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COURT OF COMMON PLEAS
HAMILTON COUNTY

JOSH SHAAD, : **Case No: A2100517**
Plaintiff, : **Judge Christopher Wagner**
v. :
KAREN ALDER, in her official : **ENTRY GRANTING**
capacity as Finance Director of : **DEFENDANT KAREN ALDER**
the City of Cincinnati. : **IN HER OFFICIAL**
Defendant. : **CAPACITY AS FINANCE**
: **DIRECTOR OF THE CITY OF**
: **CINCINNATI'S MOTION TO**
: **DISMISS**

This matter came before the Court on the motion of Karen Alder, in her official capacity as Finance Director of the City of Cincinnati, to dismiss the claims asserted in the Complaint pursuant to Civ. R. 12(b)(6). Plaintiff filed a memorandum in opposition. A hearing was held on May 5, 2021.

I. Procedural History and Relevant Facts

Plaintiff filed this Complaint for Declaratory Judgement and Injunctive Relief on February 9, 2021. Plaintiff's Complaint also named Attorney General Dave Yost in his official capacity. The Attorney General was dismissed and removed from the caption of the complaint on April 29, 2021. The Attorney General chose not to continue argue the constitutionality of the statute.

Plaintiff is a resident of the City of Blue Ash, Ohio who is employed at a business located within the City of Cincinnati. Before the Covid-19 pandemic, Mr. Shaad would frequently work from his home in Blue Ash as well as other locations outside the City of Cincinnati. Each year, Mr. Shaad would track his days working inside and outside Cincinnati and would apply for a tax refund pursuant to the codified ordinance and tax forms. Each year, Mr. Shaad would receive a

refund. Plaintiff worked entirely from home from June 2020 until December 2020 but was denied a refund for that tax year.

Plaintiff requests this Court declare House Bill 197 (“H.B. 197”) unconstitutional and void. He argues that the General Assembly had no authority to issue the regulation and it violated his due process rights. He further requests an injunction enjoining the collection of municipal income taxes from nonresidents outside the City of Cincinnati on work that was performed and a refund of all withholdings collected on such income.

The parties agreed at oral argument that Count Two of Plaintiff’s Complaint is moot.

II. Legal Standard for a Motion to Dismiss

“In construing a complaint upon a motion to dismiss for failure to state a claim, we must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party.” *Mitchell v. Lawson Milk Co.*, 40 Ohio St. 3d. 190, 532 N.E.2d 753, 756 (1988). Before a court may dismiss the complaint “it must appear beyond doubt that plaintiff can prove no set of facts warranting recovery.” *Id.*

III. Analysis

On March 9, 2020, Ohio Governor Mike DeWine signed an Executive Order declaring a state of emergency to protect the citizens of Ohio from the effects of the Covid-19. The General Assembly drafted an emergency bill that provides clarity to how the municipal taxation rules would apply during the pandemic in order to preserve the status quo as well avoiding confusion and creating burdens for both employers and municipalities. Governor DeWine signed the bill on March 27, 2020.

The Ohio Constitution and Ohio Revised Code authorizes municipalities to impose an income tax. *See* Ohio Const., Art. XVIII, Sect. 6 & 13; R.C. Chapter 718. H.B. 197 is a large comprehensive bill but the relevant section at issue is Section 29:

Notwithstanding section 718.011 of the Revised Code, and for the purposes of Chapter 718. of the Revised Code, during 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, to Am. Sub. H. B. No. 197 133rd G.A. 341 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 bill was passed as to provide continuity to municipal taxes. In essence H.B 197 extends the existing 20-day rule, R.C. 718.011(D)¹, providing consistency for municipalities in determining income tax for all their employees. Designating the principal place of work as where the employee is required to report to work mitigates the burden of determining where each employee lives. Many or most employers were encouraging, if not ordering, their employees work from home during the pandemic. It also provided consistency for municipalities' revenue to continue to provide services for cities and residents, which was desperately needed revenue because of the impact of the pandemic.

A. Constitutional Challenge

All statutes have a strong presumption of constitutionality. "A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality. This court has held enactments of the General Assembly to be constitutional unless such enactments are clearly unconstitutional beyond a

¹ Under the 20-day rule, municipal income tax must be withheld for the employee's principal place of work for the first 20 days an employee works in another Ohio city. After the first 20 days, municipal income tax must be withheld and paid to the employee's non-principal place of work municipality. *See* 718.011(D).

reasonable doubt.” *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 147, 128 N.E.2d 59, 63 (1955). “[S]tatutes are presumed to be constitutional and that courts have a duty to liberally construe statutes in order to save them from constitutional infirmities.” *Eppley v. Tri-Valley Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 56, 2009-Ohio-1970, 908 N.E.2d 401, ¶ 12 (citing *Desenco, Inc. v. Akron*, 84 Ohio St.3d 535, 538, 1999 Ohio 368, 706 N.E.2d 232 (1999).)

The Ohio General Assembly has broad powers in powers of taxation. “The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized.” *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 87–88, 60 S.Ct. 406, 408, 84 L.Ed. 590 (1940). “And the Constitution grants legislators, not courts, broad authority (within the bounds of rationality) to decide whom they wish to help with their tax laws and how much help those laws ought to provide.” *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 108, 123 S.Ct. 2156, 2160, 156 L.Ed.2d 97(2003).

The General Assembly has the authority to establish municipal income tax allocations classifications among Ohio Municipal Corporations. Cincinnati has home rule powers under the Ohio Constitution. See Ohio Const., Art. XVII, Sect 3 & 7. “In considering the home-rule provisions and the General Assembly's authority, we have held that “[t]he Constitution authorizes the city to exercise part of the sovereign power, and in the proper exercise of that part it is immune from general laws.” *Dies Elec. Co. v. Akron*, 62 Ohio St.2d 322, 325, 405 N.E.2d 1026 (1980) (quoting *Froelich v. Cleveland*, 99 Ohio St. 376, 391, 124 N.E. 212 (1919)). Accordingly, with respect to municipal taxation, immunity from state law is the rule, with the exception being that the General Assembly may pass legislation that “limits” or “restricts” the power of municipalities to tax.” *Athens v. McClain*, 2020-Ohio-5146.

H.B. 197 designated the employee’s regular principal place of work as the location to impose income tax even if the employee was working from home in another city. Ohio courts have recognized the legislature’s authority to regulate the differing municipalities imposing tax to avoid double taxation by payees. “Ohio municipalities have the power to levy and collect income taxes subject to the power of the General Assembly to limit the power of municipalities to levy taxes under Section 13 of Article XVIII or Section 6 of Article XIII of the Ohio Constitution.” *Athens v. McClain*, 2020-Ohio-5146 at ¶ 50.

Redefining where the work was done maintained the status quo in an emergency situation. It was done to avoid confusion, it was uniform, statewide, it was not subject to a referendum, and went into immediate effect. Section 40 of the Bill states as such: “The reason for such necessity is to continue essential operation of various facets of state government, maintain the continuity of the state tax code, and respond to the declared pandemic and global health emergency related to COVID-19.”

H.B. 197 compelled Cincinnati to apply its tax code to those working from home. As the Ohio Supreme Court recently held:

We hold that the General Assembly's authority to limit the power of municipalities to tax allows it to broadly preempt municipal income taxes and to require that such taxes be imposed in strict accordance with the terms dictated by legislation passed by the General Assembly. Specifically, we agree with the Tenth District's determination that “[b]ecause Article XVIII, Section 13 permits the General Assembly to limit the municipalities' power to levy taxes, the General Assembly can require municipalities to enact legislation that accomplishes this aim.” *Id.* at ¶ 51.

The Court in *Athens*, *supra*, was a case brought by various municipalities challenging the constitutionality of a net-profits tax. *Id.* at ¶1. The cities challenged the General Assembly’s enactment of laws that centralize the collection and administration of those taxes. *Id.* But the Court

concluded that the laws imposing centralized administration constitute an act of limitation within the General Assembly's explicit constitutional authority. *Id.* ¶ 3.

This Court is also bound by the recent decision in the First District. In *Time Warner Cable Inc. v. City of Cincinnati*, the First District held that a state statute that required cities to accept consolidated income tax returns was a valid limitation of a city's taxation power rather than "impermissible compulsion to exercise a power of taxation" and that "even if state tax statute forced city to exercise extraterritorial power by taxing beyond its borders, such power was not unlawful." *Time Warner Cable, Inc. v. City of Cincinnati*, 1st Dist. No. C-190375, 2020-Ohio-4207, 157 N.E.3d 941. The First District stated that "a municipality may act extraterritoriality where granted such authority by statute." *Id.* at ¶17 (citing *Springfield v. All Am. Food Specialists, Inc.*, 85 Ohio App.3d 464, 469, 620 N.E.2d 120 (2d Dist. 1993)).

The Ohio Supreme Court in *Athens* found that the administration of municipal taxes was a limitation not an expansion. This Court is not persuaded that H.B. 197 would be an expansion but appears to explicitly direct and limit the power of municipalities to tax during the time of the health emergency. Based on the ruling in *Athens*, H.B. 197 was a limitation of the city's power, not an expansion. And as in the ruling in *Time Warner*, a municipality may exercise exterritorial power when granted that power by statute. This Court finds that finds that H.B. 197 is constitutional.

B. Due Process

Plaintiff further argues that the Due Process Clause forbids imposing a tax on an individual if that individual is not physically performing the work in the taxing jurisdiction. Plaintiff avers that a municipal corporation can tax income only when it exercises *in personam* jurisdiction over a taxpayer's residence in the municipality or *in rem* jurisdiction because it is earned for work performed within the municipality's borders.

Plaintiff points the Court to two cases in support of his argument. In *Hillenmeyer v. Cleveland Board of Review*, a nonresident professional football player filed application for refunds of income to taxes paid to the City of Cleveland. That tax ordinance involved a “games played” taxation formula. The Court found that: “due process requires an allocation that reasonably associates the amount of compensation taxed with work the taxpayer performed within the city.” *Hillenmeyer v. Cleveland Bd. of Rev.*, 144 Ohio St.3d 165, 2015-Ohio-1623, 41 N.E.3d 1164, ¶ 46.

Hillenmeyer concerned an unusual and very different tax rule and its analysis was specifically guarding against extraterritorial intrastate taxation. But a careful reading of the Court’s due process analysis in that case actually supports Defendant’s motion.

‘[t]he Due Process Clause places two restrictions on a State’s power to tax income generated by the activities of an interstate business.’ (citing *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 272–273, 98 S.Ct. 2340, 57 L.Ed.2d 197 (1978).) ‘The first is to require ‘some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.’ (citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 306, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344–345, 74 S.Ct. 535, 98 L.Ed. 744 (1954).) The second restriction is that ‘the income attributed to the State for tax purposes must be rationally related to ‘values connected with the taxing State.’” *Hillenmeyer v. Cleveland Bd. of Rev.*, 144 Ohio St.3d 165, 2015-Ohio-1623, 41 N.E.3d 1164, ¶ 40.

In this case, Mr. Shaad is an Ohio resident working for an Ohio company. Here there is sufficient nexus between the state and the person. Plaintiff is subject to *in personam* jurisdiction in Cincinnati with regards to matters arising out of his employment. Before, during, and after the stay at home order, Plaintiff was dividing his time between the two municipalities. Furthermore, in a plain reading of H.B.197, for purposes of the tax code, Plaintiff was working in Cincinnati even if he was physically working in the City of Blue Ash.

As to the second restriction, the income attributed to the state is rationally related to the taxing state, or in other words, the income taxed is rationally related to the taxing municipality. There is clearly a rational relationship between Ohio and the City of Cincinnati for Mr. Shaad's work. Whether he conducts business in Blue Ash, Ohio, or from his office in downtown Cincinnati, the income attributed to his work is rationally related to Ohio.

Plaintiff directs this Court to a more recent Ohio Supreme Court decision to support the same argument "that compensation must be allocated to place where the employee performed the work." *Willacy v. Cleveland Bd. of Income Tax Rev.*, 159 Ohio St.3d 383, 2020-Ohio-314, 151 N.E.3d 561 ¶ 26 (quoting *Hillenmeyer*, *supra* at ¶ 45.). In *Willacy*, a former employee of Sherwin-Williams exercised stock options, purchased while she worked and lived in Cleveland but exercised after she retired and lived in Florida. *Id.* at ¶ 3-4. She was subsequently taxed by the City of Cleveland, but was ultimately denied her refund requests. *Id.* at ¶ 4-5.

When analyzing her Due Process claims the Ohio Supreme Court found that Cleveland's taxation of Ms. Willacy's income satisfied the Due Process Clause's twofold test whether a taxing authority exceeded its jurisdiction. *Id.* at ¶ 22.

Due process first requires 'some definite link, some minimum connection' between the local taxing authority 'and the person, property or transaction it seeks to tax.' (citing *Miller Bros.* at 344-345, 74 S.Ct. 535.) Second, it demands the presence of a rational relationship between the income taxed by the jurisdiction and the income-producing activity or property within that jurisdiction. *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273, 98 S.Ct. 2340, 57 L.Ed.2d 197 (1978). These inquiries involve distinct but related concerns: While the former focuses on the presence of either in personam jurisdiction over the taxpayer or in rem jurisdiction over her income or property, the latter focuses on how much of a nonresident's income the local taxing authority may fairly reach. *Id.*

The Ohio Supreme Court found that regardless of residency status, the first prong is satisfied when a municipality imposes taxes on income from work performed in the jurisdiction, therefore there was a sufficient connection between the taxing entity and the payee being taxed.

Id. at ¶ 23. As to the second prong, “the taxing jurisdiction can reach only the portion of the income that is reasonably associated with activity in that jurisdiction,” the Court concluded that Ms. Willacy’s exercise of stock options did not violate the Due Process Clause because the income was from work performed in Cleveland. *Id.* at ¶ 24 & ¶ 26. The Court noted its holding in *Hillenmeyer* and how distinct that case was because it concerned a professional athlete who was a nonresident of Ohio and it imposed income tax on compensation done while he was working outside Cleveland, creating a Due Process issue. *Id.* (citing *Hillenmeyer* at ¶ 49).

Like the reasoning in *Willacy*, *Hillenmeyer* was a distinctly different factual case. This Court recognizes the challenge of citing to cases that concern an untested law. But the two-fold due process is the same in these cases. When that test is applied to Mr. Schaad, it is evident that the due process issue fails because the taxes arise from work performed in the jurisdiction and where is a sufficient connection between the taxing entity and the taxed party. This Court finds there is a sufficient nexus that did not violate the Due Process Clause as established by the Ohio legislature.


IV. Conclusion

This Court finds that H.B. 197 is constitutional under the General Assembly’s broad powers of taxation over its residents. It was enacted uniformly, to maintain the status quo, to avoid confusion, and to help maintain tax revenues for municipalities. This Court does not find that Plaintiff’s Due Process rights were violated. For these reasons Defendant’s motion to Dismiss is GRANTED. Because this Court finds that H.B. 197 is constitutional, Plaintiff’s request for injunctive relief is DENIED.

Because the other named Defendant was previously dismissed and the parties agreed that Court Two of the Complaint is now moot, the Court finds that the all of the claims have been adjudicated.

There is no just cause for delay.

IT IS SO ORDERED.



Judge Christopher Wagner
6 / 15 / 21

Date