)D. of this section;

2. The resident's distributive share of the net profit of each pass-through entity owned directly or indirectly by the resident shall be calculated without regard to any net operating loss that is carried forward by that entity from a prior taxable year and applied to reduce the entity's net profit for the current taxable year.

C. Division (n)(1)B. of this section does not apply with respect to any net profit or net operating loss attributable to an ownership interest in an S corporation unless shareholders' distributive shares of net profits from S corporations are subject to tax in the municipal corporation as provided in division (n)(5) of this section.

D. Any amount of a net operating loss used to reduce a taxpayer's net profit for a taxable year shall reduce the amount of net operating loss that may be carried forward to any subsequent year for use by that taxpayer. In no event shall the cumulative deductions for all taxable years with respect to a taxpayer's net operating loss exceed the original amount of that net operating loss available to that taxpayer.

(2) In the case of nonresidents, all income, salaries, qualifying wages, commissions, and other compensation from whatever source earned or received by the nonresident for work done, services performed or rendered, or activities conducted in the municipality, including any net profit of the

nonresident, but excluding the nonresident's distributive share of the net profit or loss of only pass-through entities owned directly or indirectly by the nonresident.

(3) For taxpayers that are not individuals, net profit of the taxpayer;

(4) Lottery, sweepstakes, gambling and sports winnings, winnings from games of chance, and prizes and awards won by residents in any jurisdiction and by nonresidents when such winnings result from a purchase or activity conducted in the City of Cleveland. If the taxpayer is a professional gambler for federal income tax purposes, the taxpayer may deduct related wagering losses and expenses to the extent authorized under the Internal Revenue Code and claimed against such winnings. Credit for tax withheld or paid to another municipal corporation on such winnings paid to the municipal corporation where winnings occur is limited to the credit as specified in Section 192.19 of this chapter.

(5) For residents, an S corporation shareholder's distributive share of net profits of the S corporation to the extent the distributive share would be allocated to this state under divisions (B)(1) and (B)(2) of RC 5733.05 if the S corporation were a corporation subject to taxes imposed under RC Chapter 5733, and the tax shall apply to the distributive share of a shareholder of an S corporation in the hands of the shareholder of the S corporation.

(o) "Intangible income" is used as it is defined in RC Chapter 718.

(p) "Internal Revenue Code" means the "Internal Revenue Code of 1986," 100 Sta. 2085, 26 U.S.C.A. 1, as amended.

(q) "Limited liability company" means a limited liability company formed under RC Chapter 1705 or under the laws of another state.

(r) "Local Board of Tax Review" and "Board of Tax Review" means the entity created under Section 192.18 of this chapter.

(s) "Municipal corporation" means, in general terms, a status conferred upon a local government unit, by state law giving the unit certain autonomous operating authority such as the power of taxation, power of eminent domain, police power and regulatory power, and includes a joint economic development district or joint economic development zone that levies an income tax under RC 715.691, 715.70, 715.71, or 715.74.

(t) (1) "Municipal taxable income" means the following:

A. For a person other than an individual, income reduced by exempt income to the extent otherwise included in income and then, as applicable, apportioned or situsted to the municipality under Section 192.14 of this chapter, and further reduced by any pre-2017 net operating loss carryforward available to the person for the municipality.

B. 1. For an individual who is a resident of a municipality other than a qualified municipal corporation, income reduced by exempt income to the extent otherwise included in income, then reduced as provided in division (t)(2) of this section, and further reduced by any pre-2017 net operating loss carryforward available to the individual for the municipality.

2. For an individual who is a resident of a qualified municipal corporation, Ohio adjusted gross income reduced by income exempted, and increased by deductions excluded, by the qualified municipal corporation from the qualified municipal corporation's tax on or before December 31, 2013. If a qualified municipal corporation, on or before December 31, 2013, exempts income earned by individuals who are not residents of the qualified municipal corporation and net profit of persons that are not wholly located within the qualified municipal corporation, such individual or person shall have no municipal taxable income for the purposes of the tax levied by the qualified municipal corporation and may be exempted by the qualified municipal corporation from the requirements of RC 718.03.

C. For an individual who is a nonresident of the municipality, income reduced by exempt income to the extent otherwise included in income and then, as applicable, apportioned or situsedto the municipality under Section 192.14 of this chapter, then reduced as provided in division (t)(2) of this section, and further reduced by any pre-2017 net operating loss carryforward available to the individual for the municipality.

(2) In computing the municipal taxable income of a taxpayer who is an individual, the taxpayer may subtract, as provided in division (t)(1)B.1. or C. of this section, the amount of the individual's employee business expenses reported on the individual's Form 2106 that the individual deducted for federal income tax purposes for the taxable year, subject to the limitation imposed by Section 67 of the Internal Revenue Code. For the municipal corporation in which the taxpayer is a resident, the taxpayer may deduct all such expenses allowed for federal income tax purposes. For a municipal corporation in which the taxpayer is not a resident, the taxpayer may deduct such expenses only to the extent the expenses are related to the taxpayer's performance of personal services in that nonresident municipal corporation.

(u) "Municipality" means the City of Cleveland.

(v) "Net operating loss" means a loss incurred by a person in the operation of a trade or business. "Net operating loss" does not include unutilized losses resulting from basis limitations, at-risk limitations, or passive activity loss limitations.

(w) (1) "Net profit" for a person other than an individual means adjusted federal taxable income.

(2) "Net profit" for a person who is an individual means the individual's net profit required to be reported on Schedule C, Schedule E, or Schedule F reduced by any net operating loss carried forward. For the purposes of this division, the net operating loss carried forward shall be calculated and deducted in the same manner as provided in RC Chapter 718.

(3) For the purposes of this chapter, and notwithstanding division (w)(1) of this section, net profit of a disregarded entity shall not be taxable as against that disregarded entity, but shall instead be included in the net profit of the owner of the disregarded entity.

(4) A. For purposes of this chapter, "publicly traded partnership" means any partnership, an interest in which is regularly traded on an established securities market. A "publicly traded partnership" may have any number of partners.

B. For the purposes of this chapter, and not withstanding any other provision of this chapter, the net profit of a publicly traded partnership that makes the election described in division (w)(4) of this section shall be taxed as if the partnership were a C corporation, and shall not be treated as the net profit or income of any owner of the partnership.

C. A publicly traded partnership that is treated as a partnership for federal income tax purposes and that is subject to tax on its net profits in one or more municipal corporations in this state may elect to be treated as a C corporation for municipal income tax purposes. The publicly traded partnership shall make the election in every municipal corporation in which the partnership is subject to taxation on its net profits. The election shall be made on the annual tax return filed in each such municipal corporation. Once the election is made, the election is binding for a five (5) year period beginning with the first taxable year of the initial election. The election continues to be binding for each subsequent five (5) year period unless the taxpayer elects to discontinue filing municipal income tax returns as a C corporation for municipal purposes under division (w)(4)D. of this section.

D. An election to discontinue filing as a C corporation must be made in the first year following the last year of a five (5) year election period in effect under division (w)(4)C. of this

section. The election to discontinue filing as a C corporation is binding for a five (5) year period beginning with the first taxable year of the election and continues to be binding for each subsequent five (5) year period unless the taxpayer elects to discontinue filing municipal income tax returns as a partnership for municipal purposes. An election to discontinue filing as a partnership must be made in the first year following the last year of a five (5) year election period.

E. The publicly traded partnership shall not be required to file the election with any municipal corporation in which the partnership is not subject to taxation on its net profits, but division (w)(4) of this section applies to all municipal corporations in which an individual owner of the partnership resides.

F. The individual owners of the partnership not filing as a C corporation shall be required to file with their municipal corporation of residence, and report partnership distribution of net profit.

(x) "Nonresident" means an individual that is not a resident of the municipality.

(y) "Ohio Business Gateway" means the online computer network system, created under RC 125.30, that allows persons to electronically file business reply forms with state agencies and includes any successor electronic filing and payment system.

(z) "Other payer" means any person, other than an individual's employer or the employer's agent, which pays an individual any amount included in the federal gross income of the individual. "Other payer" includes casino operators and video lottery terminal sales agents.

(aa) "Pass-through entity" means a partnership not treated as an association taxable as a C corporation for federal income tax purposes, a limited liability company not treated as an association taxable as a C corporation for federal income tax purposes, an S corporation, or any other class of entity from which the income or profits of the entity are given pass-through treatment for federal income tax purposes. "Pass-through entity" does not include a trust, estate, grantor of a grantor trust, or disregarded entity.

(bb) "Pension" means any amount paid to an employee or former employee that is reported to the recipient on an IRS Form 1099-R, or successor form. Pension does not include deferred compensation, or amounts attributable to nonqualified deferred compensation plans, reported as FICA/Medicare wages on an IRS Form W-2, Wage and Tax Statement, or successor form.

(cc) "Person" includes individuals, firms, companies, joint stock companies, business trusts, estates, trusts, partnerships, limited liability partnerships, limited liability companies, associations, C corporations, S corporations, governmental entities, and any other entity.

(dd) "Postal service" means the United States Postal Service, or private delivery service delivering documents and packages within an agreed upon delivery schedule, or any other carrier service delivering the item.

(ee) "Postmark date," "date of postmark," and similar terms include the date recorded and marked by a delivery service and recorded electronically to a database kept in the regular course if its business and marked on the cover in which the payment or document is enclosed, the date on which the payment or document was given to the delivery service for delivery.

(ff) (1) "Pre-2017 net operating loss carryforward" means any net operating loss incurred in a taxable year beginning before January 1, 2017, to the extent such loss was permitted, by a resolution or ordinance of the municipality that was adopted by the municipality before January 1, 2016, to be carried forward and utilized to offset income or net profit generated in such municipality in future taxable years.

(2) For the purpose of calculating municipal taxable income, any pre-2017 net operating loss carryforward may be carried forward to any taxable year, including taxable years beginning in

2017 or thereafter, for the number of taxable years provided in the resolution or ordinance or until fully utilized, whichever is earlier.

(gg) "Qualified municipal corporation" means a municipal corporation that, by resolution or ordinance adopted on or before December 31, 2011, adopted Ohio adjusted gross income, as defined by RC 5747.01, as the income subject to tax for the purposes of imposing a municipal income tax.

(hh) "Qualifying wages" means wages, as defined in Section 3121(a) of the Internal Revenue Code, without regard to any wage limitations, adjusted as follows:

(1) Deduct the following amounts:

A. Any amount included in wages if the amount constitutes compensation attributable to a plan or program described in Section 125 of the Internal Revenue Code.

B. Any amount included in wages if the amount constitutes payment on account of a disability related to sickness or an accident paid by a party unrelated to the employer, agent of an employer, or other payer.

C. Any amount included in wages that is exempt income.

(2) Add the following amounts:

A. Any amount not included in wages solely because the employee was employed by the employer before April 1, 1986.

B. Any amount not included in wages because the amount arises from the sale, exchange, or other disposition of a stock option, the exercise of a stock option, or the sale, exchange, or other disposition of stock purchased under a stock option. Division (hh)(2)B. of this section applies only to those amounts constituting ordinary income.

C. Any amount not included in wages if the amount is an amount described in Section 401(k), 403(b), or 457 of the Internal Revenue Code. Division (hh)(2)C. of this section applies only to employee contributions and employee deferrals.

D. Any amount that is supplemental unemployment compensation benefits described in Section 3402(o)(2) of the Internal Revenue Code and not included in wages.

E. Any amount received that is treated as self-employment income for federal tax purposes under Section 1402(a)(8) of the Internal Revenue Code.

F. Any amount not included in wages if all of the following apply:

1. For the taxable year the amount is employee compensation that is earned outside of the United States and that either is included in the taxpayer's gross income for federal income tax purposes or would have been included in the taxpayer's gross income for such purposes if the taxpayer did not elect to exclude the income under Section 911 of the Internal Revenue Code;

2. For no preceding taxable year did the amount constitute wages as defined in Section 3121(a) of the Internal Revenue Code;

3. For no succeeding taxable year will the amount constitute wages; and

4. For any taxable year the amount has not otherwise been added to wages under either division (hh)(2) of this section or RC 718.03, as that section existed before the effective date of H.B. 5 of the 130th general assembly, March 23, 2015.

(ii) "Related entity" means any of the following:

(1) An individual stockholder, or a member of the stockholder's family enumerated in Section 318 of the Internal Revenue Code, if the stockholder and the members of the stockholder's family own directly, indirectly, beneficially, or constructively, in the aggregate, at least fifty percent (50%) of the value of the taxpayer's outstanding stock;

(2) A stockholder, or a stockholder's partnership, estate, trust, or corporation, if the stockholder and the stockholder's partnerships, estates, trusts, or corporations own directly, indirectly, beneficially, or constructively, in the aggregate, at least fifty percent (50%) of the value of the taxpayer's outstanding stock;

(3) A corporation, or a party related to the corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under division (ii)(4) of this section, provided the taxpayer owns directly, indirectly, beneficially, or constructively, at least fifty percent (50%) of the value of the corporation's outstanding stock;

(4) The attribution rules described in Section 318 of the Internal Revenue Code apply for the purpose of determining whether the ownership requirements in divisions (ii)(1) to (3) of this section have been met.

(jj) "Related member" means a person that, with respect to the taxpayer during all or any portion of the taxable year, is either a related entity, a component member as defined in Section 1563(b) of the Internal Revenue Code, or a person to or from whom there is attribution of stock ownership under Section 1563(e) of the Internal Revenue Code except, for purposes of determining whether a person is a related member under this division, "twenty percent (20%)" shall be substituted for "5 percent" wherever "5 percent" appears in Section 1563(e) of the Internal Revenue Code.

(kk) "Resident" means an individual who is domiciled in the municipality as determined under Section 192.08 of this chapter.

(ll) "S corporation" means a person that has made an election under subchapter S of Chapter 1 of Subtitle A of the Internal Revenue Code for its taxable year.

(mm) "Schedule C" means Internal Revenue Service Schedule C (Form 1040) filed by a taxpayer under the Internal Revenue Code.

(nn) "Schedule E" means Internal Revenue Service Schedule E (Form 1040) filed by a taxpayer under the Internal Revenue Code.

(oo) "Schedule F" means Internal Revenue Service Schedule F (Form 1040) filed by a taxpayer under the Internal Revenue Code.

(pp) "Single member limited liability company" means a limited liability company that has one (1) direct member.

(qq) "Small employer" means any employer that had total revenue of less than five hundred thousand dollars ($500,000.00) during the preceding taxable year. For purposes of this division, "total revenue" means receipts of any type or kind, including, but not limited to, sales receipts; payments; rents; profits; gains, dividends, and other investment income; commissions; premiums; money; property; grants; contributions; donations; gifts; program service revenue; patient service revenue; premiums; fees, including premium fees and service fees; tuition payments; unrelated business revenue; reimbursements; any type of payment from a governmental unit, including grants and other allocations; and any other similar receipts reported for federal income tax purposes or under generally accepted accounting principles. "Small employer" does not include the federal government; any state government, including any state agency or instrumentality; any political subdivision; or any entity treated as a government for financial accounting and reporting purposes.

(rr) "Tax administrator" means the Commissioner of the Division of Taxation charged with direct responsibility for administration of an income tax levied by the municipality under this chapter.

(ss) "Tax return preparer" means any individual described in Section 7701(a)(36) of the Internal Revenue Code and 26 C.F.R. 301.7701-15 .

(tt) "Taxable year" means the corresponding tax reporting period as prescribed for the taxpayer under the Internal Revenue Code.

(uu) (1) "Taxpayer" means a person subject to a tax levied on income by a municipal corporation in accordance with this chapter. "Taxpayer" does not include a grantor trust or, except as provided in division (uu)(2)A. of this section, a disregarded entity.

(2) A. A single member limited liability company that is a disregarded entity for federal tax purposes may be a separate taxpayer from its single member in all Ohio municipal corporations in which it either filed as a separate taxpayer or did not file for its taxable year ending in 2003, if all of the following conditions are met:

1. The limited liability company's single member is also a limited liability company.

2. The limited liability company and its single member were formed and doing business in one (1) or more Ohio municipal corporations for at least five (5) years before January 1, 2004.

3. Not later than December 31, 2004, the limited liability company and its single member each made an election to be treated as a separate taxpayer under division (L) of RC 718.01 as this section existed on December 31, 2004.

4. The limited liability company was not formed for the purpose of evading or reducing Ohio municipal corporation income tax liability of the limited liability company or its single member.

5. The Ohio municipal corporation that was the primary place of business of the sole member of the limited liability company consented to the election.

B. For purposes of division (uu)(2)A.5. of this section, a municipal corporation was the primary place of business of a limited liability company if, for the limited liability company's taxable year ending in 2003, its income tax liability was greater in that municipal corporation than in any other municipal corporation in Ohio, and that tax liability to that municipal corporation for its taxable year ending in 2003 was at least four hundred thousand dollars ($400,000.00).

(vv) "Taxpayers' rights and responsibilities" is used as defined in RC Chapter 718.

(ww) "Video lottery terminal" has the same meaning as in RC 3770.21.

(xx) "Video lottery terminal sales agent" means a lottery sales agent licensed under RC Chapter 3770 to conduct video lottery terminals on behalf of the state under RC 3770.21.

(Ord. No. 1412-15. Passed 11-23-15, eff. 1-1-16)

§ 192.41 Actions to Recover; Statute of Limitations

(a) (1) A. Civil actions to recover municipal income taxes and penalties and interest on municipal income taxes shall be brought within the latter of:

1. Three (3) years after the tax was due or the return was filed, whichever is later; or
2. One (1) year after the conclusion of the qualifying deferral period, if any.

B. The time limit described in division (a)(1)A. of this section may be extended at any time if both the Tax Administrator and the employer, agent of the employer, other payer, or taxpayer consent in writing to the extension. Any extension shall also extend for the same period of time the time limit described in division (c) of this section.

(2) As used in this section, "qualifying deferral period" means a period of time beginning and ending as follows:

A. Beginning on the date a person who is aggrieved by an assessment files with a Local Board of Tax Review the request described in Section 192.40 of this chapter. That date shall not be affected by any subsequent decision, finding, or holding by any administrative body or court that the Local Board of Tax Review with which the aggrieved person filed the request did not have jurisdiction to affirm, reverse, or modify the assessment or any part of that assessment.

B. Ending the later of the sixtieth (60th) day after the date on which the final determination of the Local Board of Tax Review becomes final or, if any party appeals from the determination of the Local Board of Tax Review, the sixtieth (60th) day after the date on which the final determination of the Local Board of Tax Review is either ultimately affirmed in whole or in part or ultimately reversed and no further appeal of either that affirmation, in whole or in part, or that reversal is available or taken.

(b) Prosecutions for an offense made punishable under a resolution or ordinance imposing an income tax shall be commenced within three (3) years after the commission of the offense, provided that in the case of fraud, failure to file a return, or the omission of twenty-five percent (25%) or more of income required to be reported, prosecutions may be commenced within six (6) years after the commission of the offense.

(c) A claim for a refund of municipal income taxes shall be brought within the time limitation provided in Section 192.28 of this chapter.

(d) (1) Notwithstanding the fact that an appeal is pending, the petitioner may pay all or a portion of the assessment that is the subject of the appeal. The acceptance of a payment by the municipality does not prejudice any claim for refund upon final determination of the appeal.

(2) If upon final determination of the appeal an error in the assessment is corrected by the Tax Administrator, upon an appeal so filed or under a final determination of the Local Board of Tax Review created under Section 192.40 of this chapter, of the Ohio Board of Tax Appeals, or any court to which the decision of the Ohio Board of Tax Appeals has been appealed, so that the amount due from the party assessed under the corrected assessment is less than the amount paid, there shall be issued to the appellant or to the appellant's assigns or legal representative a refund in the amount of the overpayment as provided by Section 192.28 of this chapter, with interest on that amount as provided by division (d) of this section.

(e) No civil action to recover municipal income tax or related penalties or interest shall be brought during either of the following time periods:

(1) The period during which a taxpayer has a right to appeal the imposition of that tax or interest or those penalties; or

(2) The period during which an appeal related to the imposition of that tax or interest or those penalties is pending.

(Ord. No. 1412-15. Passed 11-23-15, eff. 1-1-16)

§ 1.58. Reenactment, amendment, or repeal of statute.

Ohio Statutes

GENERAL PROVISIONS

Chapter 1. DEFINITIONS; RULES OF CONSTRUCTION

Current through the 133rd General Assembly

§ 1.58. Reenactment, amendment, or repeal of statute

(A) The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:

(1) Affect the prior operation of the statute or any prior action taken thereunder;

(2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder;

(3) Affect any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal;

(4) Affect any investigation, proceeding, or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.

(B) If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

Cite as R.C. § 1.58

History. Effective Date: 01-03-1972 .

§ 718.11. Local board of tax review.

Ohio Statutes

Title 7. MUNICIPAL CORPORATIONS

Chapter 718. MUNICIPAL INCOME TAXES

Current through the 133rd General Assembly

§ 718.11. Local board of tax review

(A) (1) The legislative authority of each municipal corporation that imposes a tax on income in accordance with this chapter shall maintain a local board of tax review to hear appeals as provided in this section. The legislative authority of any municipal corporation that does not impose a tax on income on June 26, 2003, but that imposes such a tax after that date, shall establish such a board by ordinance not later than one hundred eighty days after the tax takes effect.

(2) The local board of tax review shall consist of three members. Two members shall be appointed by the legislative authority of the municipal corporation, but such appointees may not be employees, elected officials, or contractors with the municipal corporation at any time during their term or in the five years immediately preceding the date of appointment. One member shall be appointed by the top administrative official of the municipal corporation. This member may be an employee of the municipal corporation, but may not be the director of finance or equivalent officer, or the tax administrator or other similar official or an employee directly involved in municipal tax matters, or any direct subordinate thereof.

(3) The term for members of the local board of tax review appointed by the legislative authority of the municipal corporation shall be two years. There is no limit on the number of terms that a member may serve if the member is reappointed by the legislative authority. The board member appointed by the top administrative official of the municipal corporation shall serve at the discretion of the administrative official.

(4) Members of the board of tax review appointed by the legislative authority may be removed by the legislative authority by majority vote for malfeasance, misfeasance, or nonfeasance in office. To remove such a member, the legislative authority must give the member a copy of the charges against the member and afford the member an opportunity to be publicly heard in person or by counsel in the member's own defense upon not less than ten days' notice. The decision by the legislative authority on the charges is final and not appealable.

(5) A member of the board who, for any reason, ceases to meet the qualifications for the position prescribed by this section shall resign immediately by operation of law.

(6) A vacancy in an unexpired term shall be filled in the same manner as the original appointment within sixty days of when the vacancy was created. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which the member's predecessor was appointed shall hold office for the remainder of such term. No vacancy on the board shall impair the power and authority of the remaining members to exercise all the powers of the board.

(7) If a member is temporarily unable to serve on the board due to a conflict of interest, illness, absence, or similar reason, the legislative authority or top administrative official that appointed the member shall appoint another individual to temporarily serve on the board in the member's place. The appointment of such an individual shall be subject to the same requirements and limitations as are applicable to the appointment of the member temporarily unable to serve.

(B) Whenever a tax administrator issues an assessment regarding an underpayment of municipal income tax or denies a refund claim, the tax administrator shall notify the taxpayer in writing at the same time of the taxpayer's right to appeal the assessment or denial, the manner in which the taxpayer may appeal the assessment or denial, and the address to which the appeal should be directed.

(C) Any person who has been issued an assessment may appeal the assessment to the board created pursuant to this section by filing a request with the board. The request shall be in writing, shall specify the reason or reasons why the assessment should be deemed incorrect or unlawful, and shall be filed within sixty days after the taxpayer receives the assessment.

(D) The local board of tax review shall schedule a hearing to be held within sixty days after receiving an appeal of an assessment under division (C) of this section, unless the taxpayer requests additional time to prepare or waives a hearing. If the taxpayer does not waive the hearing, the taxpayer may appear before the board and may be represented by an attorney at law, certified public accountant, or other representative. The board may allow a hearing to be continued as jointly agreed to by the parties. In such a case, the hearing must be completed within one hundred twenty days after the first day of the hearing unless the parties agree otherwise.

(E) The board may affirm, reverse, or modify the tax administrator's assessment or any part of that assessment. The board shall issue a final determination on the appeal within ninety days after the board's final hearing on the appeal, and send a copy of its final determination by ordinary mail to all of the parties to the appeal within fifteen days after issuing the final determination. The taxpayer or the tax administrator may appeal the board's final determination as provided in section 5717.011 of the Revised Code.

(F) The local board of tax review created pursuant to this section shall adopt rules governing its procedures and shall keep a record of its transactions. Such records are not public records available for inspection under section 149.43 of the Revised Code. Hearings requested by a taxpayer before a local board of tax review created pursuant to this section are not meetings of a public body subject to section 121.22 of the Revised Code.

Cite as R.C. § 718.11

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

Effective Date: 09-26-2003 .

Sec. 5747.01. Except as otherwise expressly provided or clearly appearing from the context, any term used in this chapter that is not otherwise defined in this section has the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes or if not used in a comparable context in those laws, has the same meaning as in section 5733.40 of the Revised Code. Any reference in this chapter to the Internal Revenue Code includes other laws of the United States relating to federal income taxes.

As used in this chapter:

(A) "Adjusted gross income" or "Ohio adjusted gross income" means federal adjusted gross income, as defined and used in the Internal Revenue Code, adjusted as provided in this section:

(1) Add interest or dividends on obligations or securities of any state or of any political subdivision or authority of any state, other than this state and its subdivisions and authorities.

(2) Add interest or dividends on obligations of any authority, commission, instrumentality, territory, or possession of the United States to the extent that the interest or dividends are exempt from federal income taxes but not from state income taxes.

(3) Deduct interest or dividends on obligations of the United States and its territories and possessions or of any authority, commission, or instrumentality of the United States to the extent that the interest or dividends are included in federal adjusted gross income but exempt from state income taxes under the laws of the United States.

(4) Deduct disability and survivor's benefits to the extent included in federal adjusted gross income.

(5) Deduct benefits under Title II of the Social Security Act and tier 1 railroad retirement benefits to the extent included in federal adjusted gross income under section 86 of the Internal Revenue Code.

(6) In the case of a taxpayer who is a beneficiary of a trust that makes an accumulation distribution as defined in section 665 of the Internal Revenue Code, add, for the beneficiary's taxable years beginning before 2002, the portion, if any, of such distribution that does not exceed the undistributed net income of the trust for the three taxable years preceding the taxable year in which the distribution is made to the extent that the portion was not included in the trust's taxable income for any of the trust's taxable years beginning in 2002 or thereafter. "Undistributed net income of a trust" means the taxable income of the trust increased by (a)(i) the additions to adjusted gross income required under division (A) of this section and (ii) the personal exemptions allowed to the trust pursuant to section 642(b) of the Internal Revenue Code, and decreased by (b)(i) the deductions to adjusted gross income required under division (A) of this section, (ii) the amount of federal income taxes attributable to such income, and (iii) the amount of taxable income that has been included in the adjusted gross income of a beneficiary by reason of a prior accumulation distribution. Any undistributed net income included in the adjusted gross income of a beneficiary shall reduce the undistributed net income of the trust commencing with the earliest years of the accumulation period.

(7) Deduct the amount of wages and salaries, if any, not otherwise allowable as a deduction but that would have been allowable as a deduction in computing federal adjusted gross income for the taxable year, had the targeted jobs credit allowed and determined under sections 38, 51, and 52 of the Internal Revenue Code not been in effect.

(8) Deduct any interest or interest equivalent on public obligations and purchase obligations to the extent that the interest or interest equivalent is included in federal adjusted gross income.

(9) Add any loss or deduct any gain resulting from the sale, exchange, or other disposition of public obligations to the extent that the loss has been deducted or the gain has been included in computing federal adjusted gross income.

(10) Deduct or add amounts, as provided under section 5747.70 of the Revised Code, related to contributions to variable college savings program accounts made or tuition units purchased pursuant to Chapter 3334. of the Revised Code.

(11)(a) Deduct, to the extent not otherwise allowable as a deduction or exclusion in computing federal or Ohio adjusted gross income for the taxable year, the amount the taxpayer paid during the taxable year for medical care insurance and qualified long-term care insurance for the taxpayer, the taxpayer's spouse, and dependents. No deduction for medical care insurance under division (A)(11) of this section shall be allowed either to any taxpayer who is eligible to participate in any subsidized health plan maintained by any employer of the taxpayer or of the taxpayer's spouse, or to any taxpayer who is entitled to, or on application would be entitled to, benefits under part A of Title XVIII of the "Social Security Act," 49 Stat. 620 (1935), 42 U.S.C. 301, as amended. For the purposes of division (A)(11)(a) of this section, "subsidized health plan" means a health plan for which the employer pays any portion of the plan's cost. The deduction allowed under division (A)(11)(a) of this section shall be the net of any related premium refunds, related premium reimbursements, or related insurance premium dividends received during the taxable year.

(b) Deduct, to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income during the taxable year, the amount the taxpayer paid during the taxable year, not compensated for by any insurance or otherwise, for medical care of the taxpayer, the taxpayer's spouse, and dependents, to the extent the expenses exceed seven and one-half per cent of the taxpayer's federal adjusted gross income.

(c) Deduct, to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income, any amount included in federal adjusted gross income under section 105 or not excluded under section 106 of the Internal Revenue Code solely because it relates to an accident and health plan for a person who otherwise would be a "qualifying relative" and thus a "dependent" under section 152 of the Internal Revenue Code but for the fact that the person fails to meet the income and support limitations under section 152(d)(1)(B) and (C) of the Internal Revenue Code.

(d) For purposes of division (A)(11) of this section, "medical care" has the meaning given in

section 213 of the Internal Revenue Code, subject to the special rules, limitations, and exclusions set forth therein, and "qualified long-term care" has the same meaning given in section 7702B(c) of the Internal Revenue Code. Solely for purposes of divisions (A)(11)(a) and (c) of this section, "dependent" includes a person who otherwise would be a "qualifying relative" and thus a "dependent" under section 152 of the Internal Revenue Code but for the fact that the person fails to meet the income and support limitations under section 152(d)(1)(B) and (C) of the Internal Revenue Code.

(12)(a) Deduct any amount included in federal adjusted gross income solely because the amount represents a reimbursement or refund of expenses that in any year the taxpayer had deducted as an itemized deduction pursuant to section 63 of the Internal Revenue Code and applicable United States department of the treasury regulations. The deduction otherwise allowed under division (A)(12)(a) of this section shall be reduced to the extent the reimbursement is attributable to an amount the taxpayer deducted under this section in any taxable year.

(b) Add any amount not otherwise included in Ohio adjusted gross income for any taxable year to the extent that the amount is attributable to the recovery during the taxable year of any amount deducted or excluded in computing federal or Ohio adjusted gross income in any taxable year.

(13) Deduct any portion of the deduction described in section 1341(a)(2) of the Internal Revenue Code, for repaying previously reported income received under a claim of right, that meets both of the following requirements:

(a) It is allowable for repayment of an item that was included in the taxpayer's adjusted gross income for a prior taxable year and did not qualify for a credit under division (A) or (B) of section 5747.05 of the Revised Code for that year;

(b) It does not otherwise reduce the taxpayer's adjusted gross income for the current or any other taxable year.

(14) Deduct an amount equal to the deposits made to, and net investment earnings of, a medical savings account during the taxable year, in accordance with section 3924.66 of the Revised Code. The deduction allowed by division (A)(14) of this section does not apply to medical savings account deposits and earnings otherwise deducted or excluded for the current or any other taxable year from the taxpayer's federal adjusted gross income.

(15)(a) Add an amount equal to the funds withdrawn from a medical savings account during the taxable year, and the net investment earnings on those funds, when the funds withdrawn were used for any purpose other than to reimburse an account holder for, or to pay, eligible medical expenses, in accordance with section 3924.66 of the Revised Code;

(b) Add the amounts distributed from a medical savings account under division (A)(2) of section 3924.68 of the Revised Code during the taxable year.

(16) Add any amount claimed as a credit under section 5747.059 or 5747.65 of the Revised Code to the extent that such amount satisfies either of the following:

(a) The amount was deducted or excluded from the computation of the taxpayer's federal adjusted gross income as required to be reported for the taxpayer's taxable year under the Internal Revenue Code;

(b) The amount resulted in a reduction of the taxpayer's federal adjusted gross income as required to be reported for any of the taxpayer's taxable years under the Internal Revenue Code.

(17) Deduct the amount contributed by the taxpayer to an individual development account program established by a county department of job and family services pursuant to sections 329.11 to 329.14 of the Revised Code for the purpose of matching funds deposited by program participants. On request of the tax commissioner, the taxpayer shall provide any information that, in the tax commissioner's opinion, is necessary to establish the amount deducted under division (A)(17) of this section.

(18) Beginning in taxable year 2001 but not for any taxable year beginning after December 31, 2005, if the taxpayer is married and files a joint return and the combined federal adjusted gross income of the taxpayer and the taxpayer's spouse for the taxable year does not exceed one hundred thousand dollars, or if the taxpayer is single and has a federal adjusted gross income for the taxable year not exceeding fifty thousand dollars, deduct amounts paid during the taxable year for qualified tuition and fees paid to an eligible institution for the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer, who is a resident of this state and is enrolled in or attending a program that culminates in a degree or diploma at an eligible institution. The deduction may be claimed only to the extent that qualified tuition and fees are not otherwise deducted or excluded for any taxable year from federal or Ohio adjusted gross income. The deduction may not be claimed for educational expenses for which the taxpayer claims a credit under section 5747.27 of the Revised Code.

(19) Add any reimbursement received during the taxable year of any amount the taxpayer deducted under division (A)(18) of this section in any previous taxable year to the extent the amount is not otherwise included in Ohio adjusted gross income.

(20)(a)(i) Subject to divisions (A)(20)(a)(iii), (iv), and (v) of this section, add five-sixths of the amount of depreciation expense allowed by subsection (k) of section 168 of the Internal Revenue Code, including the taxpayer's proportionate or distributive share of the amount of depreciation expense allowed by that subsection to a pass-through entity in which the taxpayer has a direct or indirect ownership interest.

(ii) Subject to divisions (A)(20)(a)(iii), (iv), and (v) of this section, add five-sixths of the amount of qualifying section 179 depreciation expense, including the taxpayer's proportionate or distributive share of the amount of qualifying section 179 depreciation expense allowed to any pass-through entity in which the taxpayer has a direct or indirect ownership interest.

(iii) Subject to division (A)(20)(a)(v) of this section, for taxable years beginning in 2012 or thereafter, if the increase in income taxes withheld by the taxpayer is equal to or greater than ten per cent of income taxes withheld by the taxpayer during the taxpayer's immediately preceding

taxable year, "two-thirds" shall be substituted for "five-sixths" for the purpose of divisions (A)(20)(a)(i) and (ii) of this section.

(iv) Subject to division (A)(20)(a)(v) of this section, for taxable years beginning in 2012 or thereafter, a taxpayer is not required to add an amount under division (A)(20) of this section if the increase in income taxes withheld by the taxpayer and by any pass-through entity in which the taxpayer has a direct or indirect ownership interest is equal to or greater than the sum of (I) the amount of qualifying section 179 depreciation expense and (II) the amount of depreciation expense allowed to the taxpayer by subsection (k) of section 168 of the Internal Revenue Code, and including the taxpayer's proportionate or distributive shares of such amounts allowed to any such pass-through entities.

(v) If a taxpayer directly or indirectly incurs a net operating loss for the taxable year for federal income tax purposes, to the extent such loss resulted from depreciation expense allowed by subsection (k) of section 168 of the Internal Revenue Code and by qualifying section 179 depreciation expense, "the entire" shall be substituted for "five-sixths of the" for the purpose of divisions (A)(20)(a)(i) and (ii) of this section.

The tax commissioner, under procedures established by the commissioner, may waive the add-backs related to a pass-through entity if the taxpayer owns, directly or indirectly, less than five per cent of the pass-through entity.

(b) Nothing in division (A)(20) of this section shall be construed to adjust or modify the adjusted basis of any asset.

(c) To the extent the add-back required under division (A)(20)(a) of this section is attributable to property generating nonbusiness income or loss allocated under section 5747.20 of the Revised Code, the add-back shall be situsedto the same location as the nonbusiness income or loss generated by the property for the purpose of determining the credit under division (A) of section 5747.05 of the Revised Code. Otherwise, the add-back shall be apportioned, subject to one or more of the four alternative methods of apportionment enumerated in section 5747.21 of the Revised Code.

(d) For the purposes of division (A)(20)(a)(v) of this section, net operating loss carryback and carryforward shall not include the allowance of any net operating loss deduction carryback or carryforward to the taxable year to the extent such loss resulted from depreciation allowed by section 168(k) of the Internal Revenue Code and by the qualifying section 179 depreciation expense amount.

(e) For the purposes of divisions (A)(20) and (21) of this section:

(i) "Income taxes withheld" means the total amount withheld and remitted under sections 5747.06 and 5747.07 of the Revised Code by an employer during the employer's taxable year.

(ii) "Increase in income taxes withheld" means the amount by which the amount of income taxes withheld by an employer during the employer's current taxable year exceeds the amount of

income taxes withheld by that employer during the employer's immediately preceding taxable year.

(iii) "Qualifying section 179 depreciation expense" means the difference between (I) the amount of depreciation expense directly or indirectly allowed to a taxpayer under section 179 of the Internal Revised Code, and (II) the amount of depreciation expense directly or indirectly allowed to the taxpayer under section 179 of the Internal Revenue Code as that section existed on December 31, 2002.

(21)(a) If the taxpayer was required to add an amount under division (A)(20)(a) of this section for a taxable year, deduct one of the following:

(i) One-fifth of the amount so added for each of the five succeeding taxable years if the amount so added was five-sixths of qualifying section 179 depreciation expense or depreciation expense allowed by subsection (k) of section 168 of the Internal Revenue Code;

(ii) One-half of the amount so added for each of the two succeeding taxable years if the amount so added was two-thirds of such depreciation expense;

(iii) One-sixth of the amount so added for each of the six succeeding taxable years if the entire amount of such depreciation expense was so added.

(b) If the amount deducted under division (A)(21)(a) of this section is attributable to an add-back allocated under division (A)(20)(c) of this section, the amount deducted shall be sitused to the same location. Otherwise, the add-back shall be apportioned using the apportionment factors for the taxable year in which the deduction is taken, subject to one or more of the four alternative methods of apportionment enumerated in section 5747.21 of the Revised Code.

(c) No deduction is available under division (A)(21)(a) of this section with regard to any depreciation allowed by section 168(k) of the Internal Revenue Code and by the qualifying section 179 depreciation expense amount to the extent that such depreciation results in or increases a federal net operating loss carryback or carryforward. If no such deduction is available for a taxable year, the taxpayer may carry forward the amount not deducted in such taxable year to the next taxable year and add that amount to any deduction otherwise available under division (A)(21)(a) of this section for that next taxable year. The carryforward of amounts not so deducted shall continue until the entire addition required by division (A)(20)(a) of this section has been deducted.

(d) No refund shall be allowed as a result of adjustments made by division (A)(21) of this section.

(22) Deduct, to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year, the amount the taxpayer received during the taxable year as reimbursement for life insurance premiums under section 5919.31 of the Revised Code.

(23) Deduct, to the extent not otherwise deducted or excluded in computing federal or Ohio

adjusted gross income for the taxable year, the amount the taxpayer received during the taxable year as a death benefit paid by the adjutant general under section 5919.33 of the Revised Code.

(24) Deduct, to the extent included in federal adjusted gross income and not otherwise allowable as a deduction or exclusion in computing federal or Ohio adjusted gross income for the taxable year, military pay and allowances received by the taxpayer during the taxable year for active duty service in the United States army, air force, navy, marine corps, or coast guard or reserve components thereof or the national guard. The deduction may not be claimed for military pay and allowances received by the taxpayer while the taxpayer is stationed in this state.

(25) Deduct, to the extent not otherwise allowable as a deduction or exclusion in computing federal or Ohio adjusted gross income for the taxable year and not otherwise compensated for by any other source, the amount of qualified organ donation expenses incurred by the taxpayer during the taxable year, not to exceed ten thousand dollars. A taxpayer may deduct qualified organ donation expenses only once for all taxable years beginning with taxable years beginning in 2007.

For the purposes of division (A)(25) of this section:

(a) "Human organ" means all or any portion of a human liver, pancreas, kidney, intestine, or lung, and any portion of human bone marrow.

(b) "Qualified organ donation expenses" means travel expenses, lodging expenses, and wages and salary forgone by a taxpayer in connection with the taxpayer's donation, while living, of one or more of the taxpayer's human organs to another human being.

(26) Deduct, to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year, amounts received by the taxpayer as retired personnel pay for service in the uniformed services or reserve components thereof, or the national guard, or received by the surviving spouse or former spouse of such a taxpayer under the survivor benefit plan on account of such a taxpayer's death. If the taxpayer receives income on account of retirement paid under the federal civil service retirement system or federal employees retirement system, or under any successor retirement program enacted by the congress of the United States that is established and maintained for retired employees of the United States government, and such retirement income is based, in whole or in part, on credit for the taxpayer's uniformed service, the deduction allowed under this division shall include only that portion of such retirement income that is attributable to the taxpayer's uniformed service, to the extent that portion of such retirement income is otherwise included in federal adjusted gross income and is not otherwise deducted under this section. Any amount deducted under division (A)(26) of this section is not included in a taxpayer's adjusted gross income for the purposes of section 5747.055 of the Revised Code. No amount may be deducted under division (A)(26) of this section on the basis of which a credit was claimed under section 5747.055 of the Revised Code.

(27) Deduct, to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year, the amount the taxpayer received during the taxable year from the military injury relief fund created in section 5902.05 of the Revised Code.

(28) Deduct, to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year, the amount the taxpayer received as a veterans bonus during the taxable year from the Ohio department of veterans services as authorized by Section 2r of Article VIII, Ohio Constitution.

(29) Deduct, to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year, any income derived from a transfer agreement or from the enterprise transferred under that agreement under section 4313.02 of the Revised Code.

(30) Deduct, to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year, Ohio college opportunity or federal Pell grant amounts received by the taxpayer or the taxpayer's spouse or dependent pursuant to section 3333.122 of the Revised Code or 20 U.S.C. 1070a, et seq., and used to pay room or board furnished by the educational institution for which the grant was awarded at the institution's facilities, including meal plans administered by the institution. For the purposes of this division, receipt of a grant includes the distribution of a grant directly to an educational institution and the crediting of the grant to the enrollee's account with the institution.

(31)(a) For taxable years beginning in 2015, deduct from the portion of an individual's adjusted gross income that is business income, to the extent not otherwise deducted or excluded in computing federal or Ohio adjusted gross income for the taxable year, the lesser of the following amounts:

(i) Seventy-five per cent of the individual's business income;

(ii) Ninety-three thousand seven hundred fifty dollars for each spouse if spouses file separate returns under section 5747.08 of the Revised Code or one hundred eighty-seven thousand five hundred dollars for all other individuals.

(b) For taxable years beginning in 2016 or thereafter, deduct from the portion of an individual's adjusted gross income that is business income, to the extent not otherwise deducted or excluded in computing federal adjusted gross income for the taxable year, one hundred twenty-five thousand dollars for each spouse if spouses file separate returns under section 5747.08 of the Revised Code or two hundred fifty thousand dollars for all other individuals.

(32) Deduct, as provided under section 5747.78 of the Revised Code, contributions to ABLE savings accounts made in accordance with sections 113.50 to 113.56 of the Revised Code.

(B) "Business income" means income, including gain or loss, arising from transactions, activities, and sources in the regular course of a trade or business and includes income, gain, or loss from real property, tangible property, and intangible property if the acquisition, rental, management, and disposition of the property constitute integral parts of the regular course of a trade or business operation. "Business income" includes income, including gain or loss, from a partial or complete liquidation of a business, including, but not limited to, gain or loss from the sale or other disposition of goodwill.

(C) "Nonbusiness income" means all income other than business income and may include, but is not limited to, compensation, rents and royalties from real or tangible personal property, capital gains, interest, dividends and distributions, patent or copyright royalties, or lottery winnings, prizes, and awards.

(D) "Compensation" means any form of remuneration paid to an employee for personal services.

(E) "Fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any other person acting in any fiduciary capacity for any individual, trust, or estate.

(F) "Fiscal year" means an accounting period of twelve months ending on the last day of any month other than December.

(G) "Individual" means any natural person.

(H) "Internal Revenue Code" means the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 1, as amended.

(I) "Resident" means any of the following, provided that division (I)(3) of this section applies only to taxable years of a trust beginning in 2002 or thereafter:

(1) An individual who is domiciled in this state, subject to section 5747.24 of the Revised Code;

(2) The estate of a decedent who at the time of death was domiciled in this state. The domicile tests of section 5747.24 of the Revised Code are not controlling for purposes of division (I)(2) of this section.

(3) A trust that, in whole or part, resides in this state. If only part of a trust resides in this state, the trust is a resident only with respect to that part.

For the purposes of division (I)(3) of this section:

(a) A trust resides in this state for the trust's current taxable year to the extent, as described in division (I)(3)(d) of this section, that the trust consists directly or indirectly, in whole or in part, of assets, net of any related liabilities, that were transferred, or caused to be transferred, directly or indirectly, to the trust by any of the following:

(i) A person, a court, or a governmental entity or instrumentality on account of the death of a decedent, but only if the trust is described in division (I)(3)(e)(i) or (ii) of this section;

(ii) A person who was domiciled in this state for the purposes of this chapter when the person directly or indirectly transferred assets to an irrevocable trust, but only if at least one of the trust's qualifying beneficiaries is domiciled in this state for the purposes of this chapter during all or some portion of the trust's current taxable year;

(iii) A person who was domiciled in this state for the purposes of this chapter when the trust document or instrument or part of the trust document or instrument became irrevocable, but only if at least one of the trust's qualifying beneficiaries is a resident domiciled in this state for the purposes of this chapter during all or some portion of the trust's current taxable year. If a trust document or instrument became irrevocable upon the death of a person who at the time of death was domiciled in this state for purposes of this chapter, that person is a person described in division (I)(3)(a)(iii) of this section.

(b) A trust is irrevocable to the extent that the transferor is not considered to be the owner of the net assets of the trust under sections 671 to 678 of the Internal Revenue Code.

(c) With respect to a trust other than a charitable lead trust, "qualifying beneficiary" has the same meaning as "potential current beneficiary" as defined in section 1361(e)(2) of the Internal Revenue Code, and with respect to a charitable lead trust "qualifying beneficiary" is any current, future, or contingent beneficiary, but with respect to any trust "qualifying beneficiary" excludes a person or a governmental entity or instrumentality to any of which a contribution would qualify for the charitable deduction under section 170 of the Internal Revenue Code.

(d) For the purposes of division (I)(3)(a) of this section, the extent to which a trust consists directly or indirectly, in whole or in part, of assets, net of any related liabilities, that were transferred directly or indirectly, in whole or part, to the trust by any of the sources enumerated in that division shall be ascertained by multiplying the fair market value of the trust's assets, net of related liabilities, by the qualifying ratio, which shall be computed as follows:

(i) The first time the trust receives assets, the numerator of the qualifying ratio is the fair market value of those assets at that time, net of any related liabilities, from sources enumerated in division (I)(3)(a) of this section. The denominator of the qualifying ratio is the fair market value of all the trust's assets at that time, net of any related liabilities.

(ii) Each subsequent time the trust receives assets, a revised qualifying ratio shall be computed. The numerator of the revised qualifying ratio is the sum of (1) the fair market value of the trust's assets immediately prior to the subsequent transfer, net of any related liabilities, multiplied by the qualifying ratio last computed without regard to the subsequent transfer, and (2) the fair market value of the subsequently transferred assets at the time transferred, net of any related liabilities, from sources enumerated in division (I)(3)(a) of this section. The denominator of the revised qualifying ratio is the fair market value of all the trust's assets immediately after the subsequent transfer, net of any related liabilities.

(iii) Whether a transfer to the trust is by or from any of the sources enumerated in division (I)(3)(a) of this section shall be ascertained without regard to the domicile of the trust's beneficiaries.

(e) For the purposes of division (I)(3)(a)(i) of this section:

(i) A trust is described in division (I)(3)(e)(i) of this section if the trust is a testamentary trust and the testator of that testamentary trust was domiciled in this state at the time of the testator's death

for purposes of the taxes levied under Chapter 5731. of the Revised Code.

(ii) A trust is described in division (I)(3)(e)(ii) of this section if the transfer is a qualifying transfer described in any of divisions (I)(3)(f)(i) to (vi) of this section, the trust is an irrevocable inter vivos trust, and at least one of the trust's qualifying beneficiaries is domiciled in this state for purposes of this chapter during all or some portion of the trust's current taxable year.

(f) For the purposes of division (I)(3)(e)(ii) of this section, a "qualifying transfer" is a transfer of assets, net of any related liabilities, directly or indirectly to a trust, if the transfer is described in any of the following:

(i) The transfer is made to a trust, created by the decedent before the decedent's death and while the decedent was domiciled in this state for the purposes of this chapter, and, prior to the death of the decedent, the trust became irrevocable while the decedent was domiciled in this state for the purposes of this chapter.

(ii) The transfer is made to a trust to which the decedent, prior to the decedent's death, had directly or indirectly transferred assets, net of any related liabilities, while the decedent was domiciled in this state for the purposes of this chapter, and prior to the death of the decedent the trust became irrevocable while the decedent was domiciled in this state for the purposes of this chapter.

(iii) The transfer is made on account of a contractual relationship existing directly or indirectly between the transferor and either the decedent or the estate of the decedent at any time prior to the date of the decedent's death, and the decedent was domiciled in this state at the time of death for purposes of the taxes levied under Chapter 5731. of the Revised Code.

(iv) The transfer is made to a trust on account of a contractual relationship existing directly or indirectly between the transferor and another person who at the time of the decedent's death was domiciled in this state for purposes of this chapter.

(v) The transfer is made to a trust on account of the will of a testator who was domiciled in this state at the time of the testator's death for purposes of the taxes levied under Chapter 5731. of the Revised Code.

(vi) The transfer is made to a trust created by or caused to be created by a court, and the trust was directly or indirectly created in connection with or as a result of the death of an individual who, for purposes of the taxes levied under Chapter 5731. of the Revised Code, was domiciled in this state at the time of the individual's death.

(g) The tax commissioner may adopt rules to ascertain the part of a trust residing in this state.

(J) "Nonresident" means an individual or estate that is not a resident. An individual who is a resident for only part of a taxable year is a nonresident for the remainder of that taxable year.

(K) "Pass-through entity" has the same meaning as in section 5733.04 of the Revised Code.

(L) "Return" means the notifications and reports required to be filed pursuant to this chapter for the purpose of reporting the tax due and includes declarations of estimated tax when so required.

(M) "Taxable year" means the calendar year or the taxpayer's fiscal year ending during the calendar year, or fractional part thereof, upon which the adjusted gross income is calculated pursuant to this chapter.

(N) "Taxpayer" means any person subject to the tax imposed by section 5747.02 of the Revised Code or any pass-through entity that makes the election under division (D) of section 5747.08 of the Revised Code.

(O) "Dependents" means dependents as defined in the Internal Revenue Code and as claimed in the taxpayer's federal income tax return for the taxable year or which the taxpayer would have been permitted to claim had the taxpayer filed a federal income tax return.

(P) "Principal county of employment" means, in the case of a nonresident, the county within the state in which a taxpayer performs services for an employer or, if those services are performed in more than one county, the county in which the major portion of the services are performed.

(Q) As used in sections 5747.50 to 5747.55 of the Revised Code:

(1) "Subdivision" means any county, municipal corporation, park district, or township.

(2) "Essential local government purposes" includes all functions that any subdivision is required by general law to exercise, including like functions that are exercised under a charter adopted pursuant to the Ohio Constitution.

(R) "Overpayment" means any amount already paid that exceeds the figure determined to be the correct amount of the tax.

(S) "Taxable income" or "Ohio taxable income" applies only to estates and trusts, and means federal taxable income, as defined and used in the Internal Revenue Code, adjusted as follows:

(1) Add interest or dividends, net of ordinary, necessary, and reasonable expenses not deducted in computing federal taxable income, on obligations or securities of any state or of any political subdivision or authority of any state, other than this state and its subdivisions and authorities, but only to the extent that such net amount is not otherwise includible in Ohio taxable income and is described in either division (S)(1)(a) or (b) of this section:

(a) The net amount is not attributable to the S portion of an electing small business trust and has not been distributed to beneficiaries for the taxable year;

(b) The net amount is attributable to the S portion of an electing small business trust for the taxable year.

(2) Add interest or dividends, net of ordinary, necessary, and reasonable expenses not deducted in computing federal taxable income, on obligations of any authority, commission, instrumentality, territory, or possession of the United States to the extent that the interest or dividends are exempt from federal income taxes but not from state income taxes, but only to the extent that such net amount is not otherwise includible in Ohio taxable income and is described in either division (S)(1)(a) or (b) of this section;

(3) Add the amount of personal exemption allowed to the estate pursuant to section 642(b) of the Internal Revenue Code;

(4) Deduct interest or dividends, net of related expenses deducted in computing federal taxable income, on obligations of the United States and its territories and possessions or of any authority, commission, or instrumentality of the United States to the extent that the interest or dividends are exempt from state taxes under the laws of the United States, but only to the extent that such amount is included in federal taxable income and is described in either division (S)(1)(a) or (b) of this section;

(5) Deduct the amount of wages and salaries, if any, not otherwise allowable as a deduction but that would have been allowable as a deduction in computing federal taxable income for the taxable year, had the targeted jobs credit allowed under sections 38, 51, and 52 of the Internal Revenue Code not been in effect, but only to the extent such amount relates either to income included in federal taxable income for the taxable year or to income of the S portion of an electing small business trust for the taxable year;

(6) Deduct any interest or interest equivalent, net of related expenses deducted in computing federal taxable income, on public obligations and purchase obligations, but only to the extent that such net amount relates either to income included in federal taxable income for the taxable year or to income of the S portion of an electing small business trust for the taxable year;

(7) Add any loss or deduct any gain resulting from sale, exchange, or other disposition of public obligations to the extent that such loss has been deducted or such gain has been included in computing either federal taxable income or income of the S portion of an electing small business trust for the taxable year;

(8) Except in the case of the final return of an estate, add any amount deducted by the taxpayer on both its Ohio estate tax return pursuant to section 5731.14 of the Revised Code, and on its federal income tax return in determining federal taxable income;

(9)(a) Deduct any amount included in federal taxable income solely because the amount represents a reimbursement or refund of expenses that in a previous year the decedent had deducted as an itemized deduction pursuant to section 63 of the Internal Revenue Code and applicable treasury regulations. The deduction otherwise allowed under division (S)(9)(a) of this section shall be reduced to the extent the reimbursement is attributable to an amount the taxpayer or decedent deducted under this section in any taxable year.

(b) Add any amount not otherwise included in Ohio taxable income for any taxable year to the

extent that the amount is attributable to the recovery during the taxable year of any amount deducted or excluded in computing federal or Ohio taxable income in any taxable year, but only to the extent such amount has not been distributed to beneficiaries for the taxable year.

(10) Deduct any portion of the deduction described in section 1341(a)(2) of the Internal Revenue Code, for repaying previously reported income received under a claim of right, that meets both of the following requirements:

(a) It is allowable for repayment of an item that was included in the taxpayer's taxable income or the decedent's adjusted gross income for a prior taxable year and did not qualify for a credit under division (A) or (B) of section 5747.05 of the Revised Code for that year.

(b) It does not otherwise reduce the taxpayer's taxable income or the decedent's adjusted gross income for the current or any other taxable year.

(11) Add any amount claimed as a credit under section 5747.059 or 5747.65 of the Revised Code to the extent that the amount satisfies either of the following:

(a) The amount was deducted or excluded from the computation of the taxpayer's federal taxable income as required to be reported for the taxpayer's taxable year under the Internal Revenue Code;

(b) The amount resulted in a reduction in the taxpayer's federal taxable income as required to be reported for any of the taxpayer's taxable years under the Internal Revenue Code.

(12) Deduct any amount, net of related expenses deducted in computing federal taxable income, that a trust is required to report as farm income on its federal income tax return, but only if the assets of the trust include at least ten acres of land satisfying the definition of "land devoted exclusively to agricultural use" under section 5713.30 of the Revised Code, regardless of whether the land is valued for tax purposes as such land under sections 5713.30 to 5713.38 of the Revised Code. If the trust is a pass-through entity investor, section 5747.231 of the Revised Code applies in ascertaining if the trust is eligible to claim the deduction provided by division (S)(12) of this section in connection with the pass-through entity's farm income.

Except for farm income attributable to the S portion of an electing small business trust, the deduction provided by division (S)(12) of this section is allowed only to the extent that the trust has not distributed such farm income. Division (S)(12) of this section applies only to taxable years of a trust beginning in 2002 or thereafter.

(13) Add the net amount of income described in section 641(c) of the Internal Revenue Code to the extent that amount is not included in federal taxable income.

(14) Add or deduct the amount the taxpayer would be required to add or deduct under division (A)(20) or (21) of this section if the taxpayer's Ohio taxable income were computed in the same manner as an individual's Ohio adjusted gross income is computed under this section. In the case of a trust, division (S)(14) of this section applies only to any of the trust's taxable years

beginning in 2002 or thereafter.

(T) "School district income" and "school district income tax" have the same meanings as in section 5748.01 of the Revised Code.

(U) As used in divisions (A)(8), (A)(9), (S)(6), and (S)(7) of this section, "public obligations," "purchase obligations," and "interest or interest equivalent" have the same meanings as in section 5709.76 of the Revised Code.

(V) "Limited liability company" means any limited liability company formed under Chapter 1705. of the Revised Code or under the laws of any other state.

(W) "Pass-through entity investor" means any person who, during any portion of a taxable year of a pass-through entity, is a partner, member, shareholder, or equity investor in that pass-through entity.

(X) "Banking day" has the same meaning as in section 1304.01 of the Revised Code.

(Y) "Month" means a calendar month.

(Z) "Quarter" means the first three months, the second three months, the third three months, or the last three months of the taxpayer's taxable year.

(AA)(1) "Eligible institution" means a state university or state institution of higher education as defined in section 3345.011 of the Revised Code, or a private, nonprofit college, university, or other post-secondary institution located in this state that possesses a certificate of authorization issued by the chancellor of higher education pursuant to Chapter 1713. of the Revised Code or a certificate of registration issued by the state board of career colleges and schools under Chapter 3332. of the Revised Code.

(2) "Qualified tuition and fees" means tuition and fees imposed by an eligible institution as a condition of enrollment or attendance, not exceeding two thousand five hundred dollars in each of the individual's first two years of post-secondary education. If the individual is a part-time student, "qualified tuition and fees" includes tuition and fees paid for the academic equivalent of the first two years of post-secondary education during a maximum of five taxable years, not exceeding a total of five thousand dollars. "Qualified tuition and fees" does not include:

(a) Expenses for any course or activity involving sports, games, or hobbies unless the course or activity is part of the individual's degree or diploma program;

(b) The cost of books, room and board, student activity fees, athletic fees, insurance expenses, or other expenses unrelated to the individual's academic course of instruction;

(c) Tuition, fees, or other expenses paid or reimbursed through an employer, scholarship, grant in aid, or other educational benefit program.

(BB)(1) "Modified business income" means the business income included in a trust's Ohio taxable income after such taxable income is first reduced by the qualifying trust amount, if any.

(2) "Qualifying trust amount" of a trust means capital gains and losses from the sale, exchange, or other disposition of equity or ownership interests in, or debt obligations of, a qualifying investee to the extent included in the trust's Ohio taxable income, but only if the following requirements are satisfied:

(a) The book value of the qualifying investee's physical assets in this state and everywhere, as of the last day of the qualifying investee's fiscal or calendar year ending immediately prior to the date on which the trust recognizes the gain or loss, is available to the trust.

(b) The requirements of section 5747.011 of the Revised Code are satisfied for the trust's taxable year in which the trust recognizes the gain or loss.

Any gain or loss that is not a qualifying trust amount is modified business income, qualifying investment income, or modified nonbusiness income, as the case may be.

(3) "Modified nonbusiness income" means a trust's Ohio taxable income other than modified business income, other than the qualifying trust amount, and other than qualifying investment income, as defined in section 5747.012 of the Revised Code, to the extent such qualifying investment income is not otherwise part of modified business income.

(4) "Modified Ohio taxable income" applies only to trusts, and means the sum of the amounts described in divisions (BB)(4)(a) to (c) of this section:

(a) The fraction, calculated under section 5747.013, and applying section 5747.231 of the Revised Code, multiplied by the sum of the following amounts:

(i) The trust's modified business income;

(ii) The trust's qualifying investment income, as defined in section 5747.012 of the Revised Code, but only to the extent the qualifying investment income does not otherwise constitute modified business income and does not otherwise constitute a qualifying trust amount.

(b) The qualifying trust amount multiplied by a fraction, the numerator of which is the sum of the book value of the qualifying investee's physical assets in this state on the last day of the qualifying investee's fiscal or calendar year ending immediately prior to the day on which the trust recognizes the qualifying trust amount, and the denominator of which is the sum of the book value of the qualifying investee's total physical assets everywhere on the last day of the qualifying investee's fiscal or calendar year ending immediately prior to the day on which the trust recognizes the qualifying trust amount. If, for a taxable year, the trust recognizes a qualifying trust amount with respect to more than one qualifying investee, the amount described in division (BB)(4)(b) of this section shall equal the sum of the products so computed for each such qualifying investee.

(c)(i) With respect to a trust or portion of a trust that is a resident as ascertained in accordance with division (I)(3)(d) of this section, its modified nonbusiness income.

(ii) With respect to a trust or portion of a trust that is not a resident as ascertained in accordance with division (I)(3)(d) of this section, the amount of its modified nonbusiness income satisfying the descriptions in divisions (B)(2) to (5) of section 5747.20 of the Revised Code, except as otherwise provided in division (BB)(4)(c)(ii) of this section. With respect to a trust or portion of a trust that is not a resident as ascertained in accordance with division (I)(3)(d) of this section, the trust's portion of modified nonbusiness income recognized from the sale, exchange, or other disposition of a debt interest in or equity interest in a section 5747.212 entity, as defined in section 5747.212 of the Revised Code, without regard to division (A) of that section, shall not be allocated to this state in accordance with section 5747.20 of the Revised Code but shall be apportioned to this state in accordance with division (B) of section 5747.212 of the Revised Code without regard to division (A) of that section.

If the allocation and apportionment of a trust's income under divisions (BB)(4)(a) and (c) of this section do not fairly represent the modified Ohio taxable income of the trust in this state, the alternative methods described in division (C) of section 5747.21 of the Revised Code may be applied in the manner and to the same extent provided in that section.

(5)(a) Except as set forth in division (BB)(5)(b) of this section, "qualifying investee" means a person in which a trust has an equity or ownership interest, or a person or unit of government the debt obligations of either of which are owned by a trust. For the purposes of division (BB)(2)(a) of this section and for the purpose of computing the fraction described in division (BB)(4)(b) of this section, all of the following apply:

(i) If the qualifying investee is a member of a qualifying controlled group on the last day of the qualifying investee's fiscal or calendar year ending immediately prior to the date on which the trust recognizes the gain or loss, then "qualifying investee" includes all persons in the qualifying controlled group on such last day.

(ii) If the qualifying investee, or if the qualifying investee and any members of the qualifying controlled group of which the qualifying investee is a member on the last day of the qualifying investee's fiscal or calendar year ending immediately prior to the date on which the trust recognizes the gain or loss, separately or cumulatively own, directly or indirectly, on the last day of the qualifying investee's fiscal or calendar year ending immediately prior to the date on which the trust recognizes the qualifying trust amount, more than fifty per cent of the equity of a pass-through entity, then the qualifying investee and the other members are deemed to own the proportionate share of the pass-through entity's physical assets which the pass-through entity directly or indirectly owns on the last day of the pass-through entity's calendar or fiscal year ending within or with the last day of the qualifying investee's fiscal or calendar year ending immediately prior to the date on which the trust recognizes the qualifying trust amount.

(iii) For the purposes of division (BB)(5)(a)(iii) of this section, "upper level pass-through entity" means a pass-through entity directly or indirectly owning any equity of another pass-through entity, and "lower level pass-through entity" means that other pass-through entity.

An upper level pass-through entity, whether or not it is also a qualifying investee, is deemed to own, on the last day of the upper level pass-through entity's calendar or fiscal year, the proportionate share of the lower level pass-through entity's physical assets that the lower level pass-through entity directly or indirectly owns on the last day of the lower level pass-through entity's calendar or fiscal year ending within or with the last day of the upper level pass-through entity's fiscal or calendar year. If the upper level pass-through entity directly and indirectly owns less than fifty per cent of the equity of the lower level pass-through entity on each day of the upper level pass-through entity's calendar or fiscal year in which or with which ends the calendar or fiscal year of the lower level pass-through entity and if, based upon clear and convincing evidence, complete information about the location and cost of the physical assets of the lower pass-through entity is not available to the upper level pass-through entity, then solely for purposes of ascertaining if a gain or loss constitutes a qualifying trust amount, the upper level pass-through entity shall be deemed as owning no equity of the lower level pass-through entity for each day during the upper level pass-through entity's calendar or fiscal year in which or with which ends the lower level pass-through entity's calendar or fiscal year. Nothing in division (BB)(5)(a)(iii) of this section shall be construed to provide for any deduction or exclusion in computing any trust's Ohio taxable income.

(b) With respect to a trust that is not a resident for the taxable year and with respect to a part of a trust that is not a resident for the taxable year, "qualifying investee" for that taxable year does not include a C corporation if both of the following apply:

(i) During the taxable year the trust or part of the trust recognizes a gain or loss from the sale, exchange, or other disposition of equity or ownership interests in, or debt obligations of, the C corporation.

(ii) Such gain or loss constitutes nonbusiness income.

(6) "Available" means information is such that a person is able to learn of the information by the due date plus extensions, if any, for filing the return for the taxable year in which the trust recognizes the gain or loss.

(CC) "Qualifying controlled group" has the same meaning as in section 5733.04 of the Revised Code.

(DD) "Related member" has the same meaning as in section 5733.042 of the Revised Code.

(EE)(1) For the purposes of division (EE) of this section:

(a) "Qualifying person" means any person other than a qualifying corporation.

(b) "Qualifying corporation" means any person classified for federal income tax purposes as an association taxable as a corporation, except either of the following:

(i) A corporation that has made an election under subchapter S, chapter one, subtitle A, of the

Internal Revenue Code for its taxable year ending within, or on the last day of, the investor's taxable year;

(ii) A subsidiary that is wholly owned by any corporation that has made an election under subchapter S, chapter one, subtitle A of the Internal Revenue Code for its taxable year ending within, or on the last day of, the investor's taxable year.

(2) For the purposes of this chapter, unless expressly stated otherwise, no qualifying person indirectly owns any asset directly or indirectly owned by any qualifying corporation.

(FF) For purposes of this chapter and Chapter 5751. of the Revised Code:

(1) "Trust" does not include a qualified pre-income tax trust.

(2) A "qualified pre-income tax trust" is any pre-income tax trust that makes a qualifying pre-income tax trust election as described in division (FF)(3) of this section.

(3) A "qualifying pre-income tax trust election" is an election by a pre-income tax trust to subject to the tax imposed by section 5751.02 of the Revised Code the pre-income tax trust and all pass-through entities of which the trust owns or controls, directly, indirectly, or constructively through related interests, five per cent or more of the ownership or equity interests. The trustee shall notify the tax commissioner in writing of the election on or before April 15, 2006. The election, if timely made, shall be effective on and after January 1, 2006, and shall apply for all tax periods and tax years until revoked by the trustee of the trust.

(4) A "pre-income tax trust" is a trust that satisfies all of the following requirements:

(a) The document or instrument creating the trust was executed by the grantor before January 1, 1972;

(b) The trust became irrevocable upon the creation of the trust; and

(c) The grantor was domiciled in this state at the time the trust was created.

(GG) "Uniformed services" has the same meaning as in 10 U.S.C. 101.

(HH) "Taxable business income" means the amount by which an individual's business income that is included in federal adjusted gross income exceeds the amount of business income the individual is authorized to deduct under division (A)(31) of this section for the taxable year.

OH HB 483