

ORIGINAL

In the
Supreme Court of Ohio

Kent W. & Sue E. Cunningham

14-0532

Appellees,

Case No. _____

v.

On Appeal from the
Ohio Board of Tax Appeals

Joseph W. Testa,
Tax Commissioner of Ohio,

BTA Case No. 2011-4641

Appellant.

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SUPREME COURT OF OHIO

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BOARD OF TAX APPEALS

NOTICE OF APPEAL OF JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO

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Appellant, Joseph W. Testa, Tax Commissioner of Ohio, gives his notice of his appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from a Decision and Order of the Ohio Board of Tax Appeals, journalized and entered on March 6, 2014, that reversed in part and affirmed in part the Tax Commissioner's Final Determination regarding Appellees Kent and Sue Cunningham's residency for purposes of their 2008 Ohio individual income tax return. A true and accurate copy of this Decision and Order is attached as Exhibit A.

The Tax Commissioner complains of the following errors:

1. The Decision and Order of the Board of Tax Appeals is unreasonable and unlawful.

2. The Board of Tax Appeals erred as a matter of fact and law in finding that Kent Cunningham was not a resident of Ohio for purposes of Ohio income taxation. Instead, the BTA should have affirmed the Tax Commissioner's final determination which found that Kent Cunningham was a resident of Ohio for Ohio income tax purposes.

3. The Board of Tax Appeals erred as a matter of fact and law in finding that Kent Cunningham was not domiciled in Ohio for purposes of Ohio income taxation. Instead, the BTA should have affirmed the Tax Commissioner's final determination which found that Kent Cunningham and his wife, Sue Cunningham, were Ohio residents for Ohio income tax purposes because they were domiciled in Ohio under the applicable common law standard for "domicile." Under that applicable standard domicile means a person's fixed and permanent home, pursuant to which the person intends to remain indefinitely and regarding which the person has not affirmatively abandoned in favor of a new permanent home lived in elsewhere.

4. The Board of Tax Appeals erred as a matter of fact and law in finding that Kent Cunningham's statement of non-domicile was not a "false statement" as that term is used in R.C. 5747.24(B)(1)(b). Instead, the BTA should have affirmed the Tax Commissioner's final determination which found that Kent Cunningham's statement of non-domicile was false. The statement was false because Kent Cunningham bears all indicia of domicile in Ohio under Ohio law. Furthermore, for the 2008 tax year at issue, Kent Cunningham affirmed his Ohio domicile through various legal acts such as: (1) voting in Ohio, (2) claiming and receiving a "homestead deduction" on his Ohio residence for Ohio real property tax purposes, (3) holding an Ohio

driver's license and no other, (4) not filing income tax returns in any other state, including Tennessee's income tax on investment income, and (5) reporting for federal income tax purposes, for the 2008 tax year and several other previous and more current tax years, that his and his wife's Tennessee house was merely a "vacation home" that they held out for rental to others, and did not occupy for their own living purposes during the 2008 taxable year at issue.

5. The Board of Tax Appeals erred as a matter of fact and law by applying an "irrebuttable presumption" standard of review to Kent Cunningham. Instead, because Kent Cunningham's statement of non-domicile was false, the BTA should have determined that Kent Cunningham bore the burden to prove non-Ohio domicile pursuant to R.C. 5747.24 (C) or (D).

6. The Board of Tax Appeals erred as a matter of fact and law in applying an "irrebuttable presumption" to the issue of Kent Cunningham's domicile. The law disfavors irrebuttable presumptions and, as such, in doubtful cases such as this, the facts should be construed against such presumptions.

7. The Board of Tax Appeals erred as a matter of law in equating Kent Cunningham's statement of non-domicile to satisfying the contact period limitation and out-of-state abode elements of R.C. 5747.24(B)(1)(a). Instead, the Board of Tax Appeals should have enforced the plain language of the statute that requires a statement that "[d]uring the entire taxable year, the individual was not domiciled in this state" in order to be entitled to a presumption of non-domicile. Thus, it was error for the BTA to eliminate the statutory requirement that a statement of non-domicile made under R.C. 5747.24(B) must include an affirmation of domicile outside Ohio as the term "domicile" is ordinarily employed under Ohio statutory and common law.

8. The Board of Tax Appeals erred in its determination that the irrebuttable

presumption of R.C. 5747.24(B) can be overcome only with the demonstration of a false statement only as to the two elements set forth in R.C. 5747.24(B)(1)(a) and (b), and not also as to the overarching consideration of domicile inherent within R.C. 5747.24.

9. The Board of Tax Appeals erred as a matter of law in its interpretation and application of R.C. 5747.24(B) and 5747.01(I) in finding that determination that the traditional notion of domicile is not a consideration inherent within R.C. 5747.24 for purposes of the definition of “resident” pursuant to R.C. 5747.01(I) in contravention of the plain language of the statute. Instead, the BTA should have given the term “domicile” its ordinary legal meaning, because no other meaning is supplied by the General Assembly or inferable from the language of the statute.

10. The Board of Tax Appeals erred as a matter of law in its interpretation and application of R.C. 5747.24(B) and 5747.01(I) because the BTA’s interpretation violates several canons of statutory instruction: (a) BTA’s interpretation of the term “domicile” is in derogation of common law, and such meaning should not be given where the intent to change the common law meaning of the word is not expressed by the General Assembly; (b) the BTA’s interpretation of the word “domicile” is inconsistent with and creates disharmony among the other provisions of R.C. 5747.24, R.C. Chapter 5747, Title 57 of the Revised Code, and the throughout the Ohio Revised Code generally. (c) the BTA’s interpretation of the term “domicile” produces absurd results; and (d) the BTA’s interpretation of the word “domicile” does not avoid constitutional issues. Instead, the BTA’s interpretation would violate the equal rights of other taxpayers under the Equal Protection Clause of the Constitution of the United States and the Ohio Constitution, by creating arbitrary and unreasonable classifications among similarly situated persons. Under the BTA’s interpretation, persons who spend less than half the year here, have an out-of-state

abode, *and* file a statement of non-domicile are entitled to an irrebuttable presumption of non-domicile, whereas persons who spend less than half the year here, have an out-of-state abode, *but do not* file a statement of non-domicile bear the evidentiary burden to prove residency. Similarly, the BTA's interpretation violates the equal rights under the Equal Protection Clauses of the Ohio and U.S. Constitutions of those persons who are domiciled in Ohio within the meaning of the common law and spend less than half the year in Ohio (i.e., had fewer than 183 contact periods in Ohio) but lack another permanent abode outside Ohio.

11. The Board of Tax Appeals erred in its interpretation of the term "resident," as contained in R.C. 5747.01(I), by giving the word a meaning that is unique to that statute and at odds with the plain language of the statute, and Ohio statutory and common law, and that results in absurd and improper results. Instead, the BTA should have interpreted that term consistent with its meaning under the plain language of the statute and Ohio common law and statutory law.

12. The Board of Tax Appeals erred as a matter of law by determining that a person can have "*nowhere* domicile"—meaning that the person has no domicile *anywhere* for purposes of Ohio income taxation. Instead, the BTA should have followed the unbroken line of precedent that every person is presumed to have a domicile and that a person retains his domicile unless he affirmatively demonstrates he has abandoned his current domicile and has established a new permanent home at which he resides.

13. The Board of Tax Appeals erred by failing to find that establishment of domicile is required under every provision of R.C. 5747.24 and that the General Assembly used that term consistently throughout that statute in an undifferentiated manner, requiring the same interpretation throughout.

14. The Board of Tax Appeals erred in failing to find that R.C. 5747.24 is merely a

burden-shifting statute, under which a different evidentiary burden of proof applies depending on one's contact with Ohio.

15. The Board of Tax Appeals erred by failing to consider all the indicia of domicile exhibited by both Mr. and Mrs. Cunningham when considering whether Mr. and Mrs. Cunningham are domiciled in Ohio. Instead, the BTA should have explicitly found that Mr. and Mrs. Cunningham bear the same indicia of domicile.

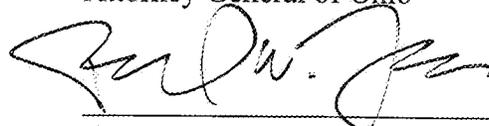
16. The Board of Tax Appeals erred by failing to find that, as joint Ohio filers, the Cunninghams' Ohio adjusted gross income should be increased by the amount of the depreciation expenses the Cunninghams claimed on their 2008 federal income tax return (which flowed through to the Ohio income tax return for 2008 at issue). The Cunninghams' federal income tax reporting was in direct conflict with their BTA testimony. Specifically, for federal income tax purposes over many tax years (including the tax year at issue), the Cunninghams deducted depreciation expenses on their Tennessee house, claiming that they did not live in the Tennessee house during any days of those taxable years. For federal (and Ohio) income tax reporting purposes, they took 100% of the depreciation expense on the Tennessee house as a business deduction, rather than attributing any of the depreciation expense on their Tennessee home to their own personal use and benefit. Consequently, if their Tennessee house had been actually lived in by the Cunninghams during those taxable years (as the Cunninghams claimed in their BTA testimony but had denied for federal income tax reporting purposes), their federal adjusted gross income would be substantially understated, and so, accordingly, would their Ohio adjusted gross income for the tax year at issue.

17. The Board of Tax Appeals erred as a matter of fact and law by separately considering the Ohio domicile status of Mr. and Mrs. Cunningham, when the Cunninghams, for

Ohio and federal income tax purposes, filed a joint income tax return as a married couple for the 2008 tax year at issue. The Board should have determined that the status of Mrs. Cunningham as an Ohio resident/domiciliary properly subjected Mr. Cunningham's income to Ohio taxation, regardless of Mr. Cunningham's status as a resident/domiciliary of Ohio. Additionally and alternatively, the Board of Tax Appeals erred as a matter of fact and law by failing to find that the Cunninghams, as married filing jointly Ohio income tax filers, failed to meet their affirmative evidentiary burden of establishing to what extent the Cunningham's investment income and other non-wage income was properly attributed to Mr. Cunningham, rather than to Mrs. Cunningham.

Respectfully submitted,

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Tax Commissioner of Ohio

In the
Supreme Court of Ohio

Kent W. & Sue E. Cunningham	:	
	:	
Appellees,	:	Case No. _____
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v.	:	On Appeal from the
	:	Ohio Board of Tax Appeals
Joseph W. Testa,	:	
Tax Commissioner of Ohio,	:	BTA Case No. 2011-4641
	:	
Appellant.	:	

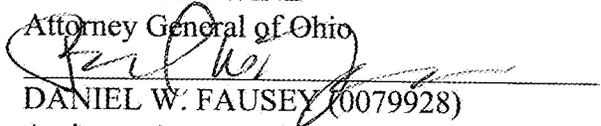
PRAECIPE

TO THE SECRETARY OF THE OHIO BOARD OF TAX APPEALS:

Pursuant to R.C. 5717.04, appellant, Joseph W. Testa, Tax Commissioner of Ohio, hereby requests that the Ohio Board of Tax Appeals (“Board”) file with the Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, a certified transcript of the record of the Board’s proceedings in the above-captioned matters, including any evidence considered by the Board in rendering its decisions in those matters.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio


DANIEL W. FAUSEY (0079928)

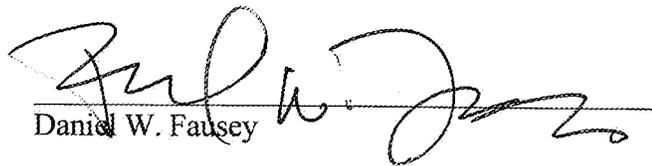
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CERTIFICATE OF SERVICE

I certify that, on this 7th day of April, 2014, a true copy of the foregoing "Notice of Appeal" and "Praecipe" was served: (1) by hand delivery upon the Ohio Supreme Court, 65 S. Front Street, Columbus, Ohio 43215, and the Ohio Board of Tax Appeals, 30 E. Broad Street, 24th Floor, Columbus, Ohio 43215; and (2) by certified mail upon the following:

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Daniel W. Fausey

OHIO BOARD OF TAX APPEALS

Kent W. & Sue E. Cunningham,)	CASE NO. 2011-4641
)	
Appellants,)	(PERSONAL INCOME TAX)
)	
vs.)	DECISION AND ORDER
)	
Joseph W. Testa, Tax Commissioner)	
of Ohio,)	
)	
Appellee.)	

APPEARANCES:

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Entered ~~MAR 06~~ 2014

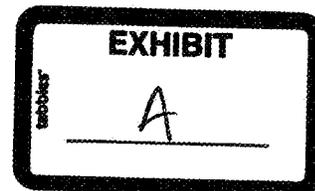
Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

Appellants appeal from a final determination of the Tax Commissioner in which he affirmed an individual income tax assessment against them for failure to file an Ohio tax return or pay their Ohio income tax liability for tax year 2008. We proceed to consider the matter upon the notice of appeal, the statutory transcript ("S.T.") certified by the commissioner, the record of the hearing before this board ("H.R."), and the parties' pre- and post-hearing briefs.

In the final determination, the Tax Commissioner explained that appellants claimed not to have been Ohio residents for 2008, based on their having fewer than 183 contact periods¹ in Ohio, owning a home in Tennessee, and Dr. Kent

¹ A "contact period" is defined in R.C. 5747.24(A) as follows:

"(1) An individual 'has one contact period in this state' if the individual is away overnight from the individual's abode located outside this state and while overnight from that abode spends at least some portion, however minimal, of each of two consecutive days in this state.



Cunningham having filed an Affidavit of Non-Ohio Domicile pursuant to R.C. 5747.24(B). R.C. 5747.24(B)(1) provides, in pertinent part:

“[A]n individual who during a taxable year has no more than one-hundred eighty-two contact periods in this state, *** and who during the entire taxable year has at least one abode outside this state, is presumed not to be domiciled in this state during the taxable year if, on or before the fifteenth day of the fourth month following the close of the taxable year, the individual files with the tax commissioner, on the form prescribed by the commissioner, a statement from the individual verifying that the individual was not domiciled in this state under this division during the taxable year. In the statement, the individual shall verify both of the following:

“(a) During the entire taxable year, the individual was not domiciled in this state;

“(b) During the entire taxable year, the individual had at least one abode outside this state. The individual shall specify in the statement the location of each such abode outside this state.

“The presumption that the individual was not domiciled in this state is irrebuttable unless the individual fails to timely file the statement as required or makes a false statement. If the individual fails to file the statement as required or makes a false statement, the individual is presumed under division (C) of this section to have been domiciled in this state the entire taxable year.”

Although he acknowledged that Dr. Cunningham had filed the requisite statement pursuant to R.C. 5747.24(B)(1), he found that the statement therein that Dr. Cunningham was not domiciled in Ohio conflicted with appellants' filing a Homestead Exemption Application in Hamilton County, Ohio, in January 2008, declaring that they occupied an abode in Cincinnati, Ohio as their principal place of residence. He therefore found Dr. Cunningham's affidavit contained a false statement and did not

Footnote contd.

“(2) An individual is considered to be 'away overnight from the individual's abode outside this state' if the individual is away from the individual's abode located outside this state for a continuous period of time, however minimal, beginning at any time one day and ending at any time on the next day.”

create an irrebuttable presumption of non-residency. Proceeding under R.C. 5747.24(C), he then concluded that appellants failed to prove by a preponderance of evidence that they were not Ohio residents for 2008, and affirmed the assessment.

Appellants thereafter appealed to this board, arguing that they satisfied the requirements of R.C. 5747.24(B)(1), or, in the alternative, were at best part-year residents of Ohio and should only be liable for payment of taxes on a portion of their income.² However, they acknowledged that only Dr. Cunningham, not Mrs. Sue Cunningham, filed an Affidavit of Non-Ohio Domicile, for tax year 2008. Appellants presented evidence at this board's hearing regarding their contacts with Ohio and with Tennessee, including a calendar detailing each of their locations throughout the year, and copies of plane tickets, hotel reservations, and numerous receipts, and asserted that such evidence establishes that neither had more than 182 contact periods with Ohio in 2008.

In our review of this matter, we are mindful that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. Consequently, it is incumbent upon a taxpayer challenging a determination of the commissioner to rebut the presumption and to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. In this regard, the taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

The first issue raised by the parties in this matter is the proper interpretation of the requirements of R.C. 5747.24(B)(1), and what "false statements" can destroy the irrebuttable presumption created by filing the Affidavit of Non-Ohio Domicile. Appellants argue that only a false statement pertaining to the two prerequisites of R.C. 5747.24(B)(1) – (1) no more than 182 contact periods with Ohio

² The commissioner argues that appellants are precluded from arguing about the actual amount of tax liability, in the event either or both of them are found to be domiciled in Ohio, as such issue was not previously raised before the commissioner. We agree. The underlying petition for reassessment merely stated that "[n]o tax is due for 2008" because of the filing of an Affidavit of Non-Ohio Domicile. S.T. at 44.

and (2) an abode outside Ohio – can nullify the irrebuttable presumption created by the affidavit. The commissioner, on the other hand, argues, because the statute requires a statement that the taxpayer (1) is not domiciled in Ohio and (2) has an abode outside Ohio, a false statement with regard to either destroys the irrebuttable presumption created by the filing of an affidavit.

We find appellants' argument more persuasive. The commissioner appears to read into the statute a requirement that does not exist. R.C. 5747.24(B)(1) initially lists three requirements for being irrebuttably presumed not to be domiciled in Ohio: "no more than one hundred eighty-two contact periods in this state, ***, and *** at least one abode outside this state *** if *** the individual files *** a statement ***." As the court stated in *Columbia Gas Trans. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-5, "[t]he first rule of statutory construction is to look at the statute's language to determine its meaning. If the statute conveys a clear, unequivocal, and definite meaning, interpretation comes to an end, and the statute must be applied according to its terms." *Id.* at ¶19. See, also, *Vought Industries, Inc. v. Tracy* (May 24, 1995), 72 Ohio St.3d 261, 265-266; *Wardrop v. Middletown Income Tax Review Bd.*, Butler App. No. CA2007-09-235, 2008-Ohio-5298, at ¶24; *City of Heath v. Licking Cty. Regional Airport Authority* (1967), 16 Ohio Misc. 69, 78-79. The additional requirement advanced by the commissioner – that taxpayers verify that they were not domiciled in Ohio – seems to be an overreading of the statute. The statute explains what the affidavit form shall include, but does not create additional barriers to the irrebuttable presumption. To require taxpayers to verify that they were not domiciled in Ohio on a form intended to create a presumption regarding their domicile in Ohio for individual income tax purposes, is absurd and distorts the purpose of the statute.

Further, as appellants argued, such a requirement essentially renders the "bright-line" non-residency status established by R.C. 5747.24(B) moot, as the commissioner could always challenge the veracity of the statement that the taxpayer was not domiciled in Ohio. Doing so would render R.C. 5747.24(B) meaningless, and

essentially cause taxpayers with fewer than 182 contact periods to exclusively fall under R.C. 5747.24(C).³

It seems more reasonable that the reference in R.C. 5747.24(B)(1)(a) refers to contact periods, as “domicile” is a legal concept defined for individual income tax purposes by R.C. 5747.24. We therefore find that a taxpayer may lose the irrebuttable presumption of non-Ohio domicile only if making a false statement regarding (1) contact periods, or (2) having an abode outside Ohio.⁴ The record indicates that Kent Cunningham complied with the requirements of R.C. 5747.24(B)(1) by filing an Affidavit of Non-Ohio Domicile for tax year 2008 in March 2009. S.T. at 47; H.R., Ex. A. He is therefore irrebuttably presumed to be not domiciled in Ohio for Ohio individual income tax purposes.⁵ We therefore reverse the Tax Commissioner’s final determination with regard to Dr. Cunningham.

Sue Cunningham, on the other hand, did not file such an affidavit, H.R., Ex. N, and therefore is not subject to an irrebuttable presumption of non-Ohio domicile. We find nothing in R.C. 5747.24 that would allow Dr. Cunningham’s filing of an Affidavit of Non-Ohio Domicile to be sufficient to establish an irrebuttable

³ As explained further herein, R.C. 5747.24(C) generally provides that a taxpayer with fewer than 183 contact periods in Ohio is presumed to be domiciled in Ohio, and that such presumption can be rebutted with a preponderance of evidence to the contrary.

⁴ We find appellants’ explanation of the legislative history of R.C. 5747.24 aids and confirms our reading of the statute. As explained in their post-hearing brief, prior to the enactment of H.B. 73 in 2006, R.C. 5747.24 essentially set forth three tiers of “domicile:” (1) An individual with 120 or fewer contact periods in Ohio with at least one abode outside Ohio during the taxable year was presumed to be *not* domiciled in Ohio. Such presumption was conclusive unless the commissioner requested a statement from the individual verifying the number of contact periods and the non-Ohio abode, and the individual failed to provide such statement; (2) An individual with between 121 and 182 contact periods was presumed to be domiciled in Ohio. Such presumption could be rebutted with a preponderance of evidence; and (3) An individual with 183 contact periods or more was presumed to be domiciled in Ohio. Such presumption could be rebutted with clear and convincing evidence. Appellants’ Post-Hearing Brief at 18-19.

⁵ Even if we were to read R.C. 5747.24(B)(1) as requiring a true statement that the taxpayer was not domiciled in Ohio, we do not find the homestead exemption application that appellants’ filed for their home in Hamilton County to be sufficient to prove a “false statement” was made on the statement required by R.C. 5747.24(B)(1). As Dr. Cunningham credibly explained in his testimony before this board, appellants spent approximately three months traveling outside Ohio and Tennessee during 2008, and, overall, spent more time at their Ohio home than at their Tennessee home. H.R. at 59-60. Therefore, their statement on the homestead exemption application that their Cincinnati home was their principal place of residence does not conflict with their assertion that they were not domiciled in Ohio pursuant to R.C. 5747.24 for 2008. The concepts are separate and, under the facts presented herein, do not conflict. Moreover, appellants both testified that neither have been the subject of legal proceedings for perjury relating to statements or documentation filed with any Ohio agency or official. H.R. at 118, 135.

presumption for Mrs. Cunningham, as well. The statute is clear that *each* taxpayer must file a statement to be irrebuttably presumed not to be domiciled in Ohio. She must therefore meet the standards in either R.C. 5747.24(C) or (D) to be deemed not to be domiciled in Ohio for tax year 2008. R.C. 5747.24(C) provides that an individual with fewer than 183 contact periods in this state is presumed to be domiciled in Ohio, rebuttable by a preponderance of evidence to the contrary. R.C. 5747.24(D) provides a presumption of domicile in Ohio for an individual with 183 or more contact periods in this state rebuttable by clear and convincing evidence to the contrary. Appellants assert that Mrs. Cunningham had 169 contact periods with Ohio in 2008, as evidenced by the documents presented at this board's hearing, and is therefore subject to R.C. 5747.24(C).

As we recently noted in *Hammer v. Testa* (Dec. 18, 2013), BTA No. 2013-1379, unreported, "[w]hile R.C. 5747.24 has set forth certain presumptions and burdens with respect to domicile, it has not altered the basic concept of what constitutes a domicile." In *Maple v. Tracy* (Sept. 3, 1999), BTA Nos. 1998-T-268, 312, unreported, we explained that Ohio courts have recognized that "residence" and "domicile" are distinct, albeit related concepts:

"Domicile is generally defined as a legal relationship between a person and a particular place that contemplates two factors: (1) residence, at least for some period of time, and (2) the intent to reside in that place permanently or indefinitely. *Hill v. Blumenberg* (1924), 19 Ohio App. 404, 409, citing *Pickering v. Winch* (1906), 48 Ore. 500; *Columbus v. Firebaugh* (1983), 8 Ohio App.3d 366. Residence, which denotes the place in which one physically lives for a period of time, is embodied in the definition of domicile. The primary distinction between the two is that while a person can have only one domicile at any given time, he or she may have more than one residence. *Saalfeld v. Saalfeld* (1949), 86 Ohio App. 225. (Footnote omitted.) Moreover, once a domicile has been established, it is presumed to continue until it is shown by a preponderance of the evidence that it has been abandoned in favor of a new one. *Cleveland v. Surella* (1989), 61 Ohio App.3d 302; *Saalfeld*, supra, 22." *Id.* at 5-6.

See, also, *Tyson v. Zaino* (Oct. 3, 2003), BTA No. 2001-B-1327, unreported; *In re Anderson*, Monroe App. 05 MO 14, 2007-Ohio-1107, ¶20 (“Residency is not the same as domicile. *** Domicile connotes a, ‘fixed permanent home to which one intends to return and from which one has no present purpose to depart.’ *In re Guardianship of Fisher* (1993), 91 Ohio App.3d 212, 215, ***.”) (internal citations omitted).

The record in this matter indicates that Mrs. Cunningham was domiciled in Ohio before and during tax year 2008. Her voting records, vehicle registrations, driver’s licenses, dog’s license, and teaching license all indicate a consistent tie to Ohio, and no evidence was presented that the Cunninghams intended to abandon their Ohio domicile for Tennessee.⁶ H.R. at 66, 138, Exs. C, D. Moreover, appellants had the utility bills for their Tennessee residence sent to their Ohio address. Mrs. Cunningham maintained a residence in Ohio, for which she claimed a reduction in real property taxation as her “principal place of residence” for 2008.” H.R., Ex. 2. Dr. Cunningham testified that appellants spent only approximately four months in Tennessee, as compared to more than five months in Ohio. We find the evidence presented establishes that Mrs. Cunningham had no intent to abandon her Ohio domicile in a favor of a new one, and, therefore, was domiciled in Ohio for tax year 2008.

Based upon the foregoing, we hereby reverse the final determination of the Tax Commissioner as to Dr. Kent Cunningham and affirm his determination as to Mrs. Sue Cunningham.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



A.J. Groeber, Board Secretary

⁶ Moreover, we agree with the commissioner’s contention that Sue Cunningham cannot be without *any* domicile. See *Sturgeon v. Korte* (1878), 34 Ohio St. 525, 534; *Saalfeld v. Saalfeld* (1949), 86 Ohio App. 225, 226.