



**NAILAH K. BYRD**  
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**Court of Common Pleas**

**New Case Electronically Filed: COMPLAINT**  
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By: JAY R. CARSON 0068526

Confirmation Nbr. 2223856

DR. MANAL MORSY

CV 21 946057

vs.

SHARON DUMAS, ET AL.

**Judge:** MICHAEL P. SHAUGHNESSY

**Pages Filed:** 14



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 has 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 while performing work within the city, the employee enjoyed the benefits of the city’s infrastructure and public safety services. 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 the provision was to clarify and simplify municipal income tax collection 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. And to the extent that an Ohio city seeks to tax employees working from another state, like Dr. Morsy, it runs afoul of the Constitution's Dormant Commerce Clause. 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. Dr. Morsy brings 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 Cleveland ("the City").

8. Dr. Morsy was required by the State of Ohio, and later by her employer, to stay out of her office in the City and instead to work from her home in Blue Bell, Pennsylvania. The State then in H.B. 197 "deemed" the work to have been performed in the City of Cleveland for tax purposes. The Orwellian operation of these two State acts—the first requiring Dr. Morsy to not work in her Cleveland office, and the other deeming a fiction for the purpose of taxation that Dr. Morsy did in fact work in the City of Cleveland—while she was in Pennsylvania—offends the basic principles of equity, and the Due Process requirements of the United States and Ohio Constitutions.

### **PARTIES**

9. Dr. Manal Morsy is a resident of the City of Blue Bell, Pennsylvania, a suburb of Philadelphia. She is employed in the bio-tech industry. Her employer's usual place of business is located within the City of Cleveland.

10. Before the COVID-19 pandemic, Dr. Morsy commuted on a weekly basis from her home in Blue Bell to Cleveland. Dr. Morsy would typically fly into Cleveland on a Sunday

evening or Monday morning and fly back to Blue Bell on Friday. Her employer withheld Cleveland municipal income tax from her pay, pursuant to R.C. 718.03. And each year, Dr. Morsy tracked her days worked inside and outside of Cleveland and applied for a tax refund pursuant to the City's codified ordinances and tax forms, which she always received.

11. Beginning in March of 2020, however, Dr. Morsy began worked entirely from home in Blue Bell due to the pandemic. On March 4, 2021, she applied for a refund, as she had in past years, and was denied.

### **Defendants and Related Parties**

12. Defendant Sharon Dumas is the Finance Director of the City of Cleveland, 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 in enjoin illegal taxes or to recover taxes.

13. The City of Cleveland Ohio is a chartered municipal corporation pursuant to Art. XVIII, Sec. 7 of the Ohio Constitution.

14. Defendant Dave Yost is the Attorney General of the State of Ohio, and official capacity is a person required to be served pursuant to R.C. § 2721.12 (A).

### **Historical and Legal Background of Municipal Income Tax in Ohio**

15. 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."

16. During the early decades of the twentieth century, the Ohio Supreme Court held that Sec. 3, Article XVIII gave municipalities the power to levy certain types of taxes, but in

dicta, expressed doubt whether that power extended to a municipal income tax. *See State ex rel. Zielonka v. Carrel* (1918), 99 Ohio St. 220, 228 (“It may be said in this connection that it is clearly to be implied from the Constitution that municipalities are without power to levy an income or inheritance tax.”)

17. Subsequent courts, however, took a more expansive view of Sec. 3, Article XVIII, holding that “unless and until the State of Ohio enacts laws providing for an income tax, a municipality may do so<sup>1</sup>.” *Stockwell v. City of Columbus*, 55 Ohio Law Abs. 168, 86 N.E.2d 822, 825 (Ohio Com.Pl.1949).

18. In 1950, the Ohio Supreme Court spoke authoritatively on the issue of both the constitutionality of municipal income taxes, and their application to nonresidents who worked within the municipality. In *Angell v. City of Toledo* (1950), 153 Ohio St. 179, the Court held that Section 3 of Article XVIII, along with Section 7 of XVIII (allowing a municipality to adopt a charter and exercise “all powers of local self-government”) invested municipalities with the authority to levy an income tax and that such a tax does not violate the due process clause when such tax is levied on a nonresident for work performed within the municipalities’ borders.

19. 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 the power to limit is not the power to *expand*, and the Ohio Constitution is notably silent regarding the General Assembly’s ability to *expand* municipal tax authority. Applying the well-established principle of legal interpretation that *expressio unius est exclusio alterius* to Section 13 of Article XVIII, the General Assembly would exceed its constitutional

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<sup>1</sup> The State of Ohio did, in fact, enact a statewide income tax in 1971, but did not preempt municipal income taxes.

limitations were it to attempt to expand a municipality's taxing power. Further, the Ohio Supreme Court has long held that the General Assembly may exercise only those powers delegated to it by the Ohio Constitution. *State ex rel. A Bentley and Sons v. Pierce*, 117 N.E. 6 (Ohio 1917); *State ex rel. Robertson Realty Co. v. Guilbert*, 78 N.E. 931 (Ohio 1906).

20. A decade later, in *McDonnell v. City of Columbus* (1961), 172 Ohio St. 95, the Ohio Supreme Court again relied upon the fiscal connection between the City's constitutional authority to tax income and the physical location where the employee earned that income. In *McDonnell*, the Court upheld the City's income tax on an employee of The Ohio State University reasoning that even though the employee worked for an arm of the State and on property owned by the State, she nevertheless performed her work and thus earned her income within the City of Columbus.

21. More recently, in *Hillenmeyer v. Cleveland Bd. of Revision*, a case involving municipal taxation levied on a professional athlete who played one game a year in Cleveland, the Ohio Supreme Court unanimously recognized the jurisdiction limits on municipal taxation, holding 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).

22. Simply put, 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).

23. The City’s income tax ordinance as written respects this limitation, stating that “The tax is an annual tax levied on the income of every person *residing, earning or receiving income in the municipal corporation . . .*” Cleveland Municipal Code §192.01 (emphasis supplied). The City tax code further recognizes the geographic limitations of the City’s power to tax, providing that the tax applies to “all qualifying wages earned or received . . . by nonresidents of the City *for work done or services performed or rendered within the City or attributable to the City . . .*” Id. at §192.03 (b)(1)(*emphasis supplied*).

24. The City of Cleveland’s income tax rate throughout 2020 was 2.5%. The City, however, provided a variable offsetting credit to nonresidents who also paid income tax in another municipality.

#### **The State’s Response to COVID-19 and H.B. 197**

25. 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, ¶¶s 1,4,7).

26. 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). In addition, the Stay-at-Home order limited travel to “Essential Travel” and “Essential Activity” only, which did not include Dr. Morsy’s commute. *Id.* at ¶¶s 4,5. Further, as a practical matter, in the early days of the pandemic, domestic airlines substantially reduced flights, making it difficult if not impossible for Dr. Morsy to fly to Cleveland.

27. 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).

28. While Dr. Morsy’s employer, which operates in the biotech sector, was considered an “essential business” under the Stay-at-Home Order, her work did not require her physical presence in Cleveland. Thus, her employer complied with the Stay-at-Home Order’s directive “to allow as many employees as possible to work from home by implementing policies in areas such as teleworking and video conferencing” and ordered her to work from home beginning in March of 2020. *Id.* at ¶18 (a).

29. To heed her employer’s request, and to comply with the Stay-at-Home Order, Dr. Morsy began working from her home five days per week starting on March 12, 2020. She has not set foot in her Cleveland office—or anywhere in Ohio—since March 12th of 2020.

30. While working from home, Dr. Morsy has performed all of her duties from Blue Bell, Ohio.

31. 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.

32. 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*)).

33. Dr. Morsy’s employer has withheld Cleveland income tax on all of her income in 2020.

34. In addition, Dr. Morsy is being required to pay income tax on 100% of her income in Blue Bell, Pennsylvania.

35. On March 4, 2021, Dr. Morsy applied for a refund of tax withheld for days when she worked outside of the City, specifically, March 13, 2020 through December 31, 2020.

36. The City of Cleveland, through its Tax Department denied any refund to Dr. Morsy, citing H.B. 197.

37. Dr. Morsy is thus subject to double taxation on the same income.

### **The Commerce Clause and Restraints on Interstate Commerce**

38. The Commerce Clause gives Congress the power to “regulate Commerce . . . among the several States.” U.S. Const., Art. I, § 8, cl. 3.

39. But the clause also has been read as “contain[ing] a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress

has failed to legislate on the subject.” *Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995).

40. This construction serves the Commerce Clause’s purpose of “preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.” *Id.* at 179-80.

41. A State’s taxation of nonresidents—or in this case, a City’s taxation of nonresidents pursuant to a state statute—will survive scrutiny under the Commerce Clause only if it meets four requirements. The State’s tax must be (1) “applied to an activity with a substantial nexus with the taxing State”; (2) “fairly apportioned”; (3) nondiscriminatory—i.e., it must not “discriminate against interstate commerce”; and (4) “fairly related to the 26 services provided by the State.” *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

42. If any of these prongs is not satisfied, the state tax will be found unlawful under the Commerce Clause. *See, e.g., Connecticut v. New Hampshire*, 1992 WL 12620398, at \*21-38 (Special Master finding that New Hampshire tax violated the Commerce Clause).

43. The Cleveland municipal income tax imposed on Dr. Morsy pursuant to Sec. 29 of H.B. 197, for work performed entirely in Pennsylvania, fails all four prongs of the *Complete Auto* test.

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

44. Dr. Morsy restates the allegations of Paragraphs 1 through 43 and incorporates them as if fully rewritten here.

45. 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.”

46. Here, the Plaintiff 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 her 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.

47. 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 City of Cleveland, pursuant to authority purportedly arising under Sec. 29 seeks to tax income of nonresidents that was earned outside the City limits, where there is neither nexus nor fiscal relation between the City and the income being taxed.

48. Dr. Morsy has had money withheld from her wages for work that was done outside of the City and over which the City has no taxing jurisdiction. Dr. Morsy has requested a refund of those withheld taxes and City has refused, based on H.B. 197.

49. In addition, Sec. 29 of H.B. 197 violates the Dormant Commerce Clause. Specifically, there is no nexus between Dr. Morsy’s work in Pennsylvania and the City of Cleveland, the Cleveland municipal income tax is not being apportioned, and its imposition unfairly discriminates against interstate commerce by subjecting her and other out-of-state

workers to double taxation on the same income. Specifically, Dr. Morsy did not receive any services from the City of Cleveland during the relevant period.

50. Dr. Morsy therefore seeks a declaration that the City of Cleveland's taxing of nonresidents on income earned outside of the City is unconstitutional.

51. Accordingly, Plaintiff respectfully requests that this Court declare Sec. 29 of H.B. 197, and all actions taken by the City of Cleveland in reliance upon it to be unconstitutional and therefore void.

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

52. Dr. Morsy restates the allegations of Paragraphs 1 through 51 and incorporates them as if fully rewritten here.

53. 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."

54. As set forth above, The City of Cleveland's levy of an income tax on income earned by nonresidents outside City limits and with no fiscal relation to the City, as defined by governing Ohio Supreme Court authority, is unconstitutional and thus illegal.

55. Dr. Morsy properly sought a refund from the City of Cleveland Finance Department by filing her municipal tax return and completing the appropriate sections to request a refund.

56. The City of Cleveland, however, has refused to provide the claimed refund. Dr. Morsy has thus involuntarily paid municipal income tax for the period in which she has been working exclusively from her home outside of the City.

57. Dr. Morsy has suffered and continues to suffer irreparable harm in the form of a continuing violation of her due process rights. Accordingly, Dr. Morsy is entitled to a preliminary and permanent injunction enjoining the City of Cleveland from collecting or requiring her employer to withhold wages for the payment of municipal income tax on income earned outside the City of Cleveland based on H.B. 197 and requiring the City of Cleveland to remit or otherwise refund any withholding of municipal income taxes for income earned while she was working from home or otherwise outside of the City of Cleveland.

WHEREFORE, Plaintiff prays for the following relief:

- (1) As to Count One, a declaration stating and Order holding that Sec. 29 of H.B. 197 of the 133<sup>rd</sup> Ohio General Assembly is unconstitutional and void;
- (2) As to Count Two, a preliminary and permanent injunction enjoining the collection of municipal income taxes from nonresidents on income earned outside of the City of Cleveland and 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 Plaintiff respectfully requests that the Court set an expedited briefing and hearing schedule.

Respectfully submitted,

/s/ Jay R. Carson

Jay R. Carson (0068526)

WEGMAN HESSLER

6055 Rockside Wood Blvd., Ste 200

Cleveland, Ohio 44131

(216) 642-3342

Email: [jrcarson@wegmanlaw.com](mailto:jrcarson@wegmanlaw.com)

Robert Alt (0091753)

The Buckeye Institute

88 East Broad Street, Suite 1300

Columbus, Ohio 43215

(614) 224-4422

Email: [robert@buckeyeinstitute.org](mailto:robert@buckeyeinstitute.org)

*Attorneys for Plaintiff*

*Dr. Manal Morsy*