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Court of Appeals

NOTICE OF
October 31, 2022 17:11

By: JAY R. CARSON 0068526

Confirmation Nbr. 2690996

DR. MANAL MORSY

CA 22 112061

vs.

JAMES E. GENTILE

Judge:

Pages Filed: 11

DR. MANAL MORSY)
)
) CASE NO. CA-22-112061
)
 Plaintiff-Appellee,)
 vs.)
)
 JAMES GENTILE, in his official)
 capacity as interim Finance Director)
)
)
 Defendant-Appellant.)

Notice is hereby given that Plaintiff, Dr. Manal Morsy, through the undersigned counsel, cross appeals to the Court of Appeals of Cuyahoga County, Ohio Eighth Appellate District, from the final judgment entered in this action on September 26, 2022, specifically related to the trial court’s holding that “Section 29 of H.B. 197 of 133rd Ohio General Assembly is constitutional on its face.” A copy of the judgment is attached.

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Attorneys for Dr. Manal Morsy

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Cross Appeal was served on all counsel of record via the Court's electronic filing system this 31st day of October, 2022.

/s/ Jay R. Carson
Jay R. Carson
One of the Attorneys for Dr. Manal Morsy

CASE NO. CV 21 946057ASSIGNED JUDGE GARY L. YOST

DR. MANAL MORSY

VS SHARON DUMAS, IN HER OFFICIAL CAPACITY AS
FINANCE DIRECTOR OF THE CITY OF CLEVELAND

- ☐ 02 REASSIGNED
☐ 03 REINSTATED (C/A)
☐ 04 REINSTATED
☐ 20 MAGISTRATE
☐ 40 ARBITRATION
☐ 65 STAY
☐ 69 SUBMITTED

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- ☐ 81 JURY TRIAL
☐ 82 ARBITRATION DECREE
☐ 83 COURT TRIAL
☐ 85 PRETRIAL
☐ 86 FOREIGN JUDGMENT
☐ 87 DIS. W/O PREJ
☐ 88 BANKRUPTCY/APEAL STAY

- ☐ 81 DIS. W/PREJ
☐ 91 COGNOVITS
☐ 92 DEFAULT
☐ 93 TRANS TO COURT
☐ 95 TRANS TO JUDGE
☐ 96 OTHER

NO. JURORS _____

COURT REPORTER _____

☐ PARTIAL

START DATE _____

START DATE ____/____/____

☐ FINAL

END DATE _____

END DATE ____/____/____

☒ POST CARDDATE 09/26/2022

(NUNC PRO TUNC ENTRY AS OF & FOR ____/____/____)

CLERK OF COURTS

ORDER

1. THE MOTION OF DEFENDANT JAMES E. GENTILE, IN HIS OFFICIAL CAPACITY AS INTERIM FINANCE DIRECTOR OF THE CITY OF CLEVELAND, FOR SUMMARY JUDGEMENT, FILED FEBRUARY 7, 2022, IS OVERRULED.
2. PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT, FILED FEBRUARY 7, 2022, IS SUSTAINED.
3. SECTION 29 OF H.B. 197 OF THE 133RD OHIO GENERAL ASSEMBLY IS CONSTITUTIONAL ON ITS FACE, BUT CANNOT BE APPLIED TO ASSESS INCOME TAX AGAINST A NONRESIDENT OF THE STATE OF OHIO FOR WAGES EARNED ON WORK PERFORMED OUTSIDE OF THE STATE OF OHIO.
4. THE DEFENANT IS ENJOINED FROM THE COLLECTION OF MUNICIPAL INCOME TAXES FROM THE PLAINTIFF ON INCOME SHE EARNED OUTSIDE OF THE CITY OF CLEVELAND, AND SHE IS ENTITLED TO A REFUND OF ALL WITHHOLDING OR PAYMENTS ALREADY COLLECTED ON SUCH INCOME.
5. COURT COSTS ARE ASSESSED AGAINST THE DEFENDANT.

ITS IS SO ORDERED

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JUDGECLERK OF COURTS
CUYAHOGA COUNTY

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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

DR. MANAL MORSY,)	Case No. CV 21 946057
)	
Plaintiff)	JUDGE GARY L. YOST
)	by assignment
v.)	
)	
SHARON DUMAS, in her official)	JUDGMENT ENTRY
capacity as Finance Director)	
of the City of Cleveland)	
)	
Defendant.)	

MOTION OF DEFENDANT JAMES E. GENTILE, IN HIS OFFICIAL CAPACITY AS INTERIM FINANCE DIRECTOR OF THE CITY OF CLEVELAND, FOR SUMMARY JUDGMENT, FILED FEBRUARY 7, 2022

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, FILED FEBRUARY 7, 2022

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, FILED MARCH 23, 2022

MEMORANDUM CONTRA OF DEFENDANT JAMES E. GENTILE, IN HIS OFFICIAL CAPACITY AS INTERIM FINANCE DIRECTOR OF THE CITY OF CLEVELAND, TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT FILED FEBRUARY 7, 2022, FILED MARCH 23, 2022

PLAINTIFF'S REPLY IN SUPPORT OF IT'S MOTION FOR SUMMARY JUDGMENT, FILED APRIL 11, 2022

REPLY MEMORANDUM OF DEFENDANT SHARON DUMAS, IN HER OFFICIAL CAPACITY AS FINANCE DIRECTOR OF THE CITY OF CLEVELAND, IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT FILED FEBRUARY 7, 2022, FILED APRIL 11, 2022

FACTUAL BACKGROUND

The Plaintiff lives in Blue Bell, Pennsylvania, and is employed by Athersys, a biotech company located in Cleveland, Ohio. Prior to the Covid-19 pandemic, the Plaintiff usually commuted to Cleveland and would stay Monday through Friday, returning home for the weekends. Prior to 2020, the

Plaintiff sought and received income tax refunds from the City of Cleveland for days she worked outside of Cleveland. In response to the pandemic, the Governor of Ohio declared a state of emergency and the State Director of Health issued a Stay at Home Order. The Plaintiff's work did not require her physical presence in Cleveland, so from March 12, 2020, she began working from home, and did not physically return to Cleveland for the remainder of 2020. The Ohio General Assembly passed H.B. 197, which was signed into law on March 27, 2020, Section 29 of which provided:

Notwithstanding section 718.011 of the Revised Code, and for purposes of Chapter 718 of the Revised Code, during the period of the emergency declared by Executive Order 2020-01D, issued March 9, 2020, and for thirty days after the conclusion of that period, any day on which an employee performs personal services at a location, including the employee's home, to which the employee is required to report for employment duties because of the declaration shall be deemed to be a day performing personal services at the employee's principal place of work.

The Plaintiff's employer continued to withhold municipal income tax from her wages, and the City of Cleveland has refused her request for a refund for the period from March 13 through December 31, 2020, when she worked exclusively from Pennsylvania.

There is no issue of material fact with regard to the determination of the cross motions for summary judgment.

PLAINTIFF'S CLAIMS

A. A municipality has jurisdiction or power to tax only 1) income earned by residents of the municipality (*in personam* jurisdiction arising from the taxpayer's residence within the city) and 2) income earned by non-residents for work done within the municipality (*in rem* jurisdiction over work performed within the city). Imposition of a tax without jurisdiction is a denial of due process.

In rem jurisdiction arising from work performed by a non-resident is based on a fiscal relation test which requires that the taxpayer receive protections, opportunities and benefits provided by the taxing authority, which can only be met by the taxpayer's physical presence in the city.

B. A municipality's power to tax arises from the Home Rule Amendment to the Ohio Constitution. Article XVIII, Section 13, of the Ohio Constitution allows the Ohio General Assembly to limit the power of municipalities to levy taxes, but does not grant it the power to expand municipal tax authority.

C. H.B. 197, Sec. 29, as applied to the Plaintiff, violates the dormant commerce clause of the U.S. Constitution.

DEFENDANT'S CLAIMS

A. Plaintiff cannot show that H.B. 197, Sec. 29 is unconstitutional beyond a reasonable doubt.

B. Plaintiff has failed to exhaust her administrative remedies.

C. The Ohio General Assembly can grant powers to municipalities beyond those granted by the Home Rule Amendment. Sec. 29 is a valid limitation on municipal taxing authority.

D. There is no due process violation. The Plaintiff stayed in and worked in Ohio for weeks before the pandemic. Due process does not require physical presence of an employee as a basis to impose an income tax. There is a fiscal relation between the Plaintiff and the City of Cleveland meeting more than the minimal connection required by the Due Process Clause.

E. H.B. 197, Sec. 29, does not violate the dormant commerce clause of the U.S. Constitution.

DISCUSSION

The Defendant relies heavily on the standard of review for constitutional challenges, arguing that the statute has a strong presumption of constitutionality and that the Plaintiff must establish beyond a reasonable doubt that the legislation is incompatible with the constitution. In tax matters, a court does not evaluate the policy or wisdom of a statute. The Defendant contends that the General Assembly may pass legislation that expands municipal tax powers beyond those granted by the Home Rule Amendment, but argues that Section 29 is a limitation because it mandated how cities must administer their tax ordinances.

The Defendant argues that the Plaintiff's physical presence, working in Cleveland during 2020 prior to the pandemic, satisfies any due process jurisdictional concerns, giving the city *in personam* jurisdiction over the Plaintiff, and the ability to continue performing her job duties through a virtual network connection with her employer, located in Cleveland, created a substantial nexus subjecting the Plaintiff to income taxation on the work she performed from home, in accordance with H.B. 197, Sec. 29.

The Defendant urges that the Plaintiff's complaint in this case should fail because she failed to exhaust administrative remedies. She filed a tax refund request for 2020 for the period she worked from home, which was denied by the City of Cleveland. She did not take an appeal, but rather filed this lawsuit. The Defendant argues that the claim for a refund of a portion of the tax does not turn on whether the city had the power to impose the tax, but on whether the Plaintiff was properly subject to tax under the pandemic work rule, which should have been litigated through an administrative appeal of the denied refund request.

The Plaintiff contends that this case involves a constitutional challenge

to H.B. 197, Sec. 29, and that an administrative appeal of the denial of her tax refund cannot provide the relief she requests. Thus, the doctrine of failure to exhaust administrative remedies does not apply to this case.

In essence, the Plaintiff claims that H.B. 197, Sec. 29 seeks to expand a municipality's jurisdiction to tax. Notwithstanding the exigencies of the pandemic, the Ohio General Assembly cannot authorize cities to engage in extraterritorial taxation. There is no case law that suggests that the legislature can expand the taxing power of a municipality to non-Ohio residents on work performed outside of the state. Furthermore, the physical presence of the Plaintiff in the early part of 2020 does not give ongoing *in personam* jurisdiction for the entire year, when she was not physically present. *Hillenmeyer v. Cleveland Board of Review*, 2015-Ohio-1623, ¶39 is clear that the city's power to tax can reach only that portion of a nonresident's income that was earned by work performed in the city.

"Beyond 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, supra* ¶42. Although advances in technology now permit many employees to perform their work from anywhere in the world, there is no case law that has permitted a state or municipality to exercise *in personam* or *in rem* jurisdiction over an employee on the basis of a virtual connection with the employer's business location.

The Plaintiff argues that the dormant Commerce Clause is actually violated in this case because she has been required to pay municipal income tax on 100% of her 2020 salary to both Blue Bell, Pennsylvania, where she lives, and the City of Cleveland. This violates the fair apportionment requirement of *Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274. The Defendant claims that the failure of the Plaintiff's city of residence to grant her a credit against taxes paid elsewhere appears to contradict Pennsylvania law, but that, in any event, the limited possibility of multiple taxation is not sufficient to invalidate the tax for violating the dormant Commerce Clause.

Buckeye Institute v. Kilgore, 2021-Ohio-4196, is a declaratory judgment action challenging the constitutionality of H.B. 197, Sec. 29. In this case, the trial court granted a motion to dismiss for failure to state a claim. After noting the deference a court must give in reviewing the constitutionality of a legislative enactment, the Tenth District Court of Appeals ruled that Section 29 of H.B. 197 was a limitation on municipal taxing authority and therefore the General Assembly was authorized to enact it under the Ohio Constitution. The court further noted that the Ohio Constitution provides that the General Assembly may pass "emergency laws necessary for the immediate preservation of the public peace, health or

safety" and stated that it did "not find Section 29 of H.B. 197 is 'clearly incompatible' with the General Assembly's authority to pass laws to limit the power of municipalities to levy taxes and to address the COVID-19 pandemic." *Buckeye Institute v. Kilgore, supra* ¶29.

Schaad v. Alder, 2022-Ohio-340, is also a declaratory judgment action challenging the constitutionality of H.B. 197, Sec. 29. The trial court in this case granted a motion to dismiss for failure to state a claim. Citing *Athens v. McClain*, 2020-Ohio-5146, the First District Court of Appeals ruled that the General Assembly has the authority to create a uniform municipal taxation scheme and that the city had no choice but to follow the dictates of Section 29. The court further concluded that due process was satisfied because Section 29 was an enactment of the Ohio legislature and Schaad was a resident of Ohio. The court also relied on *Buckeye Institute v. Kilgore, supra*, in affirming the trial court.

The line of cases relied upon by the Plaintiff is specific to the constitutional authority to levy municipal income taxes. Prior to the Covid-19 pandemic, it was fairly understood that a municipality could assess tax on the incomes of persons who resided within the city and of nonresidents who performed work within the city. With regard to nonresidents, *in rem* jurisdiction is based on performing the physical activity generating the income within the city but also, importantly, on a fiscal relation theory that the nonresident employee enjoys services and protections offered by the city. *Angell v. City of Toledo* (1950) 153 Ohio St. 179. The Defendant has argued that the City of Cleveland acquired *in personam* jurisdiction over the Plaintiff because she worked within the city for part of 2020. This is not really tenable since, prior to 2020, the City of Cleveland granted a refund to the Plaintiff of taxes withheld by her employer for wages paid for work that she performed outside of the city. Additionally, H.B. 197, Section 29, by its language, is limited to the "period of the emergency declared by Executive Order 2020-01D, issued March 9, 2020, and for thirty days after the conclusion of that period."

Since the Plaintiff is not a resident of the State of Ohio, her liability to the City of Cleveland for income tax on wages paid for work that she performed from her home must be based on a finding that 1) H.B. 197, Section 29, created a valid exception to the traditional due process jurisdictional requirements recognized by case law, or 2) the Plaintiff had a sufficient fiscal relation with the City of Cleveland to support traditional *in rem* jurisdiction. The Defendant argues that both apply in this case.

Due process requires that traditional *in rem* jurisdiction must be based on facts that establish a sufficient fiscal relation to the protections, opportunities, and benefits given by the entity seeking to impose the tax. The Defendant argues that while the Plaintiff is working remotely she is

delivering her work into Cleveland, using facilities maintained by her employer, and that the City of Cleveland provides services and protections to her employer's offices and the infrastructure that allows the Plaintiff to remotely connect to resources she needs to do her job from Pennsylvania. The Plaintiff responds that no court has recognized such a theory of virtual jurisdiction. Technological advancements in electronic communications are improvements on earlier methods of communication like mail, telegraph, and telephone. The Plaintiff urges that remote work, although more prevalent as a result of the pandemic, is nothing new.

Cases involving sales tax, unemployment compensation tax, and personal property tax do not really provide good analogies for income tax cases, where the object of the tax, or *res*, is the fruit of the actual activity of an individual.

CONCLUSIONS

The Plaintiff is not required to exhaust administrative remedies. The First District Court of Appeals pointed out in *Schaad v. Alder, supra*, that "the city had no choice but to follow the dictates of the General Assembly in Section 29." *Schaad*, ¶10. Thus, as the Plaintiff contends, the City's Tax Board of Review cannot provide the relief she seeks in this case.

The standard for finding a duly enacted statute unconstitutional is, of course, difficult to meet. H.B. 197, Section 29, is not "clearly incompatible" with the constitutional authority of the General Assembly to address the COVID-19 pandemic, nor is it "clearly incompatible" with the authority of the General Assembly to pass laws limiting the power of municipalities to levy taxes. Two Appellate Courts have so found. This Court concludes that H.B. 197, Section 29 is not unconstitutional on its face.

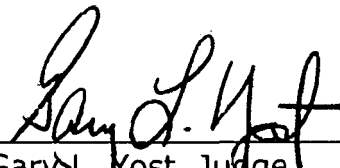
However, in both *Buckeye Institute* and *Schaad, supra*, the plaintiffs were residents of the State of Ohio. The court in the *Schaad* case determined that due process was satisfied because *Schaad* was a resident of Ohio. While the Ohio General Assembly has jurisdiction over Ohio residents and authority to deal with exigencies of the pandemic, it cannot create jurisdiction to levy a tax on the income of persons who are not residents of Ohio, and that was earned for work performed outside of the State of Ohio.

It may be that the law has not kept pace with technology. Traditional due process is a minimal requirement for acquiring jurisdiction to impose an income tax on an individual. The cases relying on a fiscal relation to establish jurisdiction deal with the services and protections enjoyed by the employee being taxed. An employee enjoys the protections, opportunities and benefits provided by the taxing authority when they are physically present in the municipality. The ability of an employee to communicate virtually with her office and to perform her job duties from home does not create the fiscal

relation required by the case law. The City of Cleveland and the State of Ohio have not established a basis for jurisdiction to tax a nonresident of Ohio on income generated by work performed at her home in Pennsylvania.

ORDER

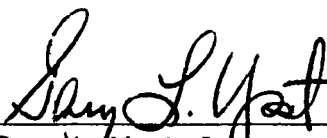
1. The Motion of Defendant James E. Gentile, in his Official Capacity as Interim Finance Director of the City of Cleveland, for Summary Judgment, filed February 7, 2022, is overruled.
2. Plaintiff's Motion for Summary Judgment, filed February 7, 2022, is sustained.
3. Section 29 of H.B. 197 of the 133rd Ohio General Assembly is constitutional on its face, but cannot be applied to assess income tax against a nonresident of the State of Ohio for wages earned on work performed outside of the State of Ohio.
4. The Defendant is enjoined from the collection of municipal income taxes from the Plaintiff on income she earned outside of the City of Cleveland, and she is entitled to a refund of all withholding or payments already collected on such income.
5. Court costs are assessed against the Defendant.



Gary L. Yost, Judge
by assignment

Notice to Clerk

THIS IS A FINAL APPEALABLE ORDER. Pursuant to Civ. R. 58(B), within three (3) days of the entry of this judgment upon the journal, the Clerk of Courts shall serve notice in accordance with Civ. R. 5, of such entry and its date upon all parties not in default for failure to appear, and shall note the service in the appearance docket.



Gary L. Yost, Judge