

## Ohio Public Law Update

April 2013

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### *MacDonald v. City of Shaker Heights*, Ohio Board of Tax Appeals Case No. 2008-K-1883 (Dec. 28, 2012)

In this case, the Ohio Board of Tax Appeals (BTA) held that the City of Shaker Heights (City) could not impose its income tax on \$9,107,013.16 of nonqualified deferred compensation plan benefits that were subject to Social Security withholding tax and included in Box 5 of a taxpayer's IRS Form W-2 for 2006, the year in which the taxpayer retired from National City Corporation (NCC). The taxpayer obtained the benefits at issue from a Supplemental Executive Retirement Plan (SERP) maintained by NCC.

Ohio Revised Code (RC) 718.01(H)(10) (RC 718.01(F)(10) for the tax year at issue in *MacDonald*) provides that no municipal corporation may tax "employee compensation that is not 'qualifying wages' as defined in [RC] 718.03." Qualifying wages are defined in RC 718.03(A) as those wages, within the meaning of Section 3121(a) of the Internal Revenue Code of 1986, as amended, that are subject to Social Security withholding tax. Such wages are generally reported in Box 5 of a taxpayer's IRS Form W-2. Qualifying wages therefore include nonqualified deferred compensation plan benefits that are subject to Social Security withholding tax, except where a municipal corporation has, under RC 718.03(A)(2)(c), exempted such amounts from taxation pursuant to resolution or ordinance.

It was uncontested in *MacDonald* that the SERP was a nonqualified deferred compensation plan and that the taxpayer's SERP benefits were subject to Social Security withholding tax upon his retirement from NCC in 2006. It was also uncontested that the City had not, by resolution or ordinance, expressly exempted from its income tax nonqualified deferred compensation plan benefits that were subject to Social Security withholding tax. Notwithstanding the lack of an express exemption for nonqualified deferred compensation plans, the taxpayer asserted that his SERP benefits constituted a pension and were therefore exempt from City income tax on that basis, because the City's codified income tax ordinances excluded pension benefits from taxation.

The City did not define the meaning of "pension" in its codified income tax ordinances or otherwise, so the BTA looked to the language of the SERP, which stated that its purpose was to "provide for the payment of certain pension, disability and survivor benefits in addition to benefits which may be payable under other plans . . ." Because the SERP described itself as a supplemental pension plan and the City exempted pensions from its income tax, the BTA held that the SERP was a nontaxable pension, even though it was also a nonqualified deferred compensation plan that the City had not expressly excepted from taxation.

In reaching this holding, the BTA distinguished *Wardrop v. City of Middletown Income Tax Review Board*, Butler County App. No. CA2007-09-235 (Oct. 13, 2008). The 12th District Court of Appeals held in *Wardrop* that a nonqualified deferred compensation plan was not a pension, within the meaning of the City of Middletown's codified income tax ordinances, and was therefore subject to Middletown income tax. The BTA attributed the differing holdings in *MacDonald* and *Wardrop* to the fact that, unlike the SERP, the nonqualified deferred compensation plan at issue in *Wardrop* did not identify itself as a pension.

It remains to be seen whether the BTA's holding in *MacDonald* will be sustained on appeal. An affirmance would allow codified municipal income tax ordinances that call for the taxation of

nonqualified deferred compensation plan benefits as qualifying wages to be disregarded where these ordinances also exempt, but do not define, pension benefits. An affirmance would thus violate the cannon of statutory construction that potentially conflicting statutes must be interpreted so that each is given effect and that neither is rendered meaningless. The BTA could have followed this cannon in *MacDonald* by holding that the exemption from City income tax for pension benefits does not extend to amounts that, like the SERP benefits, are subject to City income tax as qualifying wages under RC 718.03. The BTA did not, however, analyze a reconciliation of the City's codified income tax ordinances that would have given meaning to each of the ordinances at issue, rather than making one of the ordinances devoid of any meaning, which is the precise effect of the holding in *MacDonald*. This cannon was recognized by the 12th District Court of Appeals in *Wardrop*, which noted that it would be ignoring the provisions of the Middletown codified income tax ordinances that mandated taxation of nonqualified deferred compensation plan benefits were it to hold that the nonqualified deferred compensation plan was a tax-exempt pension under the Middletown codified income tax ordinances.

It is interesting to note that Ohio House Bill 5, the municipal income tax overhaul bill introduced on January 30, 2013, would, if enacted, amend RC 718.01 to provide that pension benefits are exempt from municipal income tax, except to the extent that the benefits are included in qualifying wages, whether as nonqualified deferred compensation plan benefits or otherwise. Thus, under Ohio HB 5, the SERP benefits at issue in *MacDonald* would be subject to municipal income tax.

In light of the present uncertainty engendered by *MacDonald*, a municipal corporation that exempts pensions from its income tax but that intends to tax nonqualified deferred compensation plan benefits should consider an amendment of its codified income tax ordinances to adopt the approach set forth in Ohio HB 5 and clarify that, for purposes of the municipal corporation's income tax, a pension does not include amounts that are subject to taxation as qualifying wages under RC 718.03.

## Recent Decisions of Interest

The Ohio Supreme Court denied a writ of mandamus in a public records case to compel a county engineer to provide an electronic database from which maps and aerial photographs are created because the county engineer did not have the capability to separate the requested electronic database from software that the Public Records Act exempts from disclosure. The Ohio Supreme Court also noted, however, that the requester may obtain the content of the electronic database by paying the private contractor's fee for extracting the requested data and the cost of the hardware on which it would be stored, both of which are a "cost," under section 149.43(B)(1) of the Ohio Revised Code, of providing the requested public records that public entities may charge. *State ex rel. Gambill v. Opperman*, 2013-Ohio-761 (Ohio Supreme Court).

The Ohio Supreme Court issued a writ of mandamus to compel a board of elections to place a tax levy on the ballot where (i) the township's email transmission of the required documents met the deadline, (ii) a subsequent hand-delivery of the required documents was delivered two minutes past the deadline, (iii) neither the board of elections nor the statute specifies how the documents are to be delivered and (iv) the township stated that the fire department's ability to do its work would be compromised without the levy. *State ex rel. Orange Twp. Bd. of Trustees v. Delaware Cty. Bd. of Elections*, 2013-Ohio-36 (Ohio Supreme Court).

The court issued a writ of mandamus to compel a city to initiate an eminent domain proceeding under section 2731.07 of the Ohio Revised Code to compensate the property owners for partial taking of their easement after the city changed drainage tile, which resulted in flooding on an easement over the property owners' property. *State ex rel. Wasserman v. Fremont*, 2013-Ohio-762 (Ohio App. 6th Dist.).

A blogger was entitled to damages for the township's failure to provide requested public records in a reasonable amount of time, because the blogger satisfied the requirement of showing that the

release of the records, which were to be made available to interested citizens on a blog site, would “provide a public benefit that is greater than the benefit to the [blogger].” *State ex rel. Hartkemeyer v. Fairfield Twp.*, 2012-Ohio-5842 (Ohio App. 12th Dist.).

A political subdivision that receives forfeited real property under section 5723.01 of the Ohio Revised Code must apply under section 5715.27 of the Ohio Revised Code to have the property placed on the list of real property exempted from taxation. The right of a former owner of real property to redeem property terminates when the court entry ordering the forfeiture of real property to a political subdivision is certified. This opinion also addresses when a political subdivision is obligated to pay taxes and assessments on forfeited real property and the continuation of the lien of the assessment. *2013 Op. Att’y General No. 2013-001.*

In determining whether section 1901.31(A)(1)(h) of the Ohio Revised Code or a city’s charter governs the manner in which a person is nominated as a candidate for the office of the clerk of a municipal court that has jurisdiction beyond the city’s boundaries, the Attorney General held that the Ohio Revised Code governs because a city charter provision may not have extraterritorial effect under the Home Rule Amendment to the Ohio Constitution. *2013 Op. Att’y General No. 2013-009.*

## Legislation of Interest

**House Bill 51** (Governor signed April 1, 2013.) This Bill authorizes the renamed Ohio Turnpike and Infrastructure Commission to issue revenue bonds payable from the revenues of the turnpike system for certain highway infrastructure projects in addition to turnpike projects. Eligible highway infrastructure projects include projects undertaken by or through the Ohio Department of Transportation (ODOT) for the construction or improvement of public express or limited access highways, super highways or motorways, including bridges, tunnels, overpasses, underpasses, interchanges, entrance plazas, approaches and connecting public roads that serve interchanges. The Director of ODOT would submit requests for approval by the Commission to pay costs of eligible highway infrastructure projects that have previously been reviewed and recommended by the Transportation Review Advisory Council. Not less than 90% of the total cost of the funding requests submitted by the Director of ODOT must be for highway infrastructure projects portions of which are located within 75 miles of the Ohio turnpike system. The Commission is required to adopt rules establishing the process and criteria for approval of ODOT projects, with certain required criteria set forth in the Bill.

The Bill increases the Commission membership from nine to 10, of which six will be appointed by the Governor, with no more than three being members of the same political party. Newly appointed members will have terms of five years, compared to the current eight year terms. The Director of ODOT and the Director of OBM will continue as ex officio members, with the Director of ODOT now being a voting member.

The Bill imposes a freeze on E-ZPass tolls for trips on the Turnpike of 30 miles or less, authorizes the distribution of E-ZPass transponders through retail locations, including deputy registrars, and authorizes the Commission to establish rules for issuance of citations for evading payment of tolls. The Bill also increases the speed limits on interstate freeways from 65 to 70 miles per hour outside of urban areas, and to 65 miles per hour on outerbelts in urban areas and 55 miles per hour in congested areas, the designation of such areas to be determined by the Director of ODOT. The speed limit on all two lane state routes located outside of municipal corporations may be increased from 55 to 60 miles per hour if certain safety determinations are made by the Director of ODOT for eligible portions of those state routes.

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