

IN THE COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO

CITY OF ATHENS, *et al.*,

*Plaintiffs,*

v.

STATE OF OHIO, *et al.*,

*Defendants.*

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: Case Number: 17 CVH 11-10258  
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: Judge Karen Phipps  
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**JUDGMENT ENTRY ORDERING THE STATE OF OHIO TO REFUND TO THE  
PLAINTIFF MUNICIPALITIES, WITH INTEREST, ALL FUNDS RETAINED BY THE  
STATE FROM THE PLAINTIFFS' MUNICIPAL NET PROFIT TAXES  
UNDER R.C. 718.85(B)**

*“In the unlikely event it is eventually determined that H.B. 49 violates the Home Rule Amendment, the [Ohio Department of Taxation] could simply remit the revenue collected back to Plaintiffs and repeal the regulations, thereby making the Plaintiffs whole and returning them to the current, defective system. In sum, because monetary restitution is possible, and there is an adequate remedy at law, injunctive relief is inappropriate.”* (State’s Brief in Opposition to Plaintiffs’ Motion for Preliminary Injunction, February 2, 2018, p. 26).

Thus, the State of Ohio Defendants (hereinafter “the State”) previously recognized that if the tax statutory scheme at issue here was found unconstitutional, then Plaintiffs’ available remedy would be “monetary restitution,” where the State would “remit the revenue collected back to Plaintiffs,” “thereby making the Plaintiffs whole.” Yet, the State now objects to granting this very relief requested by Plaintiffs<sup>1</sup>.

As the parties are well aware, Plaintiffs were not successful in their quest seeking to invalidate in their entirety the Municipal Income Tax Provisions set forth in H.B. 49 and codified within R.C. Chapter 718, but they ultimately prevailed in one aspect. The Ohio Supreme Court declared R.C. 718.85(B) and its retention by the State of 0.5% of the municipal net profit taxes

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<sup>1</sup> The Court is in no way applying an estoppel argument against the State. The Court emphasizes the State’s prior contradictory position as it sorely undermines and discredits the State’s contention now that this result could not have been foreseen and that monetary restitution would be inequitable.

collected as a fee for administering the net profits tax system to be unconstitutional. *City of Athens v. McClain*, 2020-Ohio-5146, ¶¶53-57. The high court was clear: “[W]hether the .5 percent retention is viewed as a fee or as a tax, the General Assembly had no authority to impose it.” *Id.* at ¶54. Thus, they reversed the portion of the court of appeals’ judgment upholding the .5 percent retention of municipal net-profits taxes by the state, and importantly, remanded “the cause to the trial court” with instructions “to enter judgment in accordance with [their] decision and to take whatever further action may be appropriate to effectuate that judgment.” *Id.* at ¶61.

Therefore, as part of this further action, Plaintiffs<sup>2</sup> have requested that the Court order the State to return with interest the funds that have been withheld from them under the unconstitutional provision, R.C. 718.85(B). Upon review, of the parties’ arguments and the applicable law, the Court finds that, in the absence of language in the *McCain* decision limiting it to prospective-only application, the Supreme Court’s decision declaring R.C. 718.85(B) unconstitutional applies retrospectively. As such, R.C. 718.85(B) was never the law, and the State lacked the authority from the law’s inception to retain funds under this provision. *Roberts v. Treasurer*, 147 Ohio App. 3d 403, 410, 2001-Ohio-8867, 770 N.E.2d 1085, ¶ 20 (10th Dist.) (citing *Peerless Elec. Co. v. Bowers*, 164 Ohio St. 209, 209, 129 N.E.2d 467, 468 (1955)).

The Court hereby adopts and incorporates the well-reasoned analysis set forth by the Plaintiffs as to the relevant issues, and rejects the State’s arguments that the Plaintiffs have not properly sought a refund of the .5% administrative fee; that the Ohio Supreme Court’s decision in *McClain* should be applied prospectively only, whether as a matter of law or applying the test set forth in *DiCenzo v. A-Best Prods. Co., Inc.*, 120 Ohio St.3d 149, 2008-Ohio-5327; and that it would be inequitable or would impose an undue burden to order restitution.

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<sup>2</sup> Plaintiff the City of Columbus, an original plaintiff-group member, has not joined this request.

The Court hereby GRANTS Plaintiffs' request and ORDERS the following:

1. That the State refund to each requesting Plaintiff municipality all of the funds it collected from the net profit tax revenues of the municipality under R.C. 718.85(B).
2. That the amount refunded to each requesting Plaintiff municipality include interest accrued from the dates those funds were collected to the date of this Order.

The Court retains jurisdiction of this case.

Finally, Plaintiffs have suggested that the Court issue a briefing schedule regarding an award of attorney fees. Any party may move for attorney fees, and the issue will be briefed in accordance with Civ. R. 6(C) and Loc. R. 21.01.

**IT IS SO ORDERED**

**Electronically Signed By:  
JUDGE KAREN HELD PHIPPS**

Franklin County Court of Common Pleas

**Date:** 03-25-2021  
**Case Title:** ATHENS CITY ET AL -VS- OHIO STATE TAX COMMISIONER  
ET AL  
**Case Number:** 17CV010258  
**Type:** JUDGMENT ENTRY

It Is So Ordered.

A handwritten signature in black ink, appearing to read "K. Held Phipps", is written over a circular official seal. The seal contains the text "COMMON PLEAS COURT" and "FRANKLIN COUNTY OHIO".

/s/ Judge Karen Held Phipps