

OHIO BOARD OF TAX APPEALS

Stanton L. Boyer,)	CASE NO. 2007-Z-139
)	
Appellant,)	(MUNICIPAL INCOME TAX)
)	
vs.)	DECISION AND ORDER
)	
St. Bernard Municipal Board of Appeal and St. Bernard Tax Administrator,)	
)	
Appellees.)	

APPEARANCES:

For the Appellant	- Stanton L. Boyer, pro se 12 Fall River Court Fairfield, Ohio 45014
For the Appellees	- Chester, Willcox & Saxbe, L.L.P. Mark S. Yurick 65 East State Street, Suite 1000 Columbus, Ohio 43215

Entered June 23, 2009

Ms. Margulies, Mr. Johrendt, and Mr. Dunlap concur.

The appellant appeals from a decision of the City of St. Bernard Board of Tax Review, St. Bernard’s municipal board of appeal established by R.C. 718.11, in which the MBOA¹ denied the request of appellant, Stanton L. Boyer, for a refund of certain income taxes withheld for tax year 2005. In this appeal, the appellant argues that the MBOA erred in finding that income as a result of exercising stock options previously granted to him from his employer was subject to the city’s income tax when

¹ Although the city of St. Bernard has established a “board of tax review” for income tax purposes, we note that R.C. 718.11 and 5717.011 refer to such an entity as a “municipal board of appeal.” For consistency, we shall refer to an entity issuing decisions under R.C. 718.11 as a municipal board of appeal, or MBOA, regardless of the actual name selected by the municipality.

he neither resided nor worked in the city of St. Bernard at the time that the stock options were exercised. Upon review, we affirm the MBOA's decision.

A review of the record in this matter reveals that Mr. Boyer was employed by Procter & Gamble beginning in September 1972 and ending in March 2000 when he retired. H.R. at 9. At all times during his employment with Procter & Gamble, Mr. Boyer worked in the city of St. Bernard ("City" or "St. Bernard"). Id. On February 29, 1996, Procter & Gamble granted to Mr. Boyer nonstatutory stock options in recognition of his "continuing contributions to the long-term success and development of the business of Procter & Gamble." Appellant's Ex. A. The stock options entitled Mr. Boyer to purchase 515 shares of Procter & Gamble's common stock at \$81.8125 per share during the nine-year period beginning March 1, 1997 through March 1, 2006. H.R. at 9; Appellant's Ex. A. The stock options were "not transferable other than by will or the laws of descent and distribution" and were exercisable only by Mr. Boyer during his lifetime. Appellant's Ex. A. In 2005, subsequent to his retirement from Procter & Gamble, Mr. Boyer exercised the stock options by utilizing a cashless option program which allowed him to obtain a short-term loan with a broker and then use the proceeds of such loan to purchase the Procter & Gamble stock at the option price. H.R. at 10; Appellant's Ex. B. The stock was then sold at the then-current market price on the open market. H.R. at 10. The proceeds from the sale of the stock were used to pay off the short-term loan and pay the related commissions and expenses. The net proceeds were then forwarded to Procter & Gamble for tax withholding purposes. Finally, the remaining profit was forwarded to Mr. Boyer.

From the net proceeds, Procter & Gamble withheld local income taxes in the amount of \$1,044.86 and remitted such amount to St. Bernard. H.R. at 12-14. Procter & Gamble issued a W-2 to Mr. Boyer reflecting the same. H.R. at 12; Appellant's Ex. C. Mr. Boyer contacted Procter & Gamble and requested that the local income tax not be withheld since he neither resided nor worked in the City. H.R. at 12. Procter & Gamble then issued a corrected W-2 reflecting that it had previously reported local wages but was now reporting no local wages. H.R. at 12-14; Appellant's Ex. D. Since Procter & Gamble had already remitted the amount of local income taxes withheld to the City, Procter & Gamble could not return such amount to Mr. Boyer. Rather, Mr. Boyer would have to request a refund of such amount from the City. H.R. at 12-14.

Mr. Boyer proceeded to request a refund from St. Bernard of the local income taxes which were withheld and remitted by Procter & Gamble. S.T. at Ex. A-1. Such request was denied by the Tax Administrator² of St. Bernard who explained that the City's position was that the stock options were earned while Mr. Boyer was working in the City, thus, the income was subject to City tax. S.T. at Ex. B-1. Mr. Boyer appealed such denial to the MBOA. S.T. at Ex. A-2. In his appeal to the MBOA, Mr. Boyer argued that while "an opportunity" was granted in 1996, the income was not earned in 1996. Rather, all "monetary transactions" were carried out in 2005 while he was neither residing nor working in St. Bernard. Id. Mr. Boyer also

² Although the city of St. Bernard has created a position within its municipal government referred to as the "Tax Commissioner" who has the authority to issue decisions with respect to municipal income tax obligations which are subject to appeal to the MBOA, we note that R.C. 718.11 and 5717.011 refer to such person as the "tax administrator." For consistency, we shall refer to such person as a "Tax Administrator," regardless of the actual name selected by the municipality.

argued that federal and state taxing authorities and Procter & Gamble “accept and refer to this income as 2005 income.” Id. Moreover, Mr. Boyer explained that the state of Ohio had initially taken a position similar to that of St. Bernard’s but then issued refunds to retirees living outside Ohio. Id. Mr. Boyer did not appear at the hearing convened by the MBOA for his appeal. S.T. at Audiotape.³

During the hearing before the MBOA, the Tax Administrator of St. Bernard, Ms. Sheri Williams, testified on behalf of the City. Id. She explained that R.C. 718.03 provided for “qualifying wages” to be adjusted for amounts arising from the exercise of a stock option. More specifically, R.C. 718.03(A)(2)(b)(ii) provides, in pertinent part, as follows:

“(2) ‘Qualifying wages’ means wages *** without regard to any wage limitations, adjusted as follows:

“(b) Add the following amounts:

“(ii) 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 and the municipal corporation has not, by resolution or ordinance, exempted the amount from withholding and tax.* Division (A)(2)(b)(ii) of this section applies only to those amounts constituting ordinary income.” (Emphasis added.)

The above statute, Ms. Williams explained, provides for the exercise of stock options to be included in qualifying wages unless the municipality specifically exempted such amounts from municipal income taxes. S.T. at Ex. C-2; S.T. at Audiotape. Ms. Williams further testified that the City had no resolution or ordinance

³ While a tape recording of the hearing before the MBOA was forwarded to this board as part of the statutory transcript, the tape recording is, in large part, inaudible. S.T. at Audiotape.

exempting such amounts from its taxes. Id. In fact, Ordinance No. 46, 2004 provides evidence that the City has not exempted stock options from taxation. Id. Ordinance No. 46, 2004 includes Section 181.03 of the St. Bernard Municipal Income Tax Code which provides, in pertinent part, as follows:

“181.03 IMPOSITION OF TAX.

“A. Basis of Imposition. *** an annual tax, shall be, and is hereby levied on and after July 1, 1985, at the rate of two per cent [sic] (2%) per annum upon the following:

“***

“2. On all qualifying wages, including sick, vacation and severance pay, other compensation, commissions, and any pay as part of an employee buyout or wage contribution plan or other taxable income *earned or received* by non-residents for work done or services performed or rendered, in the Municipality.” (Emphasis added.)

Ms. Williams testified that the City’s position was that the “income received in 2005 was the result of a benefit of his employment in St. Bernard in 1996 when the options were granted. Had he not had his employment in 1996 [sic] he would not have received this income in 2005.” S.T. at Ex. C-2. The fact that Mr. Boyer “neither lived nor worked in St. Bernard during 2005 is irrelevant.” Id. Thus, the City’s argument is that the stock options were earned in 1996 at the time they were granted to Mr. Boyer in connection with his employment, and at that time, Mr. Boyer was working within the City limits. The income resulting from the exercise of the stock options, regardless of when the stock options were exercised, was therefore subject to tax by the City. Id. Upon review of the evidence before it, the MBOA

affirmed the Tax Administrator's denial of Mr. Boyer's request for a refund. This appeal ensued.

In his appeal before this board,⁴ Mr. Boyer makes many of the same arguments that he made before the MBOA. In essence, Mr. Boyer's argument is that the income from the stock options was earned in 2005 when the stock options were exercised and the stock was purchased and sold as opposed to 1996 when the stock options were granted. Because he neither resided nor worked in St. Bernard during 2005, Mr. Boyer argues that the income from the stock options and the purchase and sale of the stock is not subject to tax by the City. Mr. Boyer is not arguing that the City cannot tax nonstatutory stock options. H.R. at 33. Rather, Mr. Boyer is arguing that the City should not be able to tax a "nonresident, nonworker during the year that those stock options were exercised." *Id.*

Likewise, the City's arguments before this board are generally the same as those made before the MBOA. The City argues that compensation was earned in 1996 upon the granting of the stock options because such stock options were granted

⁴ On November 1, 2007, prior to the hearing before this board, the appellant filed three motions with this board. The appellant's first motion requested an order from this board requiring the appellees to provide appellant with a list of their witnesses and copies of documentary exhibits that they planned to offer into evidence at the hearing. To the extent not otherwise overruled previously, the appellant's first motion is hereby overruled, as the appellees filed with this board on October 24, 2007 a list of witnesses and documents that the appellees planned to offer into evidence at the hearing. The appellees forwarded a copy of such list to the appellant by way of regular U.S. mail. The appellant's second motion requested an order from this board requiring Ms. Williams, the Tax Administrator of St. Bernard, to attend the hearing as a potential witness. To the extent not otherwise overruled previously, the appellant's second motion is hereby overruled as moot. We note that the proper procedure would have been for the appellant to request this board to issue a subpoena to compel Ms. Williams to attend the hearing. See Ohio Adm. Code 5717-1-13. In any event, the motion is moot as Ms. Williams attended and testified at the hearing. In the appellant's third motion, he requested that the appellees provide the statutory transcript to this board and he requested a copy of it. To the extent not otherwise overruled previously, the appellant's third motion is hereby overruled as the appellees filed with this board the statutory transcript on August 6, 2007 and a copy of the statutory transcript was made available to the appellant.

to Mr. Boyer in connection with his employment. The City argues that Mr. Boyer acknowledged that the stock options were granted in connection with his employment as he testified before this board to the effect that the stock options were granted to him as a result of the “previous 25-and-a-half years of performance” that got him “to a position in the company where this opportunity was available.” H.R. at 9.

We begin our review of this matter by noting that when cases are appealed from a municipal board of appeal to this board, the burden of proof is on the appellant to establish its right to the relief requested. Cf. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. In this regard, we will determine the weight and credibility to be accorded the evidence presented. *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St.2d 13.

As noted above, R.C. 718.03(A)(2)(b)(ii) provides for amounts arising 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 to be included in “qualifying wages” and subject to taxation as long as the municipal corporation has not, by resolution or ordinance, exempted such amounts from withholding and tax. The evidence in the record demonstrates that the City had no resolution or ordinance exempting such amounts from its taxes. Thus, the central issue in this matter is not whether the City had the authority to tax income generated from the stock options. The City clearly had such authority. See *Hartman v. Cleveland Heights* (Aug. 11, 1994), 8th Dist. No. 66074, unreported; *Rice v. Montgomery* (1995), 104 Ohio App.3d 776.

The central issue in this matter is when did the stock option income become subject to the municipal income tax. The stock options were granted in 1996 when Mr. Boyer worked within the City limits. However, the stock options were not exercised until 2005 when Mr. Boyer neither resided nor worked in the City.

In *Hartman*, supra, the employee was granted stock options, exercised them in a later tax year and failed to report the resulting income on his municipal income tax return. Initially, the court determined that income gained from an employee's exercise of stock options constitutes earned compensation which may be taxed by a municipality. *Id.* The employee argued that it was inconsistent for the city to assert that the granting of the option was a taxable event but the amount of the income provided was the difference between the option price and the market price on the day he purchased the stock (i.e., exercised the option). The court held that the taxable gain to the employee should be measured as of the time that the options were exercised and not as of the time that they were granted. *Id.*

In *Rice*, supra, the court considered whether stock options granted to the employee were taxable as compensation and, if so, when their value should be determined. Initially, the court held that the granting of the stock options constituted compensation subject to tax by the municipality. *Id.* The court went on to consider when and how to measure the value of such income as follows:

“Quantifying the value of a stock option at the time of its grant is a complex task, subject to the vagaries of market forecast and compounded by the fact that no ready market can exist for nontransferable stock options. 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 the exercise. At the moment that the income is recognized, a fair market value can be assigned to the stock option.” Id. at 781.

The court, therefore, concluded that the fair market value of the options was measurable when they were exercised. Id. The court distinguished between a realization event and a recognition event. Id. at 783. While a realization event is not necessary for an income taxation event, recognition is necessary for an income taxation event. “[T]he value of an option is the anticipated appreciation in stock price. The value of the option is simply unascertainable until it is exercised. The city *** is merely measuring this value at the time of the exercise because the exercise of the option is a recognition event. Upon this recognition event, the options can be accurately valued.” Id.

More recently, in *Wardrop v. Middletown Income Tax Review Bd.* (Oct. 13, 2008), Butler App. No. CA2007-09-235, 2008-Ohio-5298, a case with striking similarities to the instant matter, the court considered when the appreciated value of nontransferable stock options was subject to city income tax. In *Wardrop*, two employees received stock options during the course of their employment but did not exercise them until after resigning from their respective positions. While both employees worked at the company’s headquarters in the city of Middletown, neither employee resided within the city limits of Middletown. The court explained that the critical issue was when the employees “earned the income, not when they received it. *** 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.” *Id.* at 7. Furthermore, the court explained that the employees earned compensation in the form of stock options while working for their employer and that 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. *Id.* 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 the employees 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 their employer. Therefore, Middletown was authorized to tax the resulting gain, which could be calculated only when the employees exercised the options. *Id.* A municipality may wait until the stock options are exercised to assign a value to the compensation. The fact that the two employees neither resided nor worked in Middletown when they exercised the options was immaterial. *Id.*

The provision of the municipal income tax code at issue in *Wardrop*, *supra*, is similar to Section 181.03 of the St. Bernard Municipal Income Tax Code at issue herein, as both provisions provide for the imposition of municipal income tax on income “earned or received” by non-residents for work done or services performed or rendered in the municipality. Mr. Boyer argued in a filing submitted post-hearing that this board should not rely on *Wardrop* but rather this board should rely on *In re Whitpain* (2008), 942 A.2d 959, a case distinguished by the court in *Wardrop*. While the court in *Wardrop* acknowledged that *Whitpain* was factually similar to *Wardrop*, the municipal income tax provisions at issue differed significantly. The municipal

income tax provision at issue in *Whitpain* authorized a municipal income tax on compensation “received” by individuals residing or employed within its city limits, and the court in *Whitpain* concluded that the stock option compensation was not “received” until the options were exercised. In contrast, the municipal income tax provision at issue herein, like that at issue in *Wardrop*, authorized a municipal income tax on compensation “earned or received” by non-residents for work done or services performed or rendered in the municipality. Relying on *Rice*, supra, and *Wardrop*, supra, we find that Mr. Boyer earned compensation at the time the stock options were granted.

We find *Hartman*, supra, *Rice*, supra, and *Wardrop*, supra, to be persuasive in the instant matter. Mr. Boyer received stock options in 1996, during the course of his employment, but did not exercise them until 2005, after retiring from his position with Procter & Gamble. While Mr. Boyer worked at Procter & Gamble’s location in St. Bernard, he did not reside within the city limits of St. Bernard. Like in *Wardrop*, supra, the critical issue is when did Mr. Boyer earn the income, not when did he receive it. We find that Mr. Boyer earned compensation in the form of stock options in 1996 while working for Procter & Gamble, and St. Bernard had the authority to tax this compensation as it constituted qualifying wages earned by a non-resident for work done or services performed or rendered in St. Bernard. See R.C. 718.03(A)(2)(b)(ii) and Section 181.03 of the St. Bernard Municipal Income Tax Code. St. Bernard 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 Mr. Boyer did not reside or work in St. Bernard when

he exercised the options, the fact remains that he earned the stock-option compensation while working for Procter & Gamble. Therefore, St. Bernard was authorized to tax the resulting gain, which could be calculated only when Mr. Boyer exercised the options. It was reasonable for St. Bernard to wait until the stock options were exercised to assign a value to this form of compensation. The fact that Mr. Boyer neither resided nor worked in St. Bernard at the time that he exercised the options is immaterial. *Wardrop*, supra.

In conclusion, we find that the appellant has failed to prove, by competent and probative evidence, that the MBOA's decision is in error. Upon review of the record before us, we conclude that the MBOA's determination is supported by a preponderance of the evidence and is in accordance with law. Accordingly, we affirm the MBOA's determination.

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