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Limitations on the Ability to Tax: Blank Rome

In the post-*Wayfair* age, the challenges to a jurisdiction's ability to tax have decreased. However, the pandemic brought a slew of new tax considerations and emergency rules and legislation, which have resulted in a steady uptick in challenges to a jurisdiction's ability to tax. One such successful challenge is the recent decision in *Morsy v. Dumas*, No. CV 21 946057 (Ohio Ct. Com. Pleas, Sept. 26, 2022).

The decision in *Morsy* examined Ohio's emergency legislation, which provided that if an employee provided personal services from home during the Stay at Home Executive Order, then the employee would be deemed to have provided those services at the employer's principal place of business. See H.B. 197. Dr. Morsy lived in Blue Bell, Pennsylvania, and commuted over six hours each way to work during the week in Cleveland, Ohio.

The Facts: From March 13, 2020, through December 31, 2020, Dr. Morsy worked from her home in Pennsylvania. Nevertheless, the City of Cleveland refused to refund the municipal income tax Dr. Morsy paid for that period as a result of the emergency legislation. Dr. Morsy challenged the refund denial. The City defended the tax, in part, on the basis that "the ability to continue performing her job duties through a virtual network connection with her employer, located in Cleveland, created a substantial nexus." The City argued that providing services and protections to the employer's offices (notably not to the employee though) and maintaining an infrastructure to allow Dr. Morsy to work from home was a sufficient basis for the imposition of the tax.

The Decision: The Court of Commons Pleas was not swayed by the City's expansive arguments. Instead, the court focused on the distinction between the two other Ohio cases on this issue and the current case—specifically that the other cases dealt with Ohio residents. See *Buckeye Institute v. Kilgore*, 2021-Ohio-4196 (Ct. App. Ohio, Nov. 30, 2021) and *Schaad v. Alder*, 2022-Ohio-340 (Ct. App. Ohio, February 7, 2022). The court held that the Ohio General Assembly "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."

While this case focused on the emergency legislation enacted as a result of the pandemic, states that use a convenience of the employer test to assert taxing authority should be wary. In those states, tax is often imposed if the employee only worked one day in the state and spent the rest of the year working from home. This case serves as an important reminder that merely having a tenuous connection with a jurisdiction does not grant that jurisdiction the authority to impose tax over a nonresident's income.

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