1	Shaper,	Appellant,	v. Tracy,	Tax Comm	r., Appellee.
	· · ·		<i>, ,</i>		/ 11

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	O <u>n</u> M <u>otion</u> to D <u>ismiss</u> or A <u>ffirm</u> .
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	constitutionality of the statute. The commissioner, after Shaper had later
2	filed applications for personal income tax refunds for these years, denied the
3	refunds. Shaper appealed to the Board of Tax Appeals ("BTA"), and the
4	BTA affirmed the commissioner's order. Shaper filed an appeal of this
5	decision to this court on February 17, 1995, twelve days before the court
6	declined jurisdiction in the declaratory judgment appeal.
7	This cause is before this court upon the commissioner's motion to
8	dismiss or affirm the BTA's decision on res judicata and/or collateral
9	estoppel grounds.
10	
10 11	Krislov & Associates Ltd. and Clinton A Krislov; Moses Krislov Co.,
	Krislov & Associates Ltd. and Clinton A Krislov; Moses Krislov Co., L.P.A., and Moses Krislov; Benesch, Friedlander, Coplan & Aronoff and
11	
11 12	L.P.A., and Moses Krislov; Benesch, Friedlander, Coplan & Aronoff and
11 12 13	L.P.A., and Moses Krislov; Benesch, Friedlander, Coplan & Aronoff and Leon Friedberg, for appellant.
11 12 13 14	L.P.A., and Moses Krislov; Benesch, Friedlander, Coplan & Aronoff and Leon Friedberg, for appellant. Betty D. Montgomery, Attorney General, and Lawrence D. Pratt,
 11 12 13 14 15 	L.P.A., and Moses Krislov; Benesch, Friedlander, Coplan & Aronoff and Leon Friedberg, for appellant. Betty D. Montgomery, Attorney General, and Lawrence D. Pratt,

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.		