

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

THE BUCKEYE INSTITUTE)	CASE NO: 20-CV-4301
)	
)	
Plaintiffs,)	
)	JUDGE WILLIAM WOODS
vs.)	
)	
KILGORE, Columbus City Auditor; et al.)	
)	PLAINTIFFS’ MEMORANDUM
)	IN OPPOSITION TO
Defendants.)	MOTION TO DISMISS
)	FILED BY ATTORNEY GENERAL
)	<u>DAVE YOST</u>

Plaintiffs respectfully oppose the Motion to Dismiss filed by the Ohio Attorney General in this matter.

Specifically addressing the municipal taxation of the income of nonresidents, a unanimous Ohio Supreme Court held that “[b]eyond in personam taxing jurisdiction over residents, local authorities may tax nonresidents only if theirs is the jurisdiction ‘within which the income actually arises and whose authority over it operates *in rem.*’” *Hillenmeyer v. Cleveland Bd. of Rev.* (2015), 144 Ohio St.3d 165, 2015-Ohio-1623, 41 N.E.3d 1164, ¶ 42, citing *Shafer v. Carter*, 252 U.S. 37, 55, 40 S. Ct. 221, 64 L. Ed. 445 (1920); see also *Willacy v. Cleveland Bd. of Income Tax Rev.*, 2020-Ohio-314, ¶ 26 (“compensation must be allocated to the place where the employee performed the work”). Thus, “[l]ocal taxation of a nonresident’s compensation for services must be based on the location of the taxpayer when the services were performed.” *Id.*

Chapter 718 of the Ohio Revised Code, which governs municipal income tax, is premised on this in rem jurisdictional requirement. The chapter recognizes the in rem requirement by defining income for nonresidents as “income, salaries, qualifying wages, commissions, and other

compensation from whatever source earned or received by the nonresident for work done, services performed or rendered, or activities *conducted in the municipal corporation.*” R.C. 718.01 (B)(2)(*emphasis added*). In the subsequent section of Chapter 718, the General Assembly again recognized the limiting principle that due process requires a city to have either in personam or in rem jurisdiction before it can levy a tax. See R.C. 718.02 (A)(2)(defining income subject to tax as the ratio of “wages, salaries, and other compensation . . . for services *performed in the municipal corporation* to wages, salaries, and other compensation . . . wherever the individual’s services are performed.”)(*emphasis added*).

This limiting principle is embedded not only in the Ohio Revised Code, but in municipal income tax ordinances throughout Ohio. Indeed, the City of Columbus’ own Income Tax Code reflects these same jurisdictional requirements and provides that the City may tax only the two types of income set forth in *Hillenmeyer*, to wit, (1) income earned by City residents on the basis of the City’s in personam jurisdiction over the resident, and (2) income earned by nonresidents for work done within city limits on the basis of in rem jurisdiction over the work performed in the City:

(N) "Income" means the following:

- (1) (a) ***For residents***, all income, salaries, qualifying wages, commissions . . .
- (2) ***In the case of nonresidents***, all income, salaries, qualifying wages, commissions, and other compensation . . . ***for work done, services performed or rendered, or activities conducted in the Municipality***

Columbus Code of Ordinances, 326.03 (N) (*emphasis supplied*). This is the long-established rule in cities large and small across Ohio; municipal income taxation of non-residents must be anchored to work performed in the that city.¹ Defendants’ attempts to characterize H.B. 197’s

¹ See e.g., Akron, Ohio, Municipal Code § 104.02 (13)(B)(“In the case of nonresidents, all income, salaries, qualifying wages, commissions, and other compensation from whatever source earned or received by the

nonresident for work done, services performed or rendered, or activities conducted *in the Municipality*") (*emphasis added*);

Blue Ash, Municipal Code § 171.03(a)(2)(tax imposed on "all qualifying wages, commissions, other compensation, and other taxable income earned or received by nonresidents for work done, or services performed or rendered, *in the Municipality.*") (*emphasis added*);;

Cincinnati, Ohio Municipal Code § 311-9-11(b)(ii) (imposing income tax on "compensation from whatever source earned or received by the nonresident for work done, services performed or rendered, or activities conducted *in the Municipality*") (*emphasis added*);;

Dayton Ohio, Municipal Code § 36.102 (A)(2)(tax imposed on "On all municipal taxable income earned or received by a nonresident, as set forth in Section 718.01(A)(1)(c) of the Ohio Revised Code, and derived from a source or sources within the city, subject in the case of qualifying wages to the limitations set forth in Ohio Revised Code Sections 718.01(C)(16) and (17) and 718.011.") (*emphasis added*);;

Elyria, Ohio, Municipal Code § 191.03(a)(3)(tax imposed on "the portion attributable to the City of the net profits earned during the effective period of this chapter of all resident unincorporated businesses, professions or other entities, derived from sales made, work done, services performed or rendered and business or other activities *performed in the City.*") (*emphasis added*);

Fremont, Ohio, Municipal Code § 171.03 (tax imposed on "all qualifying wages, commissions, other compensation, and other taxable income earned or received by nonresidents for work done, or services performed or rendered, *in the Municipality*") (*emphasis added*);

Gallipolis, Ohio, Municipal Code § 181.03 (tax imposed on "all qualifying wages, commissions, other compensation, and other taxable income earned or received by nonresidents for work done, or services performed or rendered, *in the Municipality* except the income received by nonresidents, receiving compensation from a contractor who has received a building permit, is exempt from tax on the permitted project only.") (*emphasis added*);

Toledo, Ohio, Municipal Code § 1905.02 (C)(16)(iii)(b)(income means "In the case of nonresidents, all income, salaries, qualifying wages, commissions, and other compensation from whatever source earned or received by the nonresident for work done, services performed or rendered, or activities *conducted in the municipal corporation*") (*emphasis added*);;

Youngstown, Ohio, Municipal Code § 183.03(a)(2) (tax imposed on "all salaries, wages, commissions and other compensation earned during the effective period of this chapter by nonresidents *for work done or services performed or rendered in the City.*") (*emphasis added*);

Zanesville, Ohio, Municipal Code § 181(a)(2)(tax imposed "On all salaries, wages, commissions and other compensation earned on and after July 1, 1959, by nonresidents for work done or services *performed or rendered in the City.*")(*emphasis added*).

The list of cities above is representative, but not comprehensive. There are numerous other Ohio municipalities with similar ordinances permitting taxation of nonresidents only for work performed in the municipality. Counsel is aware of no municipality, including the City of Columbus, whose ordinances supports extraterritorial taxation of nonresidents for work not performed in the municipality.

literally unprecedented municipal taxation of non-resident income for work performed outside the city as consistent with existing Ohio tax law is meritless, and is contradicted by Ohio Supreme Court precedents, the Ohio Revised Code, and numerous local ordinances.

Finally, the Home Rule Amendment of the Ohio Constitution does not allow municipal corporation to govern outside of its geographic limits. *See Britt v. City of Columbus* (1974), 38 Ohio St.2d 1, 7, 309 N.E.2d 412, 416, quoting *Beachwood v. Bd. of Elections* (1958), 167 Ohio St. 369, 148 N.E.2d 291 (“The power of local self-government granted to municipalities by Article XVIII relates solely to the government and administration of the internal affairs of the municipality, and, in the absence of statute conferring a broader power, municipal legislation must be confined to that area.”)

The State may, in some circumstances, confer “broader powers” to municipalities by statute. For example, a city planning commission may “examine and check plats” adjacent to the city where authorized by statute. *See, e.g., Prudential Co-op. Realty Co. v. City of Youngstown* (1928), 118 Ohio St. 204, 210, 160 N.E. 685. But the General Assembly may not expand a municipality’s power to tax. Section 13 of Article XVIII of the Ohio Constitution specifically grants the Ohio General Assembly the power to “limit the power of municipalities to levy taxes and incur debts for local purposes,” but does not grant the General Assembly the power to *expand* municipal taxing authority. Applying the well-established principle of legal interpretation that *expressio unius est exclusio alterius* to Section 13 of Article XVIII, the Ohio Constitution prohibits the General Assembly from authorizing municipal corporations to tax the income of nonresidents for work performed outside of the municipal corporation. *See, e.g. Bd. of Elections for Franklin Cty. v. State ex rel. Schneider*, 128 Ohio St. 273, 292, 191 N.E. 115, 123

(1934)(applying the doctrine of ‘expressio unius’ to the General Assembly’s powers under the Ohio Constitution).

For all the foregoing reasons, as well as the legal authorities cited in the Plaintiffs’ Brief in Opposition to the Motion to Dismiss filed by City Auditor Kilgore, which the Plaintiffs hereby incorporate by reference, the motion should be denied.

Respectfully submitted,

/s/ Jay R. Carson

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CERTIFICATE OF SERVICE

The foregoing Brief was served on all counsel of record via the Court’s electronic filing system this 30th day of September 2020.

/s/ Jay R. Carson

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