



Ohio Municipal League

*Our Cities and Villages ★ Bringing Ohio to Life*

# Sub.HB5 Municipal Income Tax Reform

## SUB HB 5 – WHAT ARE THE BILL’S MAJOR PROVISIONS?

- Current Year Offsets: Current-year schedule and pass-through (“PT”) loss offsets are required. For residence tax purposes, owners of PTs and/or residents that have Schedule C, E or F income, are allowed to offset current year losses against current year income from these activities. Any remaining losses can be carried forward for 5 years beginning with tax year 2016.
- NOL CF: 5-Year Net Operating Loss Carryforward (“NOL CF”) required. Begins with losses incurred in tax year 2016, with only 50% of these losses allowed to be carried forward to tax years 2017 through 2021. 100% of NOL CF loss allowed beginning with tax year 2022.
- Municipal Income Tax Net Operating Loss Review Committee Established: Required to study the impact of a 5-year NOL CF and report to the legislature. Also required to study revenue loss impacts of other provisions, report to the legislature, and recommend additional payments to municipalities from the LGF to reduce negative impacts (provision added by amendments sponsored by Rep. Amstutz).
- SERPS: Language in the bill keeps current treatment intact and sets the stage for the issue of SERP taxability to be left to the courts to decide.
- Occasional Entrant Rule: Increases current 12-day occasional entrant rule to 20 days. Exempts first 20 days from taxation by employment municipality. Employers may elect to withhold from day 1. Employers who do not elect Day 1 withholding must submit an annual report to each municipality in which work was performed during the first 20 days listing employees that performed services and for whom the employer did not withhold tax back to Day 1. Adds definition for “preponderance of a day” so that employees are not taxed by more than one municipality for a “day” of work. Adds exemption from withholding for nonresident employers with <\$500,000 in annual gross receipts when a nonresident employer has nonresident employees performing services in any municipality other than the one in which the employer is located.
- \$10 Deminimus: Adds \$10 deminimus for taxes and refunds.
- \$100 Estimated Payment Deminimus: Estimated payments do not have to be remitted if tax due is less than \$100.
- Consolidated Returns: Allows consolidated filers to “opt out” of filing consolidated after 5 years, without the approval of a Tax Administrator. Also allows consolidated filers to “opt in or out” in regards to including or excluding any PT income or losses in AFTI. (This treatment only applies to consolidated returns).
- Uniform Due Dates: Adds uniform due dates for all annual income tax returns, extensions and estimated payments.
- Uniform Withholding Due Dates: Adds uniform due dates for all withholding payments and annual withholding reconciliations. Withholding payment due dates are based on dollar thresholds, with higher withholding amounts required to file on a more frequent basis (i.e. semi-monthly vs. monthly, or monthly vs. quarterly).
- Uniform Penalty and Interest Rates: Requires uniform interest rates based on federal short-term rate plus 5%; requires uniform penalty rates (15%) and late filing fees.

## **NET OPERATING LOSS CARRYFORWARD MUNICIPAL COALITION POSITION**

**A tiered approach of permitting zero, one, three or five year net operating loss is proposed by the Municipal Coalition. This approach provides simplicity, consistency for businesses and municipal corporations, and allows municipal corporations to maintain revenue necessary to provide essential services.**

What is a net operating loss? A net operating loss occurs when tax-deductible expenses exceed the taxable income for a particular tax year. In many cases, those expenses can be “paper” losses, such as depreciation (which is not an out-of-pocket expense, but is defined as a deduction “from taxable income a portion of the original cost of a business asset over several years as the value of the asset decreases”). A business can show a loss on their tax return and still be a profitable business.

Current law provides:

*718.01(K)(1) Nothing in this chapter prohibits a municipal corporation from allowing, by resolution or ordinance, a net operating loss carryforward.*

*(2) Nothing in this chapter requires a municipal corporation to allow a net operating loss carryforward.*

Cities and villages in Ohio with a municipal income tax have the option to determine, by Ordinance, the policy that best suits the needs of their municipality when it comes to the net operating loss carryforward (NOL). This flexibility permits municipalities to provide the best scenario for providing services for their municipality. When a business has a loss, it does not pay municipal tax. In those loss years, the level of services must still be maintained. Businesses are heavily reliant upon the basic services that municipalities provide, and expect that roads will be paved and cleared in the winter to allow for goods and services to be delivered. They expect that employees will be able to commute safely to work. They expect a clean and safe environment for their business to thrive, and that police and fire protection are well-equipped, adequately staffed, and ready to respond.

In 2003, then State Tax Commissioner Tom Zaino headed a Committee to Study State and Local Tax in Ohio, and made many recommendations, including a mandatory five year net operating loss carryforward. This provision was not enacted. Many other provisions of uniformity were enacted from his recommendations. In September, 2003, Mike Sobul (Ohio Department of

Taxation), in his presentation to the FTA Revenue Estimating / Tax Research Conference in New Orleans, stated that “the tax reform proposal makes a number of common sense reforms that will reduce the compliance burden for business taxpayers without significantly impacting the fiscal ability of Ohio’s 541 municipal corporations.” (Note: His presentation also provided detail on the 5 year NOL, and indicated that it was not enacted.) The five year mandatory net operating loss carryforward was not implemented with HB 5, implying that it would have violated the revenue impact criteria established for tax reform and uniformity. This is the same concern the Municipal Coalition has today.

The Municipal Coalition proposal of a tiered NOL allows for simplicity and predictability. With options reduced to zero, one, three or five years for a NOL, businesses are provided with consistency and simplicity (moving from a larger number of variables down to four). Many cities with a zero NOL also provide other business incentives to attract businesses, and for purposes of retention and expansion of current businesses. Some of these incentives include (but are not limited to) Job Creation credits, business expansion loans, and Enterprise Zones (where withholding tax is shared with the school district in exchange for abatements of property tax, and are based on new job growth). Columbus is a prime example of a municipality with a zero NOL, and business incentive programs to encourage new business, and current business retention and expansion. A forced NOL would result in a substantial loss of revenue for many municipalities, and would jeopardize the ability to offer any business incentives for retention and expansion.

#### NOL BY THE NUMBERS:

- Currently, there are approximately 170 cities in Ohio with a zero NOL, and over 70 with less than a five year NOL.
- For these communities, a forced NOL would result in a substantial revenue loss, negatively impacting the revenue of nearly 40% of all municipalities that have an income tax.
- The Municipal Coalition proposal reduces the number of options to four, providing simplicity and consistency.
- Revenue impacts from the Business Coalition proposal of a 5 year NOL include: Dayton (conservatively estimated annual loss of \$2 million, currently at zero NOL); Kettering (conservatively estimated annual loss of \$275,000, currently at 3 year NOL); Monroe (conservatively estimated loss of \$100,000, currently at 3 year NOL).
- Any community currently at a zero, or less than five year NOL will experience a loss of revenue from a forced, mandatory five year NOL.

11/20/13 K.I.T.A ESTIMATE OF ENTRY LOSS BASED ON 2011 RETURNS & COLLECTIONS.

CITY #	MUNICIPALITY	NOL IMPACT	LENGTH OF NOL	NOTES
29	BALTIMORE	\$ (2,891.60)	1 Yr NOL	
86	BELLEVUE	\$ (50,436.10)	1 Yr NOL	
83	BELLE CENTER	\$ -	0 Yr NOL	New Member as of 7/1/2013
104	BEXLEY	\$ (30,079.44)	0 Yr NOL	
110	BOSTON HEIGHTS	\$ (10,198.19)	3 Yr NOL	
137	BRIMFIELD TOWNSHIP / TALLMADGE JEDD	\$ -	0 Yr NOL	No information available
190	CIRCLEVILLE	\$ (36,304.61)	0 Yr NOL	
159	CLINTON	\$ -	0 Yr NOL	New Member as of 1/1/2012
223	CORWIN	\$ -	3 Yr NOL	No information available
251	DANVILLE	\$ -	0 Yr NOL	New Member as of 7/1/2012
256	DENNISON	\$ -	0 Yr NOL	New Member as of 12/1/2012
268	EAST PALESTINE	\$ (4,738.57)	0 Yr NOL	
271	EDISON	\$ -	0 Yr NOL	No information available
287	FAIRBORN	\$ (133,132.67)	0 Yr NOL	
308	FREDERICKTOWN	\$ (3,452.42)	0 Yr NOL	
310	FREMONT	\$ (145,967.62)	0 Yr NOL	
316	GAHANNA	\$ (129,466.15)	0 Yr NOL	
317	GALION	\$ (19,046.02)	0 Yr NOL	
346	GIRARD	\$ (22,632.64)	0 Yr NOL	
350	GRAFTON	\$ (9,767.60)	0 Yr NOL	
357	GRANDVIEW HEIGHTS	\$ (58,264.75)	0 Yr NOL	
337	GREENHILLS	\$ (3,634.56)	3 Yr NOL	
358	GROVE CITY	\$ (208,811.52)	0 Yr NOL	
339	HARRISON	\$ (26,696.65)	3 Yr NOL	
329	HARRISON TWP. JEDD	\$ -	3 Yr NOL	No information available
371	HILLIARD	\$ (296,724.56)	0 Yr NOL	
377	JEWETT	\$ -	7 Yr NOL	No information available
386	JOHNSTOWN	\$ (7,414.17)	0 Yr NOL	
401	LAKEMORE	\$ (2,911.55)	0 Yr NOL	
424	LITHOPOLIS	\$ (1,282.60)	0 Yr NOL	
427	LOCKBOURNE	\$ (2,654.64)	0 Yr NOL	
460	MAPLE HEIGHTS	\$ (181,624.71)	1 Yr NOL	
486	MECHANICSBURG	\$ (1,000.97)	0 Yr NOL	
503	MIDDLEPORT	\$ (673.39)	0 Yr NOL	
501	MIFFLIN	\$ -	0 Yr NOL	No information available
508	MINGO JUNCTION	\$ (1,425.13)	0 Yr NOL	
527	MT HEALTHY	\$ -	3 Yr NOL	New Member as of 1/1/2014

CITY #	MUNICIPALITY	NOL IMPACT	LENGTH OF NOL	NOTES
535	NEW ALBANY	\$ (317,055.98)	0 Yr NOL	
564	NEW FRANKLIN	\$ (8,488.13)	0 Yr NOL	
525	NEW WATERFORD	\$ (317.17)	0 Yr NOL	
585	OBERLIN	\$ (42,725.37)	3 Yr NOL	
609	OXFORD	\$ (53,584.46)	3 Yr NOL	
619	PATASKALA (new tax)	\$ (2,009.00)	0 Yr NOL	
637	PIKETON	\$ (5,456.85)	0 Yr NOL	
648	POWELL	\$ (31,795.77)	0 Yr NOL	
662	REYNOLDSBURG	\$ (103,550.94)	0 Yr NOL	
671	RICHWOOD	\$ (1,220.40)	0 Yr NOL	
588	RIO GRANDE	\$ -	0 Yr NOL	New Member as of 7/1/2013
680	RIVERSIDE	\$ (85,305.58)	3 Yr NOL	
710	SANDUSKY	\$ (81,533.06)	0 Yr NOL	
749	SHAWNEE HILLS	\$ -	0 Yr NOL	No information available
751	SHEFFIELD LAKE	\$ (4,347.18)	0 Yr NOL	
757	SILVERTON	\$ (8,783.62)	0 Yr NOL	
733	SUGAR GROVE	\$ (18.50)	0 Yr NOL	
779	SUNBURY	\$ (14,068.39)	0 Yr NOL	
783	TALLMADGE	\$ (91,897.46)	0 Yr NOL	
728	THURSTON	\$ -	0 Yr NOL	No information available
792	TORONTO	\$ (3,346.81)	0 Yr NOL	
801	TREMONT CITY	\$ -	0 Yr NOL	No information available
790	TWINSBURG	\$ (297,804.38)	0 Yr NOL	
797	UHRICHSVILLE	\$ (13,538.72)	0 Yr NOL	
802	UPPER ARLINGTON	\$ (192,415.41)	0 Yr NOL	
806	URBANCREST	\$ (14,785.60)	0 Yr NOL	
815	VERMILION	\$ (20,125.61)	3 Yr NOL	
833	WELLINGTON	\$ -	3 Yr NOL	New Member as of 1/1/2013
839	WELLSVILLE	\$ (13,169.58)	0 Yr NOL	
864	WILLIAMSBURG	\$ (1,763.83)	3 Yr NOL	
892	WILLSHIRE	\$ -	0 Yr NOL	No information available
904	WORTHINGTON	\$ (425,023.37)	0 Yr NOL	
906	YELLOW SPRINGS	\$ (6,869.57)	0 Yr NOL	

\$ (3,232,233.59)

As reported by the Ohio Department of Taxation, 175 Ohio municipalities listed below have determined it is the best policy for their own community to not carry an NOL carry-forward policy. They are:

Ashland	Germantown	Moscow	Twinsburg
Ashtabula	Girard	Mt. Vernon	Union
Athens	Glandorf	Monroe Falls	Uhrichsville
Baltimore	Gnadenhutten	Nelsonville	Upper Arlington
Bedford	Golf Manor	New Albany	Upper Sandusky
Bellaire	Grafton	New Boston	Urbancrest
Bellefontaine	Grandview	New Bremen	Vandalia
Bellville	Greenwich	New Concord	Wakeman
Beverly	Grove City	New Franklin	Walbridge
Bexley	Groveport	New Washington	Warren
Brewster	Hamler	Newark	Wauseon
Brice	Harrisburg	Newton Falls	Waverly
Brookville	Heath	North Canton	Wellsville
Bryan	Hicksville	North Kingston	W. Jefferson
Bucyrus	Hilliard	Oberlin	W. Milton
Carrolton	Hopedale	Obetz	W. Unity
Canal Winchester	Hubbard	Orrville	Westerville
Canfield	Huber Hts	Osgood	Weston
Carey	Jamestown	Pataskala	Whitehall
Centerville	Johnstown	Perrysville	Willshire
Chillicothe	Kalida	Phillipsburg	Windham
Circleville	Lakemore	Piketon	Woodlawn
Columbiana	Lakeview	Plymouth	Worthington
Columbus	Lancaster	Pomeroy	Xenia
Conneaut	Lebanon	Port Clinton	Yellow Springs
Crestline	Lexington	Powell	
Crooksville	Lisbon	Reynoldsburg	
Dayton	Lithopolis	Richwood	
Deer Park	Lockbourne	Rittman	
Delta	Logan	Salem	
Dennison	Lordstown	Salineville	
Dover	Loudonville	Sandusky	
Dresden	Luckey	Shawnee Hills	
Dublin	Malinta	Sheffield	
E. Canton	Manchester	Springfield	
E. Palestine	Mansfield	Struthers	
Eaton	Mantua	Stryker	
Edgeton	Maple Hts	Sugar Grove	
Edison	Marble Cliff	Sunbury	
Englewood	Marietta	Tallmadge	
Fairborn	Marion	Thurston	
Fairport Harbor	Marysville	Tiffin	
Fostoria	Mechanicsburg	Tipp City	
Fredericktown	Miamisburg	Tontogany	
Fremont	Middleport	Toronto	
Galion	Mifflin	Tremont	
Gallipolis	Milbury	Trotwood	
Gambier	Mingo Junction	Troy	
Genoa	Montpelier	Tuscarawarus	

## Municipalities with 1 year NOL treatment:

Baltimore  
Bellevue  
E.Lake  
Pickerington  
Willard

## 2 year:

Coshocton

## 3 year:

Akron	S. Solon
Boston Heights	Springdale
Cambridge	Sharonville
Canton	Union City
Carlisle	Urbana
Cheviot	Van Wert
Convoy	Vermillion
Corwin	Versailles
Coventry	Wellington
Cygnets	W. Carrollton
Defiance	
Delaware	Williamsburg
Eaton	
Evendale	

## 4 year treatment:

Fairfax

*66 additional cities/villages that would lose revenue by 5 yr mandate*

Hamilton	Jewett-7
Harrison	McDonald-10
Hebron	
Jefferson	
Kettering	
Lincoln Heights	
Louisville	
Monroe	
Monroeville	
Morrow	
Mt. Healthy	
Mt. Orab	
New Philadelphia	
N. College Hill	
Norwalk	
Norwood	
Pandora	
Reading	
Riverside	

**OCCASIONAL ENTRANT / TRANSIENT EMPLOYEE  
12-20 DAY RULE  
MUNICIPAL COALITION POSITION**

Current law provides that an employer is not required to withhold tax for an employee working within a municipal corporation for less than 12 days. If the 12 day limit is exceeded, the employer must remit tax retroactively back to the first day to the municipal corporation where the work is performed. This rule does not apply to professional entertainers or professional athletes, promoters of professional entertainment or sports events, or an employee of the promoter.

The concept for the current 12-day rule was created by Rep Don Mottley (R, West Carrollton) during his Interested Parties meetings for HB 477. Seeing a need to relieve employers from having to withhold when an employee spends a minimal amount of time in a municipal corporation, Rep. Mottley believed that this would resolve issues for small business. After many years of implementation, the one key issue missing in this language was a clear definition of a "day". Under the current statute, any portion of a day is considered to be a day, so an employee working in multiple jurisdictions in one day would require withholding for each jurisdiction for that particular day. For businesses whose very nature is the occasional entry into multiple jurisdictions in the same day (florists, plumbers, electricians, etc), this did not eliminate the burden for reporting and paying multiple jurisdictions for one or more employees for each day of work.

The Municipal Coalition created the concept of using "preponderance" of a day to define a day for municipal tax withholding purposes, in the hope that this clarification would resolve issues for exactly these types of businesses. Understanding that the concept would result in a revenue loss for municipalities, it was important to clean this language and provide a clear definition of a "day" for businesses in Ohio.

The language proposed by the Municipal Coalition provides four key aspects, intended to assist businesses who are highly transient in nature. This area of the Municipal Coalition Proposal has a negative impact on municipal revenue, but the Municipal Coalition felt that the compromise language provided resolves outstanding issues that needed to be addressed. This represents major concessions on the part of municipalities in an attempt to solve issues for small businesses in Ohio and those that do work in multiple jurisdictions in the same working day.

1. Increases the number of days from 12 to 20. This is a significant compromise on the part of the Municipal Coalition.
2. Sets minimum threshold of \$500,000 in gross receipts. When a business has less than \$500,000 in gross receipts in their previous tax filing period, the employer is only required to withhold tax for the principal place of work, and is not required to track or report to each municipality where work is performed. *(Note: If the taxpayer requests a refund of tax withheld and paid to the principal place of work because they did not work or live there, they are required to file and pay where work is performed..*

3. Fixes what was not addressed with the original 12-day rule in HB 477 by providing a definition of a "day". A "day" is considered to be where the employee spends the preponderance (largest portion) of their day. An employer will only be required to withhold for this one location (if a municipal tax exists in this location) in any given day, where current law requires that the employer withhold for any and all municipal corporations where work is performed in any given day. Withholding will immediately be reduced from potentially multiple jurisdictions per day to simply just one jurisdiction per day. This proposal alone will solve most of the issues for employers who currently have employees working in multiple cities and villages each working day. This will create a more business friendly environment, and maintains Ohio's competitiveness regarding business retention and expansion.
4. Requires that an employer withhold the tax back to day one when an employee exceeds 20 days in a municipal corporation, or they may choose to opt out of withholding back to day one. By opting out, the employer is required to make one annual filing each year to the municipal corporation showing the name, SSN, address and qualifying wages earned by each employee who worked in the municipal corporation for the first 20 days, but for whom the employer chose not to go back to day one and do the withholding retroactively. This allows the municipal corporation to ensure that the employee pays the tax for the first 20 days.

Other items included in the Municipal Coalition Proposal related to the occasional entrant include:

- Provide clearer definitions of "principal place of work" for withholding purposes
- Clarifies how travel time is taken into consideration.
- Provides language that clarifies that employees working at a construction site where the employer will have a presence for more than 20 days are taxable for all days spent on the construction site, regardless of the number of days that the individual employees spend on that site.

While aspects of this portion of the language will negatively impact revenue, the Municipal Coalition supports the concepts included, and believes that this language will provide simplicity and consistency for businesses in Ohio.

## **OFFSET OF PASS-THROUGH INCOME MUNICIPAL COALITION POSITION**

Municipalities in Ohio with a municipal income tax propose to retain the option to determine, by Ordinance, the offset policy that best suits the needs of their municipality when it comes to the offsetting of pass-through income. This flexibility permits municipalities to decide which policy best fits their business and residential communities. Generally, municipalities only allow the offsetting of pass-through losses incurred in same proportion in which they would tax the income of a resident taxpayer. These pass-through losses include those incurred in a taxing jurisdiction with a lower tax rate than the resident's tax rate or in a non-taxing jurisdiction. This approach will prevent significant losses in tax revenues to municipal corporations and prevent unintended tax increases to certain non-resident pass-through investors.

### **Current law provides:**

Ohio Revised Code 718 – The language of O.R.C. 718 is silent on the offsetting of pass-through income. Municipalities have codified which sources of pass-through income may offset income from other net profits distributed to resident and non-resident investors.

### **Substitute HB5 As Passed by the House provides:**

The new pass-through offset language was recently revealed for the first time in substitute House Bill 5. This recently-added provision was not agreed to by the Municipal Coalition. This language was not contained in the introduced version of House Bill 5.

The offset provision permits resident owners of pass-through entities to offset losses from those entities against their resident city income taxes even though the losses have been incurred in other municipalities. This new loophole for alleged simplicity will generally benefit wealthier taxpayers that manage their assets through the use of pass-through entities such as partnerships and limited liability companies. Additionally, there is the possibility that pass-through losses may be utilized at the entity level, due to the new mandatory five (5) year net operating loss provision, and by the resident owner the pass-through entity.

Unlike its treatment of resident pass-through owners, Substitute House Bill 5 now prevents any non-resident owners from offsetting pass-through gains and losses because of the new net operating loss provision to prevent the utilization of the same loss twice. Currently, many municipalities that do not allow net operating losses allow for non-resident investors to offset pass-through gains and losses in their taxing jurisdiction. The resulting overpayment may be

credited or refunded to the pass-through investor. Substitute House Bill 5 will prevent these pass-through investors from receiving these credit or refunds in future tax years.

Businesses and residents are heavily reliant upon the basic services that municipalities provide, and expect that roads will be paved and cleared in the winter to allow for goods and services to be delivered. Employers expect that employees will be able to commute safely to work. They expect a clean and safe environment for their business to thrive, and that police and fire protection are well-equipped, adequately staffed, and ready to respond. Allowing a resident owner of a pass-through entity to fully offset all gains and losses regardless of where the loss was incurred will result in a substantial loss of revenue for many municipalities, and will jeopardize the ability to offer basic services that municipalities provide to the community.

## **CONSOLIDATED RETURNS MUNICIPAL COALITION POSITION**

An affiliated group of corporations may elect to file a single consolidated return for the group instead of separate returns for each corporation. Corporations eligible to be included in consolidated returns are basically domestic corporations, except for tax-exempt corporations, regulated investment companies and real estate investment trusts. Foreign corporations, with certain exceptions, are generally not includible corporations. The common parent of the group must own, directly or indirectly, at least 80% of the stock of the members of the group. The underlying principle is to permit the group to be taxed as a single entity with the intercompany profit and loss within the group eliminated. Once a group files a consolidated return, it must continue doing so while it remains in existence, unless it gets IRS permission to file separate returns.

Determining a group's consolidated taxable income requires that computations be performed on two levels. First, the separate taxable income of each member of the group must be determined. Certain adjustments must be made to a member's taxable income, as computed for separate return purposes, in order to arrive at the member's separate taxable income for consolidated return purposes. The adjustments include those which may be required because of transactions between members of the group, and those to exclude items which are determined on a consolidated basis. Next, the separate taxable incomes of all the members are aggregated, together with those items which are determined on a consolidated basis.

### **Current law provides:**

Ohio Revised Code 718.06 - Provides that a corporation may elect to file a consolidated return if that affiliated group reported a consolidated return for federal income tax purposes pursuant to section 1501 of the Internal Revenue Code.

Ohio Revised Code 718.01(J) - States "Nothing in this section or 718.02 of the Revised Code, shall authorize the levy of any tax on income that a municipal corporation is not authorized to levy under existing laws or shall require a municipal corporation to allow a deduction from taxable income for losses incurred from a sole proprietorship or partnership. This provides the authority to add back pass-through losses flowing into the taxpayer's federal return.

Ohio Revised Code Section 718.02 - States that the allocation factors for calculating the allocated income within and without the city shall be based on the property, sales, and wages utilized by the taxpayer in their corporate consolidated business activity.

**Substitute HB5 As Passed by the House provides:**

Ohio Revised Code 718.06 - Provides that a corporation may elect to file a consolidated return if that affiliated group reported a consolidated return for federal income tax purposes pursuant to section 1501 of the Internal Revenue Code. The election to file a consolidated return based on the federal affiliated group return is binding for a five (5) year period. After this five (5) year period the taxpayer may elect to file separately for each affiliate having a nexus to file a corporate return without having to get permission of the tax administrator and without having changed their federal method of filing.

Ohio Revised Code 718.06 - States if the net profit or loss of a pass-through entity is included in an affiliated group of corporation's consolidated federal taxable income it is now an option of the taxpayer to either include or exclude a pass-through gain or loss in the calculation of taxable income. If the pass-through gain or loss is excluded from taxable income, then the taxpayer has to exclude the allocation factors of the pass-through entity. If the pass-through gain or loss is included in taxable income, then the taxpayer has to include the allocation factors of the pass-through entity.

In most cases the partnership return of the pass-through entity, that may be included within the corporate consolidated return, is prepared by a different preparer than that of the corporation. Attempting to obtain the property, sales, and payroll factors of the pass-through entity would be very difficult and burdensome for the corporate return preparer. If the pass-through entity was related to a multi-tiered partnership this would further complicate the consolidated return filing.

The Municipal Coalition proposal of allowing a corporation the option to file a consolidated return, yet retaining the right of the tax administrator to allow separate filing, provides for simplicity in filing and predictability in tax revenues. The elimination of the pass-through entity gains, losses, and allocation factors simplifies the calculation of taxable income on the corporate consolidated return. Businesses are heavily reliant upon the basic services that municipalities provide, and expect that roads will be paved and cleared in the winter to allow for goods and services to be delivered. They expect that employees will be able to commute safely to work. They expect a clean and safe environment for their business to thrive, and that police and fire protection are well-equipped, adequately staffed, and ready to respond. Allowing a corporate taxpayer the option to elect separate filing after filing on the consolidated basis and the ability to utilize pass-through losses with their entity apportionment factors would result in a substantial loss of revenue for many municipalities, and would jeopardize the ability to offer basic services that municipalities provide to the community.

## **HOUSE BILL 5**

### **THROWBACK PROVISION**

#### **THROWBACK HISTORY**

State and Local taxes on businesses conducting a national business (one that manufactures in one or a few locations while shipping and delivering throughout the United States) is controlled by a three factor formula per state agreement. The three factors are the percentage of property, wages and sales within and without a particular jurisdiction. The average of these three is applied to net income of the business to determine the taxable income pertaining to a particular jurisdiction. It was intended that this would allocate the total net income of the business to the locations where the business is conducting its operations.

When a business has property or wages in a jurisdiction, there exists nexus or a connection with that jurisdiction which creates a liability for taxation in the jurisdiction. Sales, however, is more difficult to establish the proper nexus or connection necessary for income taxation. This is mainly because it would hinder interstate commerce if taxation were permitted for simply delivering merchandise into a jurisdiction. Instead states have regulated the sales by setting forth specific sales activities which would create sufficient nexus to establish a basis for taxation. With that in mind, states can subject any business to its income taxation based on these three factors of property, wages or sales.

A fair and equitable system of taxation is created when the total of each factor for all jurisdictions involved equals 100%. Income is then fairly apportioned to the jurisdiction in which the businesses activity has occurred. However, because businesses are very seldom taxed in jurisdictions when there is no nexus (no property or wages, only interstate sales), sales in jurisdictions where they are not taxed are currently "THROWN BACK" to the originating source of product and general management activity. With the throwback, validity of the 3 factor formula is maintained in that all sales are now accounted for within taxing jurisdictions and the total sales factor will now equal 100%. Those sales that would typically avoided taxation because they were delivered in a jurisdiction with no nexus have been thrown back to be taxed by the originating jurisdiction. This is fair because the activity for the sale (e.g. production, storage, marketing, billing, shipping, etc. is all performed at the headquarters of the business.

Why provide a tax reduction of this magnitude to businesses, which has such a crippling effect on local revenues? This scenario will impact most the industrial, manufacturing, wholesale, warehousing and distribution companies in all taxing jurisdictions in Ohio. These companies do not make significant sales in their local business jurisdiction, thereby forcing the sales factor to be minimized. Cities will be devastated by loss of 1/3 of their net profits taxes for these types of companies. House Bill 5 was said to be a revenue neutral piece of legislation. This item within the Bill prevents that from becoming reality.

OHIO MUNICIPAL LEAGUE  
Review of Sub HB 5 - LSC 130 1581-2 with OMNIBUS, 11/11/13

LINE # - LSC 130 1581-2	ISSUE	CONCERNS	IMPACT
276-280	<p style="text-align: center;"><b>OFFSETS</b></p> <p>Allows offsets of pass through entity losses against net profit income of the resident. The Omnibus amendment allows any net operating loss of a resident as a deduction against the distributive share of any net profit attributable to ownership interest in a pass through entity generated during the same year. The Omnibus also provides that the offset does not apply to any net profit or NOL attributable to ownership interest in an S Corporation unless the shareholders' distributive shares of the net profits from the S Corp are subject to the municipal tax in the municipal corporation.</p>	<ol style="list-style-type: none"> <li><b>1.</b> Individuals will be able to take losses more than once. For example, a Columbus resident with a reportable gain from a PTE in a township and a loss from a Westerville partnership will be able to take the Westerville partnership loss (already reported in Westerville and carried forward in Westerville) against the gain reportable to Columbus.</li> <li><b>2.</b> Municipal corporations that currently do not allow the offsetting of gains and losses will be forced to do so.</li> <li><b>3.</b> Municipal corporations that only allow un-apportioned losses and gains to offset will now be forced to allow apportioned and un-apportioned gains and losses to offset.</li> <li><b>4.</b> Municipal corporations that tax S Corps at the individual level (took to ballot in 2003 / 2004) that have not allowed other losses to offset S Corp gains, or who have not allowed S Corp losses to offset other gains will now be forced to do so.</li> </ol>	REVENUE LOSS
311	<p style="text-align: center;"><b>SERP / NONQUALIFIED DEFERRED COMP ISSUE</b></p> <p>Previous language that would have exempted SERPS and Nonqualified Deferred Comp ("pension payments and benefits") language has been changed to now only show "pensions" as being taxable.</p>	<p>Language was added that exempts from qualifying wages "any amount that is exempt income", requiring additional review on whether or not this will impact this issue.</p>	IMPACT UNCLEAR

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<p>409 - 442 and Section 718.011</p>	<p><b>OCCASIONAL ENTRANT RULE</b> Provides language that increases 12 day rule to 20 day rule, eliminates the retroactive component for taxing employees back to day one, provides opt-in or out language for employers to withhold, gives exemption to employers who have gross receipts under \$500,000 in previous taxable year. Gives employee an exemption from taxation on wages that are currently taxed by municipal corporations.</p>	<p><b>1.</b> Sub HB 5 does not require withholding back to day one, when an employee exceeds the 20 day rule. The employer is required to withhold for the principal place of work location of the employer, and can opt to withhold for the place where work was performed. If the employer is located in a township or non-taxing jurisdiction, the employee working in a municipal corporation could pay nothing for the first 20 days. The wages are also EXEMPT from municipal taxation, except for the employee's place of residence. This means that the actual work location cannot tax those first 20 days. Under current 12 day law, the employer must withhold back to day one when the 12 days is exceeded.</p> <p><b>2.</b> An employer is only required to withhold for principal place of work if the employer's gross receipts were under \$500,000 in the previous taxable year. An employer located in a township or non-taxing jurisdiction would withhold zero for employees working in municipal corporations. An employee could work within the same municipal corporation for an entire year, and not be subject to that municipal corporation's tax. The municipal corporation where work is performed is prohibited from taxing these earnings, as they are exempt.</p> <p><b>3.</b> The Omnibus amendment specifically exempts Board of Directors fees, providing a carve-out for what are typically highly compensated individuals.</p> <p><b>4.</b> An employee with tax withheld for the first 20 days due to principal place of work location who neither works nor lives in that municipal corporation will be able to obtain a refund of the tax withheld and paid to the principal place of work. The employee will still have a W-2 showing the tax withheld, and could use this credit on their city of residence return, even though the tax was refunded back to the employee. The municipality of residence will not know when the credits shown on the W-2's are legitimate or not.</p>	<p><b>REVENUE LOSS</b></p>
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<p>500 - 566</p>	<p><b>NET OPERATING LOSS CARRYFORWARD</b>                  Sub HB 5 mandates a five year NOL carry-forward for all municipal corporations, with a five year phase in period beginning in 2017. An NOL Study Committee is formed to study the effects of the NOL on revenue.</p>	<p>1. Approximately 170 cities have no current Net Operating Loss carry-forward, and approximately 60 have less than a five year NOL, resulting in a significant loss of revenue for these municipal corporations.                  2. The NOL Study Committee will serve no true purpose, as it has already been determined by the legislature that regardless of the revenue impact, the five year NOL is hereby mandated.                  3. With the combination of offsets and the NOL, even those municipalities who currently have a five year NOL could experience significant revenue loss due to the mandated combination of both.                  4. The five year phase in allows only 50% NOL for all, so businesses in a municipal corporation that currently has an NOL will experience a tax increase during the phase in period.                  5. JEDD and JEDZ follow the municipal corporation tax ordinance, so JEDD and JEDZ that currently do not have an NOL or that have less than five year NOL will experience a significant revenue loss.                  6. JEDD and JEDZ, with the combination of offsets and the NOL, even those with a current five year NOL could experience significant revenue loss due to the mandated combination of both.</p>	<p><b>REVENUE LOSS</b></p>
<p>819 - 836</p>	<p><b>WRITTEN DETERMINATION</b>                  Omnibus amendment removed "written finding of tax administrator" language, but issues still exist in current version.</p>	<p>1. A refund submitted on an amended tax return filing would trigger the "written determination" procedure, prompting certified mail notification to taxpayer of any change to the refund request (again, on an amended return only).                  2. Language does not clarify that a "written determination" is not an audit or assessment, or a correction to a tax return submitted.</p>	<p><b>ADMINISTRATIVE BURDEN, INCREASED COSTS</b></p>

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<p>1001 - 1007</p>	<p><b>DOMICILE</b> Language has been removed from Municipal Coalition draft that clarified language.</p>	<p>1. Removed Municipal Coalition draft language showing that the taxpayer could rebut the conclusion of domicile if the tax administrator unreasonably concluded domicile, and instead requires only a preponderance of the evidence to determine domicile, when clearly some factors are weighted differently than others. 2. Removed key sentence "A taxpayer's intention to change a domicile will not affect such change unless the taxpayer ceases to reside in the domicile". "Intent" is a key component in determining domicile, and removal of this sentence may impact the ability to use "intent" as a weighted factor.</p>	<p><b>POSSIBLE INCREASED COST OF LITIGATION</b></p>
<p>1132 - 1142</p>	<p><b>ALTERNATIVE APPORTIONMENT</b> Allows the taxpayer to notify the tax administrator prior to using an alternative apportionment. Current law requires tax administrator approval.</p>	<p>1. Current law requires the taxpayer to seek approval to use an alternative apportionment method, Sub HB 5 only requires that the taxpayer notifies the tax administrator prior to submitting the return. 2. Any ability to disallow the filing using an alternative apportionment formula appears to have been removed from the bill, removing the tax administrator's authority to deny the use of an alternative apportionment formula.</p>	<p><b>REVENUE LOSS, LOSS OF AUTHORITY TO DETERMINE PROPER FILING METHOD</b></p>
<p>1722 - 1726</p>	<p><b>CREDIT FOR TAX PAID ON PTE INCOME</b> Sub HB 5 required that a municipal corporation may, by Ordinance or resolution, grant a credit to residents for all or a portion of taxes paid to other municipal corporations on PTE income.</p>	<p>1. A municipal corporation that allows NO CREDIT for tax paid to other municipal corporations would be prohibited from not allowing "all or a portion" of the taxes paid as a credit. 2. This provision provides inequitable treatment between taxpayers based on type of income, and disproportionate credits allowed for residents.</p>	<p><b>REVENUE LOSS</b></p>
<p>1843, 1893, etc.</p>	<p><b>DE MINIMIS THRESHOLD</b> Municipal Coalition draft language provided \$5 de minimis for balances due and refunds, Sub HB 5 provides for \$10 de minimis.</p>	<p>1. State of Ohio provides for a minimum amount due of \$1, Municipal Coalition draft language raised this for municipal purposes to \$5. There is no need to raise this to a minimum of \$10. A return must still be filed. 2. While this will also reduce the number of refunds issued, it will decrease the amount of revenue collected and these two will not be offsetting.</p>	<p><b>REVENUE LOSS</b></p>

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<p>2023 - 2029</p>	<p><b>STATE TAX COMMISSIONER TO PROVIDE DOCUMENTS</b> This provision increases the amount of time (from 30 to 60 days) for the State Tax Commissioner to provide documentation to municipal corporations relative to municipal filings on deregulated electric and telephone companies collected by the State.</p>	<p>1. Refund requests for taxes overpaid on deregulated telephone and electric companies are forwarded to each municipal corporation to process and refund. NO documentation is provided by the State Tax Commissioner to verify the refund amounts. This provision requires the State Tax Commissioner to provide documents in a timely manner. 2. The amount of time was increased from 30 days (in Municipal Coalition proposal) to 60 days. 3. By not tolling the statute of limitations (as requested) during this period, a municipal corporation would not have time to request the documents, wait for a response from the State Tax Commissioner, and then audit and review documents received prior to the 90-day statute for issuing the refund to the taxpayer.</p>	<p><b>INCREASED COSTS (Interest paid on refunds not processed timely), ADMINISTRATIVE BURDEN</b></p>
<p>2096 - 2150</p>	<p><b>CONSOLIDATED RETURN LANGUAGE</b> Sub HB 5 provides new language, defining "affiliated group of corporations" and "Incumbent local exchange carriers", and excludes them from "Consolidated federal taxable income" definition.</p>	<p>1. New language provides special treatment at the request of AT&amp;T, not provided to other taxpayers. 2. Language provides an opt-in opt-out every five years for municipal tax purposes from filing a consolidated municipal income tax return, even when consolidated federal income tax return is filed for that particular tax year. While it allows for tax administrator to approve opt-out request for good cause, denials will result in lengthy litigation process. Opt-out provides special interest treatment, different municipal treatment as opposed to federal treatment, and possible income shifting to avoid municipal tax.</p>	<p><b>REVENUE LOSS, LOSS OF AUTHORITY TO DETERMINE PROPER FILING METHOD</b></p>
<p>2185 - 2211</p>	<p><b>CONSOLIDATED RETURN LANGUAGE - TREATMENT OF PASS THRU ENTITY</b> Sub HB 5 provides option to include or exclude PTE profit or loss from the consolidated federal taxable income of the affiliated group, contrary to current law.</p>	<p>1. Municipal Coalition language required that an affiliated group would deduct from the group's consolidated federal tax return the profits from a pass through entity that is included in the consolidated federal taxable income of the affiliated group, and add back any loss incurred by the pass through entity that is included in the consolidated federal taxable income of the affiliated group. 2. Sub HB 5 language provides an OPTION to include or not include the profit or loss, providing for cherry-picking the best scenario to avoid municipal income tax, contrary to current law or current practice.</p>	<p><b>REVENUE LOSS</b></p>

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<p>2819 - 2875</p>	<p><b>CERTIFIED MAIL PROCESS FOR WRITTEN DETERMINATION</b> Sub HB 5 provides cumbersome language for specifics in certified mailing process</p>	<p>1. Language is administratively burdensome, and is intended to be burdensome. 2. For taxpayers who move through the criminal or civil process, there are notification processes required by the Courts to ensure service notification, so this language is not necessary. 3. ANY TAXPAYER WHO HAS REQUESTED A WRITTEN DETERMINATION would have provided a good address for this notification and would have been in contact directly with the tax administrator, making this language not only burdensome but completely unnecessary.</p>	<p><b>INCREASED COSTS, ADMINISTRATIVE BURDEN</b></p>
<p>3365 - 3368</p>	<p><b>AMENDED CONSOLIDATED RETURN LANGUAGE</b> Sub HB 5 provides language contrary to current law regarding the filing of an amended consolidated return.</p>	<p>1. New language that states that a taxpayer intending to file an amended consolidated municipal income tax return shall notify the tax administrator before filing the amended return. 2. Current law requires that, unless they are now filing an amended return as a consolidated return for the first time (original return was not a consolidated return), the taxpayer had to obtain permission to file the consolidated return. 3. This is a way to bypass the authority process of the tax administrator, and file an "amended" consolidated municipal return without the prior approval of the taxpayer.</p>	<p><b>ADMINISTRATIVE BURDEN, POTENTIAL REVENUE LOSS</b></p>
<p>4426 - 4431</p>	<p><b>MUNICIPAL NOL STUDY COMMITTEE</b></p>	<p>1. NOL STUDY COMMITTEE LANGUAGE should be included, but MANDATED 5 YEAR NOL SHOULD BE REMOVED UNTIL THE STUDY COMMITTEE HAS CONCLUDED IT'S WORK. 2. The scenarios are an attempt to hand-pick scenarios that will not truly reflect the NOL losses that will ABSOLUTELY be felt by municipalities throughout the State. draw upon the information from existing records. As many municipalities that can participate should be permitted to participate. 3. AGAIN, leaving in the mandated 5 year NOL indicates a pre-determined result without benefit of the research, which the LSC fiscal analysis clearly shows will be negative and significant revenue loss.</p>	<p><b>PROBLEMATIC LANGUAGE</b></p>

## subHB5 analysis

### NET OPERATING LOSS CARRYFORWARD

Sub HB 5 mandates a five year NOL carry-forward for all municipal corporations, with a five year phase in period beginning in 2017. An NOL Study Committee is formed to study the effects of the NOL on revenue.

#### Concerns:

- Approximately 175 cities have no current Net Operating Loss carry-forward, and approximately 65 have less than a 5 year NOL, resulting in a significant loss of revenue for these municipal corporations.
- The NOL Study Committee will serve no true purpose, as it has already been determined by the legislature that regardless of the revenue impact, the 5 year NOL is hereby mandated.
- With the combination of offsets and the NOL, even those municipalities who currently have a 5 year NOL could experience significant revenue loss due to the mandated combination of both.
- JEDD and JEDZ follow the municipal corporation tax ordinance, so JEDD and JEDZ that currently do not have an NOL or that have less than five year NOL will experience a significant revenue loss. JEDD and JEDZ, with the combination of offsets and the NOL, even those with a current five year NOL could experience significant revenue loss due to the mandated combination of both.

### OFFSETS

The current version of the bill allows offsets of pass through entity losses against net profit income of the resident. Sub.HB5 allows any net operating loss of a resident as a deduction against the distributive share of any net profit attributable to ownership interest in a pass through entity generated during the same year. The bill also provides that the offset does not apply to any net profit or NOL attributable to ownership interest in an S Corporation unless the shareholders' distributive shares of the net profits from the S Corp are subject to the municipal tax in the municipal corporation.

#### Concerns:

- Individuals will be able to take losses more than once. For example, a Columbus resident with a reportable gain from a PTE in a township and a loss from a Westerville partnership will be able to take the Westerville partnership loss (already reported in Westerville and carried forward in Westerville) against the gain reportable to Columbus.
- Municipal corporations that currently do not allow the offsetting of gains and losses will be forced to do so.
- Municipal corporations that only allow un-apportioned losses and gains to offset will now be forced to allow apportioned and un-apportioned gains and losses to offset.
- Municipal corporations that tax S Corps at the individual level (took to ballot in 2003 / 2004) that have not allowed other losses to offset S Corp gains, or who have not allowed S Corp losses to offset other gains will now be forced to do so.

### **OCCASIONAL ENTRANT RULE**

Provides language that increases 12 day rule to 20 day rule; eliminates the retroactive component for taxing employees back to day one; provides opt-in or out language for employers to withhold; gives exemption to employers who have gross receipts under \$500,000 in previous taxable year; gives employee an exemption from taxation on wages that are currently taxed by municipal corporations.

#### **Concerns:**

- Sub HB 5 does not require withholding back to day one, when an employee exceeds the 20 day rule. The employer is required to withhold for the principal place of work location of the employer, and can opt to withhold for the place where work was performed. If the employer is located in a township or non-taxing jurisdiction, the employee working in a municipal corporation could pay nothing for the first 20 days. The wages are also EXEMPT from municipal taxation, except for the employee's place of residence. This means that the actual work location cannot tax those first 20 days. Under current 12 day law, the employer must withhold back to day one when the 12 days is exceeded.

- An employer is only required to withhold for principal place of work if the employer's gross receipts were under \$500,000 in the previous taxable year. An employer located in a township or non-taxing jurisdiction would withhold zero for employees working in municipal corporations. An employee could work within the same municipal corporation for an entire year, and not be subject to that municipal corporation's tax. The municipal corporation where work is performed is prohibited from taxing these earnings, as they are exempt.

- Exempts Board of Directors fees, providing a carve-out for what are typically highly compensated individuals.

- An employee with tax withheld for the first 20 days due to principal place of work location who neither works nor lives in that municipal corporation will be able to obtain a refund of the tax withheld and paid to the principal place of work. The employee will still have a W-2 showing the tax withheld, and could use this credit on their city of residence return, even though the tax was refunded back to the employee. The municipality of residence will not know when the credits shown on the W-2's are legitimate or not.

### **SERP / NONQUALIFIED DEFERRED COMP ISSUE**

Previous language that would have exempted SERPS and Nonqualified Deferred Comp ("pension payments and benefits") language has been changed to now only show "pensions" as being taxable.

#### **Concern:**

- Language was added that exempts from qualifying wages "any amount that is exempt income", requiring additional review on whether or not this will impact this issue.

### **WRITTEN DETERMINATION**

Substitute version of the bill removed "written finding of tax administrator" language that would have generated increase requirements for certified mail to be used, but issues still exist in current version.

#### **Concerns:**

- A refund submitted on an amended tax return filing would trigger the "written determination" procedure, prompting certified mail notification to taxpayer of any change to the refund request (again, on an amended return only).
- Language does not clarify that a "written determination" is not an audit or assessment, or a correction to a tax return submitted.

### **CONSOLIDATED RETURN LANGUAGE**

Sub HB 5 provides new language, defining "affiliated group of corporations" and "Incumbent local exchange carriers", and excludes them from "Consolidated federal taxable income" definition.

#### **Concerns:**

- New language provides special treatment at the request of AT&T, not provided to other taxpayers.
- Language provides an opt-in opt-out every five years for municipal tax purposes from filing a consolidated municipal income tax return, even when consolidated federal income tax return is filed for that particular tax year. While it allows for tax administrator to approve opt-out request for good cause, denials will result in lengthy litigation process. Opt-out provides special interest treatment, different municipal treatment as opposed to federal treatment, and possible income shifting to avoid municipal tax.

### **ALTERNATIVE APPORTIONMENT**

Allows the taxpayer to notify the tax administrator prior to using an alternative apportionment. Current law requires tax administrator approval.

#### **Concerns:**

- Current law requires the taxpayer to seek approval to use an alternative apportionment method, Sub HB 5 only requires that the taxpayer notifies the tax administrator prior to submitting the return.
- Any ability to disallow the filing using an alternative apportionment formula appears to have been removed from the bill, removing the tax administrator's authority to deny the use of an alternative apportionment formula.

### **NET OPERATING LOSS CARRY FORWARD IMPACT STUDY COMMITTEE**

#### **Concerns:**

- NOL study committee language should be included, but the mandated 5 year NOL should be removed UNTIL the study committee has concluded its work.
- There is a real concern that there will be an attempt to hand-pick scenarios/municipalities that will not truly reflect the NOL losses that will be felt by municipalities throughout the State. Any municipality that would want to participate should be permitted to participate, and any "representative sample" should come from cities with no current NOL, or less than 5 year NOL, and should be a sampling based on region, size of community and those who can readily draw upon the information from existing records. As

many municipalities that can participate should be permitted to participate.

- AGAIN, leaving in the mandated 5 year NOL indicates a pre-determined result without benefit of the research, which the LSC fiscal analysis clearly shows will be negative and significant revenue loss.

# **A Brief History of Municipal Income Tax Uniformity Actions**

**Melinda J. Frank, Columbus Income Tax Division Administrator**

The most recent actions by the State Legislature related to municipal income tax have demonstrated that there are few, if any, legislators with any form of historical or institutional knowledge regarding the evolution of Ohio Revised Code Chapter 718 *Municipal Income Tax*. Few are aware that a number of issues, relating to the lack of uniformity and present in the current language of the chapter, are the work product of previous legislative bodies, reflecting an inability to draft and enact simple, clear and concise language and a lack of understanding municipal taxation in general.

Much has been said recently about the municipal income tax and the lack of uniformity among municipal taxing jurisdictions as relates to administration. Statements have been made regarding the lack of cooperation on the part of those jurisdictions - as well as of the Ohio Municipal League, with the efforts of our State Legislature and various private sector groups to obtain such uniformity.

In light of the misinformation and "urban legends" that have been circulating regarding the history of municipal income tax uniformity, the following historical background along with an examination of previous State legislative actions is provided.

In 1938, the first local income tax was imposed by the City of Philadelphia, PA. Toledo, Ohio was the second in 1946, with Columbus becoming the third in 1947. As the number of local jurisdictions in Ohio grew, so did the number of ordinances governing local tax administration, each addressing the needs and circumstances of the jurisdiction. In 1973, the Ohio Municipal League drafted a model income tax ordinance as well as rules and regulations to foster uniformity among local jurisdictions. This model ordinance was amended in 1977.

Currently, there are 644 municipal tax jurisdictions in the State of Ohio. They consist of cities, villages and the products of ORC Section 715.69 et seq.: Joint Economic Development Districts and Zones, which more often than not pull

townships into the mix. Income tax rates range from .50 % to 3.0% and provide for full or partial credit for municipal tax paid elsewhere.

In 1991, the OSCPA published a summary of a survey conducted of the then 510 municipalities with income tax ordinances. This publication is what is affectionately referred to as "The Green Book".<sup>1</sup>

The purpose of the publication was to:

- Illustrate the different administrative, procedural and operational matters related to local taxation
- Describe the reasons for this diversity and the problems taxpayers experienced as a result of that diversity
- Recommend the best solution for each area of diversity.

The overall recommendation of the publication:

*The enactment of a simple, uniform system of municipal tax administration statewide that was fair to both local government and taxpayers alike.*

The publication acknowledged the dramatic changes that had taken place with regard to many federal and state tax regulations and offered that many of the "problems" caused were due to some municipalities moving faster than others in adopting new rules and changing ordinances to comply. It also noted that technological advances were anticipated which would most likely change federal and state requirements with regard to filings and payments.

Areas of Municipal Diversity considered within the "Green Book":

- Municipal tax return due dates - April 30 followed by 70% of the municipalities as opposed to April 15 followed by 30% of the municipalities at that time
- Payroll tax deposits: amounts; due dates

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<sup>1</sup> "Ohio Municipal Income Tax Uniformity Guide" , The Ohio Society of Certified Public Accountants, Subcommittee Chairs: Linda Tracy Gill, Mable Weddington Kitchen, J. Matthew Yuskewich

- Estimated tax payment requirements; due dates; penalties for late or insufficient deposits; waiver provisions
- Extensions for filing
- Interest rates on assessments and refunds
- Administrative appeals procedures
- Treatment of employee business expenses
- Corporate income tax paid by shareholders (Sub-S corporations))
- Standardized tax forms
  1. Income tax filings
  2. Non-resident income earners
  3. Apportionment formulas

Recommendations resulting from the survey:

- Uniform due date (for annual filings) of the last day of the fourth month after year end
- Payroll tax – all payments due by the last day of the month following the end of the payroll period
- Estimated tax payments
  1. Individuals file April 30 and the 15<sup>th</sup> day of the 6<sup>th</sup> and 9<sup>th</sup> months of the tax year and the 15<sup>th</sup> day of the first month following the tax year end
  2. All other taxpayers quarterly payments would be due April 30, and the 15<sup>th</sup> of the 6<sup>th</sup>, 9<sup>th</sup> and 12<sup>th</sup> months of the tax year (the goal being to conform to the federal filing dates)
  3. Minimum liability to require quarterly payments \$100
  4. Estimated payments are to be based upon 100% of prior year liability or 90% of current year liability before imposition of a penalty
  5. Uniform penalty to be calculated in the same manner as for federal and state tax purposes
- Time extensions for filing
  1. Use of federal Form 4868 or 7004 in place of any municipal form
  2. The extension period is to commence with the original due date

- Interest rates on assessments and refunds - uniform and the same rate utilized by the State of Ohio Department of Taxation
- Administrative Appeals - Goal to be fair , cost effective and provide speedy access at all levels
  1. Taxpayer given 30 days following **receipt** of proposed audit changes to request an informal conference with auditor and audit supervisor
  2. After **receipt** of a Notice of Proposed Audit Changes the Taxpayer would have 90 days to file a written protest requesting a hearing before the local Board of Review
  3. Judicial review may be requested at any point during the administrative appeal process
  4. Taxpayer may be represented at any conference or appeal by an attorney, CPA or officer or full-time employee of the Taxpayer's organization (when the taxpayer is other than an individual).
- Treatment of employee business expenses – All expenses reported on Form 2106 should be allowed without limitation. Meals and entertainment should equal the deduction reported on Form 2106 (80%)
- Corporate income tax paid by shareholders:
  1. Corporations should be required to pay municipal tax only if engaged in business in that municipality
  2. Federal Sub-S status should not be recognized for municipal income tax purposes. Sub-S corporations should be taxed in the same manner as corporations that have not elected Sub-S status
  3. In determining the corporate income of a Sub- S corporation, both the income and the deductions reported on page one and Sch K must be included
- Standardizing income tax form - The survey demonstrated that 80 of those municipalities surveyed indicated the taxing of earned income, rental income and taxpayer's share of nonresident partnership income, suggesting a comparable tax base. Current forms have only minor variations. Uniform form would produce benefits for the city, taxpayer and practitioner

- Taxation of non-resident workers – Use of a standardized form for calculating the amount of compensation for services rendered outside of the jurisdiction that is excluded from taxable income. Document should include a log for dates and places traveled, number of days spent in each location and certification by the employer. This calculation would be made prior to the filing of the return and used to reduce the taxable income thus eliminating the need for a separate refund request (our IR-22)
- Apportionment formulae – All municipalities should permit a separate accounting for operations both within and without an Ohio municipality. In the alternative, the three-factor formula should be the only method for determining income taxable in the municipality.

These recommendations were made, but no formal action was taken.

**Fast forward to October 1999 when H.B. 477 was introduced to be signed by the Governor in late April 2000 with an effective date of July 26, 2000. This bill addressed some areas of uniformity previously raised as well as others that had not been contemplated in 1991 as it:**

- Implemented the “12 day rule” prohibiting a municipal corporation from taxing compensation paid to non-resident individuals employed in the municipal corporation performed in that municipal corporation if:
  1. The services are performed on 12 or fewer days in a calendar year
  2. The individual is not a resident of the municipal corporation in which the work is performed
  3. The principal place of business of the individual’s employer is located outside of the municipal corporation in which the limited services were performed.
  4. Exception – professional athletes, promoters of professional entertainment or sports events and their employees (as reasonably defined by the municipal corporation)
- Ensured that municipal corporations could not require a taxpayer to file tax returns prior to the filing date for the corresponding federal tax reporting period

- Required municipal corporations to accept consolidated returns from affiliated groups of corporations that file consolidated returns (for the same tax reporting period) for federal income tax purposes simplifying reporting for members of a corporate group and allowing the group to offset operating losses of some group members against operating profits of other group members
- Mandated the acceptance of generic forms so long as the form and accompanying documents contain all of the information required by the filing requirements of the municipal corporation. A generic form being any electronic or paper form designed for reporting estimated and annual municipal income tax liability, but that is not prescribed by any particular municipal corp.
- Brought municipalities to the internet, requiring the publication of forms and instructions, ordinances, rules and regulations on an internet accessible site, but providing a posting site through the Ohio Department of Taxation for those municipal corporations without internet access.
- Required a declaration by each municipal corporation as to how the income of pass through entities would be taxed – as an entity or in the hands of each owner’s share of the entity. Also, municipal corporations were required to grant a credit to preclude multiple taxation of that income.
- Exempted parsonage allowances
- Established a \$150 tax due threshold for the withholding of employee tax by non-resident employers. Separate and distinct from the 12 day rule, this provision relieved a non-resident employer from the duty of withholding tax from employee wages on a job within a municipal jurisdiction unless the total amount of tax to be withheld from the wages of all employees working in that jurisdiction is more than \$150 for a calendar year. Once the total exceeds \$150 for the calendar year the employer is required to withhold tax for that year as well as all succeeding years unless the amount due to that jurisdiction fell below \$150 per year for three consecutive years.

- Barred municipal corporations from taking any action against a taxpayer for tax paid in error to another municipal jurisdiction if more than three (3) years had passed from the date of filing the erroneous return and making payment thereon, mandating that a credit be allowed for the improperly deposited tax.
- Created uniform filing and payment dates for estimated tax:
  1. For Individuals April 30, July 31, October 31 and January 31
  2. For calendar year taxpayers not individuals: April 15, June 15, Sept 15 and Dec 15
  3. Fiscal year taxpayers not individuals: the 15<sup>th</sup> of the 4<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup> and 12<sup>th</sup> months
- Required municipal corporations to grant tax return filing extensions to those taxpayers who have requested a federal filing extension. To receive the extension, the taxpayer must file a copy of the federal extension request no later than the original filing deadline of the local return. The municipality could deny the request if:
  1. The taxpayer is late in filing the request
  2. The taxpayer did not file a copy of the federal extension request
  3. The taxpayer had not filed a return or other required document for a previous reporting period
  4. The taxpayer is delinquent in the payment of any tax, penalty, interest, assessment or other charge.

**Jumping ahead to 2003, the 125<sup>th</sup> General Assembly passed Am.Sub.H.B 95, portions of which related to municipal income tax with a variety of effective dates. If at first you don't succeed.....or if something didn't work the way originally intended ..... go back to the legislature ...and try again. This Bill repealed what didn't work, was a "Mulligan" for some issues that weren't working as anticipated and introduced some new issues into the "uniformity" spotlight.**

- It should come as no surprise that the provision of H.B. 477 relating to the \$150 minimum liability for all employers was repealed. This was as

impossible to administer as it was to comply. Both sides were happy to see it go.

- A uniform net profits base was established. Net profit subject to municipal taxation is the taxpayer's adjusted federal taxable income, defined as a C corporation's federal taxable income before net operating losses and special deductions adjusted as follows:
  1. Deduction of intangible income to the extent the taxpayer includes it in federal taxable income. The deduction being allowed regardless of whether the intangible income relates to assets used in a trade or business or held for the production of income.
  2. Add back of 5% of the intangible income deducted, but not that portion of intangible income that directly relates to the sale, exchange or other disposition of Section 1221 capital assets
  3. Addition of any losses allowed as a deduction in computing federal taxable income if the losses directly relate to the sale, exchange or other disposition of Section 1221 or 1231 capital assets
  4. Deduction of income or gain included in federal taxable income to the extent it is directly related to the sale, exchange or other disposition of a Section 1221 or 1231 capital asset – but not to the extent the income or gain is from the disposition of Section 1245 or Section 1250 depreciable property.
  5. Addition of taxes on or measured by net income allowed as a deduction in the computation of federal taxable income
  6. In the case of a Real Estate Investment Trust and regulated investment company, addition of all amounts with respect to dividends, distributions and amounts set aside for or credited to the benefit of investors and allowed as a deduction in the computation of federal taxable income.

\*Effective for tax year 2004 forward, municipalities could not tax a business' net profit using any base other than Adjusted Federal Taxable Income. However, that restriction did not apply to the net profits of electric companies, telephone companies and sole proprietorships.

- A uniform withholding base known as “qualifying wages” was established for employee compensation while providing an election for municipalities, through legislative action, to exempt certain income from taxation (stock options and non-qualified deferred compensation).
- The extended due date of any municipal income tax return became the last day of the month following the month to which the due date for the filing of the federal return had been extended. Modification of the uniform extension due dates created in H.B. 477 resulted from the realization that a municipality could extend the deadline for filing the municipal return beyond the federal deadline thus resulting in the possibility of non-uniform length of the extension period granted.
- April 15 was established as the uniform filing deadline for municipal income tax returns. (If you recall, H.B. 477 utilized April 30 in all of the filing requirements for the filing and payment of the first quarter estimate.)
- Taxpayers and municipalities were given an option for an appeal from the local Board of Tax Appeals to be filed with the Ohio Board of Tax Appeals or Court of Common Pleas. Should the appeal be heard by the Ohio Board, either party may appeal that decision to the Ohio Supreme Court or the Court of Appeals in the county of the municipality in which the dispute arose.
- All municipal jurisdictions were required to accept filings and payments from business taxpayers through the Ohio Business Gateway.

**And now we are again seeing the State legislature attempting to tinker with local income tax. The most recent legislative actions related to ORC Chapter 718 *Municipal Income Taxes*, H.B. 601 in 2012 and now H.B. 5, demonstrate several things:**

- The Legislature continues to change its collective mind as to the basis of uniformity and its application.
- Clear and concise language continues to elude the drafters.
- The State of Ohio now wishes to dictate the method of administration, meaning compliance actions and enforcement.

Finally, the apparent goal is no longer uniformity and simplicity, but rather tax reform at the expense of municipal revenue. It seems that the earlier concept of fairness to both local government and taxpayers alike has been abandoned.