

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

KAREN KRESEVIC 10525)	
Bartholomew Rd. Chagrin)	
Falls, Ohio 44023)	CASE NO
)	
Plaintiff,)	JUDGE:
)	
vs.)	
)	
PATRICIA CHITTOK, in her official)	
capacity as Tax Commissioner)	
of the City of Akron, Ohio)	
1 Cascade Place, Suite 100)	COMPLAINT FOR
Akron, Ohio 44308)	DECLARATORY RELIEF
)	
)	
Defendant,)	
)	
and)	
)	
DAVE YOST, in his official capacity as)	
Ohio Attorney General)	
30 East Broad St.)	
Columbus, Ohio 43215)	
)	
Person required to be served)	
by statute.)	

Plaintiff Karen Kresevic, by and through counsel, for her Complaint hereby states as follows:

NATURE OF THE SUIT

1. The novel coronavirus and the State of Ohio’s efforts to limit its spread forced Ohioans to make significant changes to how they live and work. Though these changes were sudden and unexpected, by and large Ohioans responded by finding ways to continue to live and work safely.

2. Perhaps the most ubiquitous adaptation across Ohio workplaces was the shift to working from home. Indeed, in many cases, the health orders issued by the State of Ohio made working from home the only option for some workplaces. In many cases, those workplaces discovered that—subject to some minor inconveniences—employees could still successfully perform their jobs remotely, without physically setting foot in their offices.

3. It is well-established, however, that where an employee performs his or her work has tax consequences. Specifically, courts have allowed municipalities to impose income taxes on nonresidents only to the extent that the income was earned for work performed within the municipality's limits. Indeed, in 2015, the Ohio Supreme Court held that "[l]ocal taxation of a nonresidents' compensation for services must be based on the location of the taxpayer when the services were performed." *Hillenmeyer v. Cleveland Bd. of Rev.* (2015), 144 Ohio St. 3d 165, 2015-Ohio-1623, ¶ 43.

4. The constitutional basis for taxing nonresidents based on work performed in the municipality was that the employee enjoyed the benefits of the city's infrastructure and public safety services while performing work within the city. There was thus a direct fiscal relation between the work performed within the city's limits and the city's public expenditures, which contributed to the employee's ability to work within the city.

5. But when employees are required to work outside of the city, that fiscal link is severed. In an attempt to ease the collection of municipal income taxes during the health crisis, the Ohio General Assembly enacted a provision in uncodified law requiring that work performed by an employee at his or her home as a result of the health crisis would be deemed to have been performed, for municipal tax purposes, at the employee's regular place of business.

6. Although the General Assembly's stated motive in enacting this provision was to clarify and simplify withholding requirements for employers during the health crisis, allowing a municipality to tax employees without some fiscal relation between the municipality and the work performed violates the due process rights of those employees under the Fifth and Fourteenth Amendments to the U.S. Constitution. Further, the Ohio Constitution is specific in the powers it grants to the General Assembly and municipal corporations. The Ohio Constitution does not authorize the General Assembly to expand the taxing power of municipalities.

7. The Plaintiff bring this suit to challenge the constitutionality of the "deemed to have been performed" provision of H.B. 197 and the imposition of municipal income tax under that provision by the City of Akron and to obtain a refund of taxes withheld from her.

PARTIES

8. Plaintiff Karen Kresevic is a resident of the Chagrin Falls, Ohio.

9. Defendant Patricia Chittock is the Tax Commissioner of the City of Akron ("the City") and in her official capacity is responsible for implementation of the City's tax ordinances and collection of municipal income tax. Pursuant to R.C. 2723.03, she is the proper statutory defendant in an action to enjoin illegal taxes or to recover taxes.

10. Dave Yost is the Attorney General of the State of Ohio, and in his official capacity is required to be served pursuant to R.C. § 2721.12(A).

Historical and Legal Background of Municipal Income Tax in Ohio

11. The Ohio Constitution does not explicitly grant municipalities the power to tax. Rather, Sec. 3, Article XVIII of the Ohio Constitution broadly authorizes municipalities "to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

12. The Due Process Clause, as interpreted by the Ohio and U.S. Supreme Courts, allows municipalities to tax two—and only two—types of income: (1) income earned by residents who live in the municipality, and; (2) income earned by non-residents for work done within the municipality. *Hillenmeyer v. Cleveland Bd. of Rev.*, 144 Ohio St.3d 165 (2015), 2015-Ohio-1623, 41 N.E.3d 1164, ¶ 42, *citing Shaffer v. Carter*, 252 U.S. 37, 55, 40 S. Ct. 221, 64 L. Ed. 445 (1920).

13. Ohio courts within the Ninth Appellate District have applied this principle to severance payments issued to nonresidents, holding in *Czubaj v. Tallmadge*, 9th Dist. Summit No. 21389, 2003-Ohio-5466 that there was no fiscal relation between the severance payments and the city seeking to tax them.

The State's Response to COVID-19 and H.B. 197

14. On March 14, 2020, in response to the public health threat posed to Ohio residents by the COVID-19 virus, Ohio Governor Mike DeWine issued Executive Order 2020-01D (“the Emergency Declaration”), which declared a state of emergency, authorized the Ohio Department of Health to issue “guidelines for private businesses regarding appropriate work and travel restrictions, if necessary” and urged “[a]ll citizens . . . to heed the advice of the Department of Health and other emergency officials regarding this public health emergency in order to protect their health and safety.” (See Emergency Declaration, ¶¶ 1,4,7).

15. On March 22, the State Director of Health issued an Order that required, subject to certain exceptions, “all individuals currently living within the State of Ohio . . . to stay at home or at their place of residence” (“the Stay-at-Home Order”). The Stay-at-Home Order further required that “[a]ll businesses and operations in the State,” except “Essential Business

and Operations” as defined in the Order, “cease all activity within the State” (See Stay-at Home Order, ¶¶s 1-2).

16. The Stay-at-Home Order, however, allowed nonessential businesses to continue operating to the extent that the continued operation consisted “exclusively of employees or contractors performing activities at their own residences (i.e., working from home.)” (Stay-at-Home Order, ¶2).

17. On March 28, 2020, the Governor signed into law H.B. 197, a measure designed to address various aspects of the health crisis. In that legislation, the General Assembly provided that employees working from home would be retroactively deemed to be working, for municipal income taxation purposes, at their typical work location.

18. Specifically, H.B. 197 provided that:

“[D]uring the period of the emergency declared by Executive Order 2020-01D, issued on 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***, 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.***”

(H.B. 197 Sec. 29, as enrolled (*emphasis added*)).

19. During 2020, Ms. Kresevic was employed as a physician assistant by Alteon Health, working at Akron City Hospital, located in the City of Akron.

20. Historically, Ms. Kresevic had paid municipal income taxes to the City of Akron for the wages that she earned while physically working within the City of Akron.

21. On July 24, 2020, Ms. Kresevic was terminated from her job.

22. Ms. Kresevic challenged the termination as wrongful, without cause and in violation of her employment contract with Alteon.

23. In June of 2021, Ms. Kresevic reached a settlement with her employer, under which she would be paid a sum (which is confidential) from her employer. The parties entered into a settlement agreement¹ and Ms. Kresevic was paid a certain sum pursuant thereto.

24. The City of Akron withheld municipal income taxes from Ms. Kresevic's pay from her settlement payment.

25. The settlement, however, did not represent wages earned for work performed—at all—let alone for work performed in the City of Akron, but rather payment for wages that she would have earned had she not been terminated.

26. On April 15, 2022, Ms. Kresevic requested a refund on the municipal taxes withheld from the settlement payment, explaining that those payments were a settlement, not for wages—let alone not wages earned for work performed within the City of Akron.

27. On July 11, 2022, Ms. Kresevic received a notice from the City of Akron denying her request for a refund. The letter cited the Ohio General Assembly's enactment of HB 197 as the reason for the denial of the refund, stating that even though Ms. Kresevic had not been working—she had been terminated—for purposes of the settlement the City of Akron deemed that those payments were for work she had performed within the City of Akron.

28. On July 22, 2022, Ms. Kresevic received a second notice from the City of Akron that she was being assessed municipal income taxes and funds were being withheld from the payments due to her even though she had not actually worked within the City—or at all—following her termination.

¹ The Settlement Agreement and the terms thereof are confidential and therefore, consistent with Ohio Rule of Civil Procedure, Rule 10(D), it is not attached.

COUNT ONE: ACTION FOR DECLARATORY JUDGMENT
BASED ON UNCONSTITUTIONALITY OF H.B. 197

29. Ms. Kresevic restates the foregoing allegations and incorporates them as if fully rewritten here.

30. Ohio R.C. §2721.03 provides that “any person whose rights, status, or other legal relations are affected by a constitutional provision, statute . . . may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it.”

31. Here, Ms. Kresevic seeks a declaration that Sec. 29 of H.B. 197, which for municipal income tax purposes deems income earned by persons working from home due to the health crisis to have been earned at the employee's principal place of work, is an unconstitutional violation of Due Process rights as secured by the Fifth and Fourteenth Amendments to the U.S. Constitution, as well as Art. I, Sec. 1 of the Ohio Constitution.

32. Specifically, Sec. 29 of H.B. 197 purports to remove the well-established requirement that a government entity must have either in personem jurisdiction over the person to be taxed or in rem jurisdiction over the property to be taxed. Or, as the *Angell* Court put it, there must be some “fiscal relation” between the municipality, the taxpayer, and the income being taxed. In this case, the Cities, pursuant to authority purportedly arising under Sec. 29, seek to tax income of nonresidents that was earned outside the Cities’ limits, where there is neither nexus nor fiscal relation between the City and the income being taxed. *Angell v. City of Toledo* (1950), 153 Ohio St. 179.

33. Further, it is unclear how or under what rationale Sec. 29 of H.B. 197 would apply to a settlement payment, where Ms. Kresevic was not performing any work for her employer at all—let alone work that could be deemed to have been performed in the City.

34. Further, notwithstanding Sec. 29 of H.B. 197, the Ninth Appellate District's decision in *Czubaj* prohibits cities from taxing severance or similar payments to nonresidents because there is no fiscal relation between the payment and the City.

35. Ms. Kresevic therefore seeks a declaration that the City's taxing of nonresidents on income earned outside of the Cities is unconstitutional on its face, as well as a declaration that the City's taxation of her income from the settlement is unconstitutional as applied to her.

36. Accordingly, Plaintiffs respectfully request that this Court declare Sec. 29 of H.B. 197, and all actions taken by the City of Akron in reliance upon it to be unconstitutional and therefore void.

COUNT TWO: ACTION UNDER R.C. 2723.01
AND TO RECOVER ILLEGAL TAX

37. Ms. Kresevic restates the allegations of Paragraphs 1 through 45 and incorporates them as if fully rewritten here.

38. Pursuant to Ohio R.C. 2723.01, et seq., "Courts of common pleas may enjoin the illegal levy or collection of taxes and assessments and entertain actions to recover them when collected, without regard to the amount thereof, but no recovery shall be had unless the action is brought within one year after the taxes or assessments are collected." As set forth above, the City's levy of an income tax on income earned by a nonresident outside the City's limits and with no fiscal relation to it, as defined by governing Ohio Supreme Court and Ninth District authority, is unconstitutional and thus illegal.

39. Ms. Kresevic has requested request a refund from the City, using the standard tax forms to claim refunds for taxes withheld on income from work performed outside of the City.

40. Pursuant to H.B. 197, the City claims that it is required to withhold that refund.

41. Because the City has taxed someone who neither lives nor worked at the relevant time within its boundaries, the City has violated Ms. Kresevic's due process rights. Accordingly, the Plaintiff is entitled to damages in the amount of any withholding of municipal income taxes on Plaintiff's income that was not earned for work actually performed within the City.

WHEREFORE, Plaintiffs pray for the following relief:

- (1) As to Count One, a declaration stating and Order holding that Sec. 29 of H.B. 197 of the 133rd Ohio General Assembly is unconstitutional and void;
- (2) As to Count Two, a refund of all withholding or payments already collected on such income; and
- (3) All costs and fees, including attorneys' fees, and any additional relief the Court deems equitable; and
- (4) Because this Complaint seeks declaratory judgment on a purely legal issue of pressing public importance, the Plaintiffs respectfully request that the Court set an expedited briefing and hearing schedule.

Respectfully submitted,

/s/ Jay R. Carson

Jay R. Carson (0068526)

David C. Tryon (0028954)

The Buckeye Institute

88 East Broad Street, Suite 1300

Columbus, Ohio 43215

(614) 224-4422

Email: j.carson@buckeyeinstitute.org

d.tryon@buckeyeinstitute.org

Attorneys for Plaintiff Karen Kresevic