IN THE SUPREME COURT OF OHIO

HUNTER T. HILLENMEYER Plaintiff-Appellant, vs. CITY OF CLEVELAND BOARD OF REVIEW, and NASSIM M. LYNCH Defendants-Appellees.	)	Case No: 2014-0235 On Appeal from the Ohio Board of Tax Appeals Ohio Board of Tax Appeals Case No. 2009-3688

APPELLEES' MOTION FOR RECONSIDERATION OF DECISION ON THE MERITS

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MEMORANDUM IN SUPPORT

Pursuant to S.Ct.Prac.R. 18.02(B)(4), Appellees, Cleveland Board of Review and Nassim M. Lynch, urgently request the Court to reconsider its decision finding that Cleveland's application of its games-played method of allocating the income of professional football players of the National Football League (NFL) violates such players' due process rights. This Court is urged to reconsider its decision for several reasons.

First, the Court's finding is in conflict with United States Supreme Court case precedent that an apportionment method may be based on *any* measurement so long as the measurement is reasonable and that no single apportionment method is required. *See Container Corp. of American v. Franchise Tax Bd.*, 463 U.S. 159, 170 (1980) ("we have long held that the constitution imposes no single [apportionment] formula on the States"). In *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989), the United States Supreme Court noted that it had "declined to undertake the essentially legislative task of establishing a 'single constitutionally mandated method of taxation.'" Yet that is clearly what this Court has done in this case with respect to NFL players. This Court has held that an apportionment method with respect to these players must be based on time or days. The due process clause of the federal Constitution does not dictate such outcome.

Second, the United States Supreme Court has held that "[s]tates [and local jurisdictions] have wide latitude in the selection of apportionment formulas and that a formula-produced assessment will only be disturbed [under the Due Process Clause] when the taxpayer has proved by 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportion to the business transacted ... in the State' or has 'led to a grossly

distorted result.'" *Moorman Mfg. Co. v. Blair*, 437 U.S. 267, 274 (1978). The Court notes that "[t]he games-played method results in Cleveland allocating approximately 5 percent of Hillenmeyer's income to itself on the basis of two days spent in Cleveland" but "[b]y using the duty-days method [] Cleveland is allocated approximately 1.25 percent based on the same two days." Opinion at ¶46. This difference in percentage hardly makes Cleveland's games-played method illegal under the Due Process Clause. The games-played method is based on the valid premise that players are paid for the games. Since all games are treated equally under the games-played apportionment formula, the resulting tax is not "out of all proportion to the business transacted" in Cleveland nor does it "led to a grossly distorted result." There is no due process violation in this regard.

Third, the United States Supreme Court "has repeatedly emphasized that the function of the apportionment formula is to determine the portion of [] income that can be fairly attributed to [] activities [within a taxing jurisdiction]," *Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 30-31 (1988), which the games-played method is specifically designed to do. Contrary to the Court's finding, the games-played method does not result in Cleveland taxing extraterritorially beyond its power to tax.

Fourth, this Court's criticism of "Cleveland['s] rel[iance] on cases involving the apportionment of business income" completely ignores the point. Opinion at ¶45. This is true notwithstanding the Court's claim that "[c]ompensation invokes a simpler rule: compensation must be allocated to the place where the employee performed work." *Id.* Business income must be apportioned where a company conducts business in more than one jurisdiction that levies a tax. Since football players in the NFL will play games in a number of jurisdictions, they

will earn compensation in a number of jurisdictions. The principles articulated in these business cases are clearly applicable in that regard.

Fifth, troubling too, is the Court's apparent finding that Cleveland's selection of an apportionment method is controlled by the employment documents of the NFL players. As the employment documents of the NFL players change, will Cleveland's authority to tax change too? And with respect to other taxpayers, will Ohio municipalities for tax purposes be controlled by whatever employment documents those taxpayers may be subject to? Ohio municipalities including Cleveland cannot be governed by such documents.

Sixth, the Court's reliance on Taxpayer's affidavits is also most troubling. So how long will it be before NFL players claim by affidavit or otherwise that they "work-out" 365 days a year for purposes of their contracts under the so-called duty-day method? Legal commentators have long suggested contract language that they believe would convert all 365 days in a year to "duty days." Kara Fratto, *The Taxation of Professional U.S. Athletes in Both The United States and Canada*, 14 Sports Law J 29, n. 114 (2007) citing Jeffrey Adams, *Why Come To Training Camp Out Of Shape When You Can Work Out In The Off-Season And Lower Your Taxes: The Taxation of Professional Athletes*, 10 Ind. Int'l & Comp.L.Rev. 79, 111 (1991). This shows the superiority of the games-played method versus the duty-days method—players cannot manufacture game days but they can easily manufacture so-called "duty days." And the suggestion that a single practice day, meeting day or even travel day equates to a game day is wholly unreasonable. The NFL has just completed its investigation of "Deflategate," the controversy where the New England Patriots and its star quarterback Tom Brady have been implicated in regards to deflating footballs (which are apparently easier to throw and catch). If

Tom Brady is ultimately disciplined as a result of this controversy with a suspension—he will clearly be suspended from *games.* And as Cleveland has repeatedly emphasized in this case, every important right or benefit that a player may be eligible to receive like free agency, player minimum salary, retirement benefits, etc. is based on one thing—the *games*, not practice, not meetings, not promotional events or anything else that NFL teams may require a player to do.

Finally, the Court's finding that the Taxpayer did not waive consideration of his constitutional claims where he chose to appeal to the board of tax appeals instead of the common pleas court should be reconsidered. The United States Supreme Court clearly demands that important constitutional issues be addressed by the lower courts before it weighs in on the issue. So too should this Court. This Court's citation to *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 299, 520 N.E.2d 188 (1988) for the proposition "that constitutional issues may be raised before the BTA for later determination by the courts on appeal" is clearly inapposite to the situation here. *Cleveland Gear* dealt with an appeal from a decision of the state tax commissioner to the board of tax appeals under R.C. 5717.02 where there was no option to appeal to the common pleas court. In this case, Taxpayer clearly had the right under R.C. 5717.011(B) to appeal to the common pleas court where not only his constitutional issues could have been decided but his other non-constitutional claims (over which the BTA found it had no jurisdiction) as well. As a matter of sound judicial policy, this Court should not issue important constitutional rulings where a party has waived consideration of nonconstitutional error that may have disposed of the matter and chosen an inappropriate forum for the action. *See Kinsey v. Bd. Of Trustees of Police & Firemen's Disability & Pension Fund of Ohio*, 49 Ohio St.3d 224, 225, 551 N.E.2d 989,991 (1990) ("[i]t is well-established that where a case can be

resolved upon other grounds the constitutional question will not be determined"). *See also Hagans v. Lavine*, 415 U.S. 528, 547 (1974) ("a [] court should not decide constitutional questions where a dispositive nonconstitutional ground is available").

CONCLUSION

For the reasons discussed herein, the Court should reconsider its decision finding that that Cleveland's application of its games-played method of allocating the income of professional football players of the NFL violates such players' due process rights. An apportionment method with respect to these players need not be based on time or days and the duty-days method is not the only method that "comports with due process." And, Cleveland's selection of an apportionment method cannot be controlled by the employment documents of NFL players or any taxpayer for that matter. Further, the Court should have held that Taxpayer waived consideration of his constitutional claims where he chose to appeal to the board of tax appeals instead of the common pleas court as a matter of sound judicial policy.

Respectfully submitted,
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By: /s/ Linda L. Bickerstaff
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CERTIFICATE OF SERVICE

A copy of the foregoing Appellees' Motion for Reconsideration of Decision on the Merits was served by regular U.S. mail on counsel for Amicus Curiae State of Ohio, Michael Dewine, Eric E. Murphy, Michael J. Hendershot, Stephen P. Carney, Daniel W. Fausey and David D. Ebersole, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215; Appellants' counsel, Stephen W. Kidder, Esq,. Hemenway & Barnes LLP, 60 State Street, Boston, MA 02109-1899 and Richard C. Farrin, Esq., Zaino Hall & Farrin LLC, 41 South High Street – Suite 3600, Columbus, Ohio 43215; and counsel for Amici Curiae National Football League Players Association, Major League Baseball Players Association, National Hokey League Players Association, and National Basketball League Players Association, Thomas M. Zaino, Esq., Zaino Hall & Farrin LLC, 41 South High Street – Suite 3600, Columbus, Ohio 43215 on this 11th day of May 2015.

/s/ Linda L. Bickerstaff
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