

1 Shaper, Appellant, v. Tracy, Tax Commr., Appellee.

2 [Cite as Shaper v. Tracy (1995), ____ Ohio St.3d ____.]

3 *Civil procedure -- Court may not dismiss a case, via a motion to dismiss,*
4 *on res judicata grounds -- Res judicata raises merit questions that*
5 *are to be resolved in a merit decision.*

6 (No. 95-389 -- Submitted July 26, 1995 -- Decided October 11, 1995.)

7 Appeal from the Board of Tax Appeals, No. 93-X-1032.

8 On Motion to Dismiss or Affirm.

9 Serene G. Shaper, appellant, filed a declaratory judgment action in

10 Cuyahoga County Common Pleas Court, later venued in the Franklin

11 County Common Pleas Court, seeking to declare R.C. 5747.01(A)(1) to be

12 in violation of the federal Commerce Clause for particular income she

13 received from 1988 through 1991. The common pleas court found the

14 statute to be constitutional, and Shaper appealed to the Franklin County

15 Court of Appeals. The appellate court affirmed the lower court's decision,

16 and Shaper filed a motion for a writ of certiorari with this court. This court

17 declined jurisdiction on March 1, 1995.

18 Shaper also filed amended income tax returns for tax years 1988

19 through 1991 with the Tax Commissioner, appellee, challenging the

1 the issues in the BTA case and bars this court from considering the instant
2 appeal. Shaper responds that the declaratory judgment decision and the
3 BTA decision deal with different issues.

4 A motion to dismiss is not the proper method to resolve the question
5 posited by the commissioner. According to *State ex rel. Freeman v. Morris*
6 (1991), 62 Ohio St.3d 107, 109, 579 N.E. 2d 702, 703, *res judicata* is an
7 affirmative defense. According to *State ex rel. Koren v. Grogan* (1994), 68
8 Ohio St.3d 590, 594, 629 N.E. 2d 446, 450, an affirmative defense must be
9 raised and proved, and it usually does not affect the jurisdiction of the court.
10 Further, according to *Freeman*, the court may not dismiss a case, via a
11 motion to dismiss, on *res judicata* grounds.

12 Accordingly, we deny the “motion to dismiss or affirm.”

13 *Motion denied.*

14 MOYER, C.J., WRIGHT, RESNICK, F.E. SWEENEY, PFEIFER AND COOK,
15 JJ., CONCUR.

16 DOUGLAS, J., dissents.

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