**Supreme Court Decision on Use Tax for Transient Boater**

On January 22, 2014, the Ohio Supreme Court held that the Ohio Board of Tax Appeals (BTA) acted unreasonably and unlawfully when it affirmed the Ohio Tax Commissioner’s imposition of use tax, penalty, and interest of more than $15,000 against a Kentucky resident who occasionally operated her boat in Ohio waters.

Cheryl Gallenstein and her husband bought a 44-foot Sea Ray Sundancer boat in June 2002. They purchased it in Indiana, docked it there, and did not register it in either Kentucky or Indiana. She obtained a certificate of documentation from the U.S. Coast Guard listing her as the owner, noting that the boat’s use is recreational, and listing Cincinnati as the hailing port because the Gallensteins thought that port would be recognized if they cruised to Florida on vacation.

According to the court, the evidence showed that they “primarily operated their boat in Kentucky and Indiana waters, downriver from Cincinnati, because the water there was cleaner and less crowded. Between June 2002 and the end of the 2004 boating season, they crossed into Ohio waters between five and ten times when operating the boat. In 2005, they operated the boat in the Ohio River once or twice but, it is not apparent from the record whether they operated it in Ohio waters during that year.” During trips upriver to Cincinnati, local police frequently would board and inspect the boat and allow the Gallensteins to continue boating after reviewing the vessel’s documentation. A boating consultant suggested that these boardings would likely end if they registered the boat in Ohio. Following this advice, Gallenstein registered the boat in Ohio, indicating that it would be principally used in Kentucky and Indiana waters. In 2003, the Ohio Department of Natural Resources (ODNR) Division of Watercraft issued a sticker and three-year registration.

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In 2005, the Ohio Department of Taxation audited Gallenstein, asking for verification that she had paid sales or use tax for the boat in Ohio or in another state. Gallenstein responded that she did not believe that Ohio taxes were due, and informed a tax agent that her boat carried an Ohio watercraft registration to avoid being boarded by Cincinnati police.

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**Lake Erie Caucus of Legislators**

State Senator Randy Gardner (R-Bowling Green) and Senator Capri Cafaro (D-Hubbard) announced in December, 2013, the formation of a new bipartisan Lake Erie Caucus of legislators which held its organizational meeting January 26, 2014.

The inaugural meeting of the bipartisan, bicameral Lake Erie Caucus was attended by the following legislators:

Senator Randy Gardner (R-Bowling Green), Co-chairman

Senator Capri Cafaro (D-Hubbard), Co-chairman

Representative Chris Redfern (D-Port Clinton), Co-chairman Representative Marlene Anielski (R-Walton Hills)

Representative Nan Baker (R-Westlake)

Representative Michael Sheehy (D-Oregon)

Representative Matt Lundy (D-Elyria)

Representative Dan Ramos (D-Lorain)

Representative Rex Damschroder (D-Freemont)

Representative Jeff McClain (R-Upper Sandusky)

Senator Edna Brown (D-Toledo)

Senator Gayle Manning (R-North Ridgeville)

Senator Mike Skindell (D-Lakewood)

Senator Frank LaRose (R-Copley)

Senator Cliff Hite (R – Findlay)

Senator Bob Peterson ( R – Sabina)

\* House Co-Chair, Representative Mike Dovilla (R-Berea) could not attend the meeting due to military service

Individuals from the following Associations attended the caucus meeting: the Ohio Lakefront Group, the Ohio Environmental Council, the Ohio Association of Convention and Visitors Bureau, the Lake Erie Charter Boat Association, Crawford County Commissioners, Ohio Department of Natural Resources (ODNR), the Ohio Environmental Protection Agency (Ohio EPA) and the Lake Erie Marine Trades Association and the Boating Associations of Ohio.

Senator Gardner formed the Lake Erie Caucus to make a meaningful impact on state and federal policies and support.   He said the problems are multi-faceted, including both environmental and economic issues that need to be addressed. Gardner said he wants the caucus to generate "action-plans" that will obtain money and/or establish policies instead of just informing and planning reports.

The committee heard a presentation by Dr. Jeff Ruetter of Ohio State University on Lake Erie. Melinda Huntly, Executive Director of the Ohio Travel Association, gave statistics about how much of Ohio's economy is affected and "protected" by tourism centered around Lake Erie.

**House Bill 372 – Rearview Mirrors for Skiers**

House Bill 372 has been introduced by State Representative John Becker (R-Cincinnati) and would allow operators of watercraft vessels to use rearview mirrors to observe water skiers, barefoot skiers, and others who are being towed by the vessels.

The current law requires a person or persons, other than the operator, ten years old or older to observe the progress of the person being towed. A person or persons other than the operator is required to, at all times, observe the progress of a person being towed. House Bill 372 would make it permissible to observe the activities of the person being towed through a mounted rearview mirror. This legislation has been referred to the Transportation, Public Safety and Homeland Security Committee.

A sponsor hearing was held on January 14, 2014. At the hearing Representative Becker said that Ohio should join the 21 other states that allow for the use of wide-

angle rearview mirrors in place of requiring a human spotter. He claimed that this would make towed skiing

more accessible to small groups, in addition to easing the task of law enforcement along Ohio’s shared border with Kentucky, where mirrors are allowed in place of spotters.

Representative Patmon questioned how these issues were treated in other states with large bodies of water, specifically New York and Illinois. Representative Becker said he was unsure what those states did but assured the committee that he would attempt to find the information. Patmon thought this was crucial for discussion.

Along with Representative Ruhl, Representative Mallory asked about the safety of having only one mirror. Representative Becker said that, instead of the normal rearview mirror present in cars, this boating mirror would have a wider angle, which would result in a larger field of vision.

Representative DeVitis asked whether Representative Becker knew of any safety statistics comparing boats with human spotters and boats with only mirrors. Representative Becker stated that the information was currently unavailable.

Chairman Damschroder asked whether there was some sort of national organization that could support HB372. Representative Becker replied that such organizations consider this issue a minor one and most choose to focus on larger boating issues.

A proponent hearing was scheduled for January 21, 2014, but no proponents appeared on the bill.

**Senate Bill 150 Use of Fertilizer**

Senate Bill 150, sponsored by State Senators Cliff Hite

( R – Findlay) and Bob Peterson ( R – Sabina), requires a person that applies fertilizer for the purposes of agricultural production to be certified to do so by the Director of Agriculture. Agricultural areas of less than 50 acres would be exempt from the provisions of the bill.

Senate Bill 150 was referred to the Senate Agriculture Committee. At the sponsor hearing, State Senator Peterson said the substitute bill **would not** solve all of the problems with nutrients in Lake Erie and inland lakes; would not dramatically increase costs for farmers; and would not increase costs for the state.

Peterson said the bill provides for education from the Ohio Department of Agriculture (ODAg) through the Ohio State University (OSU) Extension; science based best management practices; and the pulling of fertilizer application licenses from farmers by ODAg.

On November 13, 2013, a number of amendments were made to the bill including language allowing the transfer of unexpended funds already appropriated to go to the Healthy Lake Erie Fund to be used for the purposes related to open lake disposal of dredge material in Lake Erie.

Also at the hearing, opponent testimony was presented by Rick Unger, President, Paul Pachalski and David Spangler of the Lake Erie Charter Boat Association. The three opponents all spoke to personal experience with the impact Lake Erie is seeing from the algae blooms, with their offering satellite pictures of where the blooms have occurred and a bottled sample of the water itself.

Unger told the committee of his concerns that this legislation does not protect the lake from significant impacts and allows excessive amounts of nutrients to enter Lake Erie, which does impact the most fragile part of Lake Erie, the western basin, causing a significant adverse impact on Lake Erie's fishery. He stressed the $1.2 billion that fishing brings into the state. Unger said that “the revised Senate Bill 150 has no teeth, it has

been reduced to an ineffectual document that will not protect the fishery, tourism, boating, lodging, restaurants, bait shops, marinas and all related ancillary services along Lake Erie."

The bill was substituted twice and amended in the Senate Agriculture Committee and was reported out of Committee on January 22, 2014. The bill then passed the Ohio Senate the same day by a vote of 32 – 0. The bill has now been referred to the House Agriculture and Natural Resources Committee.

The bill authorizes a person who operates agricultural land to develop, or have developed on the person's behalf, a voluntary nutrient management plan that monitors certain conditions of and identifies nutrients applied on the agricultural land.

Under the bill "agricultural pollution" means failure to use management or conservation practices in farming or silvicultural operations to abate wind or water erosion of the soil or to abate the degradation of water by residual farm products, manure, or soil sediment, including attached substances. The bill eliminates the term "animal waste" and replaces it with "residual farm products" and "manure." "Residual farm products" is defined to mean bedding, wash waters, waste feed, and silage drainage. The bill defines "manure" to mean animal excreta.

The bill prohibits a person, beginning September 30 of the third year after the bill's effective date, from applying fertilizer for the purposes of agricultural production unless that person has been certified to do so by the Director of Agriculture or is acting under the instructions and control of a person who is certified.

The bill also requires money in the Conservation Reserve Management Program that is not retained by soil and water conservation districts for certain activities related to nutrient reduction in Lake Erie to be transferred to the GRF and used for activities related to open lake disposal of dredge material in the Lake.

A sponsor hearing was held in the House Agriculture and Natural Resources Committee on February 11, 2014 and a proponent hearing was held on February 18, 2014. Ohio Department of Agriculture Director David Daniels offered proponent testimony for the bill. Daniels said, “what we have before us today is a bill that effectively establishes guidelines for the responsible use of agricultural nutrients toward the end goal of protecting Ohio’s waterways from harmful algal blooms.”

Daniels said the bill does not address the issue of manure, but that it will continue to be an important issue going forward. He told the Committee that the EPA has done research on nutrient loading in Lake Erie, and that farmers are generally open to the idea of cooperating in this venture to reduce nutrient loading.

Also testifying as a proponent of the legislation was Tony Seegers, the Ohio Farm Bureau Federation Director of State Policy. Seegers said that while farmers are proactively changing their practices to improve the water without legislation, he said the bill will create a certification program that is educational and economical.

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This tax agent informed her that she should register the boat in the state where she principally uses it and directed her to cancel the Ohio registration. Gallenstein attempted to do so, but the Ohio Department of Natural Resources (ODNR) advised her that there is no way to cancel a boat registration other than allowing it to expire. She informed the tax agent what ODNR had told her and her intent to not renew the registration. The tax agent

replied that her response did not satisfy the state’s request for proof of tax paid.

The Tax Commissioner assessed a $12,000 use tax, and imposed an $1,800 penalty and $1,252.93 in pre-assessment interest. Gallenstein petitioned for reassessment and requested remission of the penalty and interest. The Tax Commissioner denied this request because her use of the boat in Ohio, combined with her declaration of Cincinnati as its hailing port and her registration of the boat in Ohio, “‘created a nexus

between the boat and Ohio,’” making it subject to the use tax, and she had not established that the transient use exception applied.

Gallenstein appealed to the Board of Tax Appeals (BTA). Relying on its own precedent, the BTA determined that the term transient use “connotes a use of a short or temporary duration” and that a period of 60 days ‘‘would seem to be an appropriate and reasonable guideline’’ for determining whether an owner’s use of a boat in Ohio had been transient. It determined that the record “‘clearly establishes’” that Gallenstein resided in Kentucky and was a nonresident of Ohio. It rejected the Tax Commissioner’s contention that Gallenstein was not a tourist or vacationer because of the proximity of her husband’s Ohio business and stated that “‘the total number of days in Ohio’s waters since the boat’s purchase in June 2002 was less than sixty days.’”

Nonetheless, the BTA determined that Gallenstein did not satisfy the transient use exception because her boat was required to be registered as it did not satisfy an exemption from watercraft registration for those boats who are temporarily transiting, not principal users of Ohio waters, and not used in Ohio waters for more than 60 days. It therefore affirmed the Tax Commissioner’s decision. Gallenstein then appealed to the Ohio Supreme Court.

In a 4-3 decision, the Ohio Supreme Court reversed the decision of the BTA. In its opinion, pursuant to R.C. 5741.02(C)(4), the tax does not apply to the transient use of tangible personal property in this state by a nonresident tourist or vacationer, or a nonbusiness use within this state by a nonresident of this state, if the property so used was purchased outside this state for use outside this state and is not required to be registered or licensed under the laws of this state.”

The court recognized the BTA’s conclusion that Gallenstein met part of R.C. 5741.02(C)(4)’s test, but

determined that Gallenstein satisfied the statute because she established her boat was not required to be registered or licensed under the laws of this state and therefore she satisfied the (B)(3) exemption. It noted that R.C. 1547.531(B)(3) exempts watercraft from registration “that have been documented by the United States coast guard or its successor as temporarily transiting, whose principal use is not on the waters in this state, and that have not been used within this state for more than sixty days.” However, according to the court, despite this exemption provision, “the term ‘temporarily transiting’ does not appear in federal regulations governing the United States Coast Guard’s documentation of vessels.”

The court wrote: “In this case, because the term ‘temporarily transiting’ does not appear in federal regulations governing the United States Coast Guard’s documentation of vessels, the BTA unreasonably and unlawfully interpreted R.C. 1547.531(B)(3)…. to require Gallenstein to show that her boat has been documented as temporarily transiting by the United States Coast Guard when it does not appear that the United States Coast Guard issues a temporary transiting endorsement is unreasonable because no one could qualify for this exemption.”

The majority opinion was joined by Justices Paul E. Pfeifer, Terrence O’Donnell, Sharon L. Kennedy, and William M. O’Neill.