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I. STATEMENT OF FACTS

A. Dr. Cunningham concedes that he had common law domicile in Ohio during 2008.

We concede that Dr. Kent and Mrs. Sue Cunningham were common law domiciliaries of Ohio during the 2008 tax year. The Tax Commissioner's Final Determination found that they were domiciled in Ohio during 2008 and the Board of Tax Appeals found that Mrs. Cunningham was both a common law domiciliary and an Ohio resident for income tax purposes during 2008. ST at 3; Board of Tax Appeals Decision at 7. Since they spent less than 6 months at their Tennessee home in 2008, and were domiciled in Ohio (rather than Tennessee) during that year, they were not subject to and did not pay Tennessee tax on interest and dividend income in 2008. *See* Tr. at 57, 59, 99 - 100; Exs. I, N.

B. The Cunninghams had a non-Ohio place of abode during all of 2008.

The Cunninghams bought land in Tennessee in 1992 and constructed a home on that land in 1993. Tr. at 35. From 1993 until 2005, the Cunninghams used this as a vacation home and rented it out when they were not there. Tr. at 35. During 2006, the Cunninghams spent approximately four months at their Tennessee home and approximately three months travelling elsewhere outside of Ohio. Tr. at 59. The Tax Commissioner concedes that the Cunninghams owned their Tennessee residential property during all of 2008. ST at 2. The Board of Tax Appeals decision shows that they were mindful of the requirement that Dr. Cunningham have a place of abode outside of Ohio for the entire year to qualify for "bright line" non-residency, but that there was no issue before the Board regarding whether he had met this requirement. Board of Tax Appeals Decision at 1 - 2, 5. Thus, the Board has necessarily found that Dr. Cunningham had at least one place of abode outside of Ohio for all of 2008, and had ample evidence in the record to support that conclusion.

C. Dr. Cunningham had fewer than 182 Ohio contact periods during 2008.

During 2008, the Cunninghams carefully documented their Ohio and non-Ohio contact periods. Tr. at 46 - 50; Exs. 4-1 – 4-131. Based on these records, and on sworn testimony, Dr. Cunningham had 167 Ohio contact periods, and Mrs. Cunningham 169 Ohio contact periods, in 2008. Tr. at 46, Ex. 4-1. The first page of Exhibit 4, which was prepared by Dr. Kent Cunningham, summarizes the Ohio number of contact periods that are further documented in the rest of that Exhibit. Ex. 4-1, Tr. at 46. The second page of Exhibit 4 is an index that identifies dates when either or both of the taxpayers were outside of Ohio, the number of such days, and the pages in the remainder of Exhibit 4 that contain further documentation of the days spent outside of Ohio. Ex. 4-2, Tr. at 47. Pages 3 through 14 of Exhibit 4 comprise a contemporaneous calendar showing where both Dr. and Mrs. Cunningham were on each day of 2008, and summarizing on each page the monthly and year-to-date days outside of Ohio. Ex. 4-3 – 4-14; Tr. at 47 – 48. In preparing these exhibits, Dr. Cunningham was aware of the statutory definition of “contact period,” and applied this in calculating the number of Ohio versus non-Ohio contact periods that he enumerated in Exhibit 4. Tr. at 46. The remainder of Exhibit 4, pages 15 through 131, contain receipts and other documentation showing that the Cunninghams were, in fact, outside of Ohio on the dates claimed.

The only evidence contra Dr. Cunningham’s claim that he had fewer than 182 Ohio contact periods is that the Cunningham’s 2007 Federal Income Tax returns, Schedule E, shows the Tennessee residence as a “vacation home,” and has an “X” in a box stating that the Tennessee home was not used by the Cunninghams for more than the greater of 14 days or ten percent of the number of days that the home was rented. Tr. at 42; Ex. 1 – 7. Dr. Cunningham testified under oath that this was a mistake on the return, and that he did not tell his tax preparer

that he spent less than 14 days at the Tennessee property in 2007. Tr. at 39 – 42. The Tennessee home was in fact rented from 1993 until 2005. Tr. at 35. This could explain why the Tennessee property was properly listed as a depreciable asset in their preparer’s tax accounting software for many years, and may mean that the information from the prior returns was simply carried forward without correction after 2005. From a tax standpoint, this error was harmless, in that it did not result in a depreciation deduction being taken for the Tennessee property in 2008. Tr. at 42 – 43; Ex. 1-7.

The Board’s Decision shows that it believed that Dr. Cunningham had proved that he had fewer than 182 Ohio contact periods in 2008. The Decision states that “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.” Board of Tax Appeals Decision at 3. The Board then moved on to discuss other matters, and ultimately to find that Dr. Cunningham was a “bright line” non-resident for income tax purposes in 2008. *Id.* at 5. The Board was mindful of the requirement that Dr. Cunningham have fewer than 182 Ohio contact periods to qualify for “bright line” non-residency. *Id.* at 3. Thus, they necessarily concluded that Dr. Cunningham had fewer than 182 Ohio contact periods in 2008, based on the evidence before them. While the evidence regarding the 2007 Schedule E was presented to the Board, they did not discuss it in their decision. Presumably, they did not find that it compromised the credibility of the Cunninghams’ sworn testimony before the Board, nor did they find that it was sufficient to rebut the Cunninghams’ testimony and documentation regarding their non-Ohio contact periods.

D. Dr. Cunningham timely filed an Affidavit of Non-Ohio Domicile for 2008.

There seems to be no dispute that Dr. Kent Cunningham timely filed a 2008 Affidavit of Non-Ohio Domicile on March 14, 2009 – well before the due date of June 1, 2009 stated on the form. Tr. 43; Ex. A-1 & A-2; ST 47. The Affidavit gave Dr. Cunningham’s address as 4975 Councilrock Lane, Cincinnati, Ohio. ST 47. Further, he wrote “TN” in the blank on line one of the form, which reads . . .

“1. I was not domiciled in Ohio at any time during taxable year 2008. I was domiciled in _____ . (name of state(s) where domiciled).”

He did not write anything on the blank on line 2 of the form, which reads . . .

“2. I had at least one abode (place where I lived) outside of Ohio for the entire taxable year. Name of city (or cities), states (if within the USA) and country (if not within the USA) where I lived if different from statement 1 above.

_____”.

Before the Board of Tax Appeals, Dr. Cunningham testified that he believed that, since his only non-Ohio place of abode was in Tennessee, it was correct to list Tennessee as the answer to “I was domiciled in” on line 1. Tr. at 97 - 99, 122 – 123.

Dr. Cunningham also stated on the form that he did not intend to file an Ohio income tax return for 2008. ST 47. Based on the timely filing of Dr. Cunningham’s Affidavit, and believing that all other requirements for an irrebuttable presumption of non-Ohio domicile for income tax purposes had been met for that year, the Cunninghams in fact did not file an Ohio income tax return for 2008. ST at 2, Tr. at 23, 94 – 95.

Both Dr. and Mrs. Cunningham timely filed Affidavits of Non-Ohio residency for the prior tax year, 2007, and filed and paid income tax as non-residents. The Department of

Taxation accepted that return and has made no adjustments or additional assessments for 2007. Tr. at 44, 132; Exs. A-3 & A-4; ST at 50 – 51. Mrs. Cunningham, however, appears not to have filed an Affidavit for 2008. Tr. at 132, 148.

E. The Cunninghams applied for Homestead Exemption on their Ohio home in January, 2008.

Both Dr. and Mrs. Cunningham signed a DTE Form 105A Homestead Exemption Application for on their Ohio home in January, 2008. ST 14; Ex. B; Tr. at 86, 146. On that application, the Cunninghams declared under penalty of perjury that the Ohio home was their “principal place of residence” at the time of the application and as of January 1 of the year or years for which they requested the exemption. ST 14. The Ohio property was held in the name of Sue Cunningham as Trustee, so that she was technically the applicant. Tr. at 86, 146. Sometime after this application was filed, Dr. Cunningham notified the Hamilton County Auditor that he had claimed to be a non-Ohio resident for income tax purposes under the “bright line” test. Tr. at 60 – 61. The Auditor’s office told Dr. Cunningham that this would not affect his Homestead Exemption eligibility as long as he did not claim Homestead Exemption on another property as well. Tr. at 60.

The Tax Commissioner held that Dr. Cunningham’s 2008 “bright line” affidavit was invalid by reason of a “false statement,” concluding that Dr. Cunningham’s statement regarding income tax domicile on that form was inconsistent with his statement on the DTE 105A that the Hamilton County property was his principal residence. ST at 2 – 3. The Board of Tax Appeals, however, found the Cunninghams’ “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.” Board of Tax Appeals Decision at 5, fn 5.

F. Procedural History.

The Department of Taxation assessed 2008 Ohio income tax against the Cunninghams based on all of their income being fully taxable in Ohio as residents. ST at 2. The Cunninghams, pro se, filed a Petition for Reassessment in which they asserted that they were “bright line” non-residents of Ohio who had no Ohio source income and, thus, were not required to file a 2008 Ohio return or pay tax for that year. *Id.* The Tax Commissioner’s Final Determination rejected the taxpayer’s claim of “bright line” non-residency, determined that they were common law domiciliaries of Ohio, and thus affirmed the assessment of resident income tax liability for 2008. ST at 3. While the Final Determination admitted that the taxpayers had the Tennessee home for all of 2008, the Department never requested or considered any evidence regarding the Cunningham’s Ohio contact periods prior to the Final Determination. Rather, the Final Determination held that Dr. Cunningham’s non-residency affidavit contained a “false statement” that he was not domiciled in Ohio, which he held violated R.C. 5747.24(B) and thus denied him that section’s irrebuttable presumption of non-Ohio income tax residency for 2008. ST at 3.

That Final Determination was timely appealed to the Board of Tax Appeals. Board of Tax Appeals Decision at 1. The Board held that Dr. Cunningham was a non-resident of Ohio for income tax purposes in 2008, and thus was not subject to Ohio’s income tax, since he qualified as a non-resident for Ohio income tax purposes under the “bright line” test of R.C. 5747.24(B). Board of Tax Appeals Decision at p. 5. The Tax Commissioner has appealed that part of the Board’s decision. By contrast, the Board found that Mrs. Cunningham was an Ohio income tax resident for 2008 and thus was subject to Ohio’s tax on her income. The Board found that Mrs. Cunningham was a common law domiciliary of Ohio for tax year 2008 and that – since she had

not timely filed a non-residency affidavit for tax year 2008 – she did not meet that part of the requirement for “bright line” non-residency for Ohio income tax purposes under R.C.

5747.24(B). The Board’s decision regarding Mrs. Cunningham was not appealed.

II. LAW AND ARGUMENT

In reviewing decisions of the Board of Tax Appeals, the Supreme Court affirms the Board’s decision if it is reasonable and lawful. R.C. 5717.04; *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954, ¶ 14. This Court gives deference to factual findings by the Board, but reviews its conclusions of law de novo. *AERC Saw Mill Village, Inc. v. Franklin County Board of Revision*, 127 Ohio St.3d 44, 2010-Ohio-4468, 936 N.E.2d 472, ¶ 15.

Specifically, it will defer to the Board’s findings of fact if they are supported by reliable and probative evidence, but will not hesitate to overturn the Board on a question of law. *Id.*

The key issue in this case is whether Dr. Kent Cunningham -- a taxpayer who admits he was a common law domiciliary of Ohio in 2008 -- was nonetheless a non-resident for 2008 Ohio income tax purposes under the “bright line” income tax non-residency statute, R.C. 5747.24(B). In 2006, the General Assembly enacted the current version of R.C. 5747.24(B), which provides a “bright line” test for determining whether a taxpayer who has residences both within and outside of Ohio is classified as a non-resident for Ohio income tax purposes. Exs. 6, 9. This change, effective April 4, 2007, gives an irrebuttable presumption of non-Ohio residency for income tax purposes only to a taxpayer who did change domicile to or from Ohio during the year and who 1) had at least one “place of abode” outside of Ohio for the entire taxable year, 2) had no more than 182 Ohio contact periods (a term defined in the statute) during the year, and 3) timely filed a statement required by the statute which does not contain a “false statement.” R.C.

5747.24(B)(1). The statement is to be on a form prescribed by the Tax Commissioner, but the

statute itself says that the taxpayer's statement must: 1) "verify" that the taxpayer was not domiciled in Ohio at any time during the taxable year under (B) of R.C. 5747.24; 2) "verify" that the taxpayer had at least one abode outside of Ohio during the entire taxable year, and 3) "specify . . . the location of each such abode outside this state." *Id.*

The Board's determination that Dr. Cunningham was a "bright line" non-resident for 2008 income tax purposes is based both on findings of fact that are supported by reliable and probative evidence and my a correct conclusion of law. As shown in the Statement of Facts and in the argument below, the facts necessary to sustain the Board's decision in this case are either amply supported by the record or are not properly before this Court on appeal. We also show below that the Board correctly decided the legal issue on which this case turns: that Dr. Cunningham did not make a "false statement" on his 2008 Affidavit of Non-Ohio Residency, within the meaning of R.C. 5747.24(B). Since the Board's decision that Dr. Cunningham was a "bright line" non-resident for 2008 Ohio income tax purposes correctly applies the law to facts that are shown by reliable and probative evidence, the Board's decision should be affirmed.

Proposition of Law No. 1.

The Board of Tax Appeals' holdings that Dr. Cunningham had a place of abode outside of Ohio for all of 2008; that he had fewer than 182 Ohio contact periods in 2008; and that he timely filed an Affidavit of Non-Ohio Domicile for 2008 are supported by reliable and probative evidence and thus should be sustained.

R.C. 5747.24(B)(1) provides an irrebuttable presumption of non-Ohio income tax residency to a taxpayer who, for the tax year in question, meets all of the following requirements:

1. Had no more than 182 Ohio contact periods during that year (hereafter, the "Contact Period Test");
2. Had at least one "abode" outside Ohio during the entire year (hereafter, the "Abode Test");

3. Timely filed a statement on the form prescribed by the Tax Commissioner, claiming non-Ohio tax residency for the year (hereafter, the “Timely Statement Test”); and.

4. The individual making the statement just described does not make “a false statement” on the required form (hereafter, the “False Statement Test”).

There is nothing in either the Final Determination or the Notice of Appeal that places in issue whether the Cunninghams could not be “bright line” non-residents because of R.C. 5747.24(B)(2), under which individuals who change their state of domicile during the tax year may be part-year residents, but cannot be part-year residents. *See* ST at 1 – 2. Thus, there is no issue before this Court regarding whether the Cunninghams were ineligible for “bright line” non-residency based on R.C. 5747.24(B)(2).

In the Statement of Facts, we have shown that there is reliable and probative evidence in the record to support the Board’s factual conclusions that Dr. Kent Cunningham met the Contact Period Test, the Abode Test, and the Timely Statement test. Neither the Tax Commissioner’s Final Determination, nor his Notice of Appeal to this Court, appears to raise any serious questions regarding whether for 2008 Dr. Cunningham had fewer than 182 Ohio contact periods, had an abode outside of Ohio, or timely filed the form prescribed by the Tax Commissioner pursuant to R.C. 5747.24(B). Further, the Tax Commissioner has not raised any objections to these factual conclusions or the adequacy of the evidence that supports them in his Notice of Appeal. Thus, we ask this Court to hold that Dr. Cunningham met the Contact Period Test, the Abode Test, and the Timely Statement test under R.C. 5747.24(B) for 2008.

Proposition of Law No. 2.

A taxpayer who files the statement required by R.C. 5747.24(B) has not made a “false statement” under that section just by virtue of being domiciled in Ohio under common law rules for the year in question, or of listing a valid non-Ohio place of abode as a place of domicile on that statement, or of having a principal residence in Ohio for Homestead Exemption purposes.

The key legal issue in this case is whether Dr. Cunningham made a “false statement” within the meaning of R.C. 5747.24(B) on his timely filed Affidavit of Non-Ohio Domicile for 2008. If he made a false statement, per that section, he is not irrebuttably presumed to be a non-Ohio resident for 2008 income tax purposes and admits that he would be taxable as an Ohio resident for 2008. But, if he did not make a “false statement” on his affidavit within the meaning of the statute, and since it was shown above that he met R.C. 5747.24(B)’s Contact Period Test, Abode Test, and Timely Statement test for 2008, he is irrebuttably presumed not to be a resident of Ohio for 2008 income tax purposes and the Board of Tax Appeals’ decision should be affirmed.

1. *R.C. 5747.24(B) provides a test for determining non-Ohio income tax residency that applies only for income tax purposes and that is not the same as common law domicile.*

R.C. 5747.24(B) requires, as one of the conditions for an irrebuttable presumption of non-Ohio income tax residency, a statement “on the form prescribed by the Tax Commissioner” that meets certain requirements. First, the statement must verify that the individual filing the form “was not domiciled in this state *under this division* during the taxable year.” R.C. 5747.24(B)(1) (emphasis added). “Under this division” can only refer to Division (B) of R.C. 5747.24 – the portion of the statute that provides for the irrebuttable presumption. This choice of wording strongly suggests that the word “domicile” when used “under this division” (i.e., under R.C. 5747.24(B) does indeed mean something different than domicile when used elsewhere in

the statute. Otherwise, there would have been no need to add the words “under this division” to the description of what must be verified. Further, R.C. 5747.24 itself defines “domicile” only for purposes of R.C. Chapter 5747. – the income tax chapter – rather than for purposes of tax law generally or other Ohio law purposes. R.C. 5747.01 defines certain terms “as used under this chapter” (i.e., Chapter 5747.), including therein the definition of “resident” to include among other persons and legal entities “an individual who is domiciled in this state, subject to section 5747.24 of the revised code.” R.C. 5747.01(I)(1). The use of the phrase “subject to section 5747.24 of the revised code” after the word “domicile” suggests that income tax residency is based on common law domicile only to the extent that R.C. 5747.24 applies common law domicile in determining residency for Ohio income tax purposes, and not otherwise.

The plain wording of R.C. 5747.24 shows that the requirements for being classified as a non-Ohio income tax resident under division (B) (the “bright line” test) are different from the requirements under divisions (C) and (D) (the tests for taxpayers who do not qualify for the “bright line”). Under division (C), an individual with fewer than 182 Ohio contact periods, but who neither changed state of domicile during the year nor qualified for the “bright line” test, is presumed to be domiciled in Ohio for income tax purposes for the entire year, but may rebut this presumption for any part of the year by a preponderance of the evidence. Division (D) provides that an individual who has more than 182 Ohio contact periods and who did not change state of domicile during the year is also presumed to be domiciled in Ohio for the entire year, but requires a taxpayer to present clear and convincing evidence to rebut this presumption for any part of the year. Thus, a taxpayer whose income tax domicile or residence is determined under divisions (C) or (D) of R.C. 5747.24 has to provide some level of proof of “domicile”, which we can presume in that case means “common law domicile” since it is not otherwise defined in the

statute. By contrast, division (B) provides for an irrebuttable presumption of domicile, meaning that no further proof of domicile is either permitted or required for a taxpayer who meets the requirements of that section. Further, a taxpayer whose income tax domicile is determined under divisions (C) or (D) can be a part-year Ohio resident for income tax purposes, while division (B) provides only for non-residency for the entire year.

By its nature, an irrebuttable presumption identifies some elements that could be used to establish the presumed fact or classification in the absence of the presumption, and makes proof of the listed facts alone sufficient to establish that fact or presumption. Thus, by creating an irrebuttable presumption under R.C. 5747.24(B), the General Assembly has expressly created a situation in which income tax residency is not identical with common law domicile. Rather, a taxpayer qualifying under that division need only establish the facts required for the irrebuttable presumption to be classified as a non-resident of Ohio for state income tax purposes. R.C. 5747.24(B) requires that the taxpayer prove that the individual had a place of abode outside of Ohio for the full year, had fewer than 182 Ohio contact periods for the year, and timely filed the statement required by that division for the year. It does not expressly provide that common law domicile outside of Ohio is one of the elements that must be shown to qualify for the irrebuttable presumption. If such a requirement exists under R.C. 5747.24(B), it comes in only by virtue of the requirement that the taxpayer's required statement verify that the taxpayer "was not domiciled in Ohio" under R.C. 5747.24(B) at any time during the year, and that the taxpayer's statement not contain a "false statement." In the next sections of this argument, we show that a taxpayer does not make a "false statement" under R.C. 5747.24(B) if the taxpayer's common law domicile is in Ohio.

2. *The Tax Commissioner's interpretation of R.C. 5747.24(B) provides only a rebuttable presumption of non-Ohio income tax residency, even though the statute expressly creates an irrebuttable presumption.*

If the Tax Commissioner's interpretation is correct, there would be no irrebuttable presumption of non-Ohio tax residency or domicile under R.C. 5747.24(B), even though that division expressly says that there is one. Two of the requirements for an irrebuttable presumption of non-Ohio income tax domicile is that there be no false statements on the form that the taxpayer must file under R.C. 5747.24(B), and that statement must verify that the taxpayer was not domiciled in Ohio under that division. If a statement that one is not domiciled "under this division" is synonymous with a statement that the taxpayer is not domiciled in Ohio under the common law rules, the supposedly irrebuttable presumption that the taxpayer was not domiciled in Ohio for income tax purposes becomes a rebuttable presumption that the taxpayer is domiciled in Ohio for income tax purposes. If the Tax Commissioner found that a taxpayer was a common law domiciliary of Ohio, he would, as he did with Dr. Cunningham, hold that the taxpayer's "bright line" affidavit was ineffective by reason of a false statement regarding domicile. Since a taxpayer has the burden, on appeal, of showing that the Tax Commissioner's final determination is wrong (*see Narmac, Inc. v. Tracy*, 66 Ohio St.2d 637, 638, 1993-Ohio-25), this would place on the taxpayer the burden of showing that there was no false statement in the affidavit. And, if the "bright line" statement required the taxpayer to affirm common law domicile outside of Ohio, the taxpayer would have to prove affirmatively that he or she was not a common law Ohio domiciliary to be recognized as a non-Ohio income tax resident under the "bright line" statute. The evidence of common law domicile would, in effect, rebut an otherwise irrebuttable presumption, thus making the "irrebuttable presumption" meaningless and ineffective.

The Tax Commissioner's interpretation is unreasonable for several reasons. First, R.C. 5747.24(B) states that it creates an irrebuttable presumption, showing the clear intent of the General Assembly that the language be construed in such a way that there is in fact an irrebuttable presumption of non-Ohio income tax domicile. Second, it is not reasonable to conclude the General Assembly intended that a taxpayer who meets the additional requirements of R.C. 5747.24(B) – timely filing of a form and maintaining a non-Ohio abode for the full year - is treated no differently than a taxpayer under R.C. 5747.24(C) who also has fewer than 182 Ohio contact periods but who did not have to timely file an Affidavit of Non-Ohio Domicile or to show a non-Ohio place of abode. R.C. 5747.24(B) says that a taxpayer who does not timely file the form required by that division, or who makes a false statement on that form, is classified based on R.C. 5747.24(C). Division (C) provides that a taxpayer who has fewer than 182 Ohio contact periods, but who does not meet the other requirements for an irrebuttable presumption, has to prove common law domicile in Ohio by a preponderance of the evidence if the Commissioner challenges the taxpayer's domicile. But, under the Commissioner's interpretation, a taxpayer who takes the additional steps that supposedly qualify the individual to an irrebuttable presumption of residency would also have to prove common law domicile in Ohio by a preponderance of the evidence if the Commissioner challenges the taxpayer's domicile. Thus, under the Commissioner's construction of the statute, a taxpayer who timely files the statement required by R.C. 5747.24(B) and who maintains a non-Ohio abode for the entire year has the same additional burden of proof regarding domicile as a taxpayer who does not comply with those two requirements. It is not reasonable to believe that such a result was intended by the General Assembly. There would be no need for R.C. 5747.24(B), with its additional requirement for a timely filed affidavit and a place of abode outside of Ohio for the entire year, if

a taxpayer who seeks to have his or her Ohio income tax domicile determined under that division is in no better position than a taxpayer described in R.C. 5747.24(C) who must meet the same Contact Period Test, but not the Abode and Timely Statement tests.

The legislative history of R.C. 5747.24(B) also suggests that the requirements for the timely filing of a form without a “false statement” was not intended to create a substantive rule that a taxpayer must be domiciled outside Ohio under the common law test to obtain an irrebuttable presumption of non-Ohio domicile for state income tax purposes. Prior to its amendment in 2007, R.C. 5747.24(B) provided for both a rebuttable and a non-rebuttable presumption of income tax domicile outside Ohio. Ex. 9-3 and 9-4. A rebuttable presumption of non-Ohio income tax domicile was available to a taxpayer who met a Contact Period Test (which was then based on a 120 rather than 182 contact period threshold) and who had a place of abode outside Ohio for the entire year. Ex. 9-3. A taxpayer with a rebuttable presumption of non-Ohio domicile received an irrebuttable presumption if the Commissioner demanded, and the taxpayer filed, a statement containing some of the information required on the current Affidavit. *Id.* There was no requirement in the earlier version of the statute that the statement not contain a “false statement,” nor did the statement have to be in a form adopted by the Tax Commissioner. *Id.*

The 2007 amendments to R.C. 5747.24(B) made several changes. First, there was no longer a way for a taxpayer to obtain a rebuttable presumption that the individual was domiciled outside Ohio. *Id.* Instead, R.C. 5747.24(B) provided only a method for obtaining an irrebuttable presumption. *Id.* The statement that the Tax Commissioner once could request now became one that the taxpayer must file as an additional requirement for getting a presumption of non-residency under that section. *Id.* For the first time, the Tax Commissioner was authorized to

prescribe the form upon which the taxpayer made the statement under that division, and that form specifically had to list the taxpayers place or places of abode outside Ohio. *Id.* And, finally, the requirement that the form filed by the taxpayer not contain a “false statement” was added. *Id.*

Prior to the 2007 amendments to R.C. 5747.24(B), it is clear that the filing of the taxpayer’s statement served only a procedural or informational function, and that the text of the form did not impose additional substantive requirements. A taxpayer could obtain an irrebuttable presumption by meeting a Contact Period Test and a Non-Ohio Domicile Test, and by filing a statement. A taxpayer who was domiciled in Ohio under the common law test would clearly have been able to obtain an irrebuttable presumption of non-Ohio income tax domicile under the earlier version of R.C. 5747.24(B). And, there is nothing to suggest that the 2007 amendments were intended to change this result.

A more likely explanation for the 2007 changes to the required text of the form and the addition of the “false statement” language is that it was intended to give the Tax Commissioner tools to enforce the requirement that the taxpayer have at least one non-Ohio domicile during the entire tax year. Before the 2007 amendments, the required statement had to state that the taxpayer had a non-Ohio abode all year, but did not require the listing of the locations of the non-Ohio homes. The addition of this language made it easier for the Tax Commissioner to verify the taxpayer’s claim of a place of abode outside of Ohio for the year. The “false statement” requirement reinforced this by denying an irrebuttable presumption to a taxpayer who did not give the Commissioner the locations of the claimed non-Ohio abodes. This would be similar in effect to the tool that the Commissioner had both before and after the 2007 changes to require the

taxpayer to prove non-Ohio contact periods or lose the irrebuttable presumption. *See* R.C. 5747.24(E).

It also seems unlikely that the addition of the “false statement” language was intended to enact a substantive requirement that the taxpayer have common law domicile in Ohio because “I was not domiciled in Ohio for the entire year” is less a statement of a verifiable fact than a conclusion of law or a statement of opinion. It reflects a judgment of how domicile is defined as used in the form, and – if domicile did mean common law domicile – the weighing of many factors in a non-objective, “facts and circumstance” type of test. Dr. Cunningham’s testimony shows that he reasonably believed that this part of the form asked him to affirm that he was domiciled outside Ohio only by reference to the “bright line” test, not under the common law rule. Tr. 96 – 97. By contrast, a statement that “I had fewer than 182 contact periods in Ohio” or “I had at least one abode (place where I lived) outside of Ohio” is a much more objective, easily verifiable fact. It is much easier to show that a statement regarding abode or contact period is false than that a statement regarding domicile is false. When used in other contexts, a “false statement” refers not to a matter of opinion, but rather to a statement regarding a fact that can be objectively shown to be true or false. *See, e.g., State v. Coyne* (1980), 69 Ohio App.2d 63, 430 N.E.2d 473 (holding that a “false statement” under R.C. 2921.13 is a false assertion or declaration of a matter of fact). In a defamation action, for example, a statement of opinion is not a “false statement” regarding a mere opinion that is actionable under Ohio law. *Wampler v. Higgins*, 93 Ohio St.3d 111, 2001-Ohio- 1293,752 N.E.2d 962.

While the Tax Commissioner’s interpretation would make the irrebuttable presumption described in R.C. 5747.24(B) meaningless and ineffective, there is a far more reasonable interpretation of the statute under which the irrebuttable presumption is given effect as the

General Assembly intended. That more reasonable interpretation is that R.C. 5747.24(B)'s requirement that the taxpayer truthfully state that he was not domiciled in Ohio under that division is satisfied if the taxpayer meets the specific requirements for the irrebuttable presumption listed in that division, even if the taxpayer is domiciled in Ohio under the common law test. The next section of this argument shows further why that is the correct interpretation of R.C. 5747.24(B).

3. *The statement required by R.C. 5747.24(B) requires that the taxpayer verify that he or she meets the requirements for "bright line" non-Ohio income tax residency, not that the taxpayer is domiciled outside of Ohio under the common law.*

R.C. 5747.24(B)(1) creates both substantive and procedural requirements for an irrebuttable presumption of non-Ohio income tax residency. The substantive requirements are described above as the Contact Period Test (no more than 182 Ohio contact periods during the year) and the non-Ohio abode test (at least one non-Ohio place of abode for the entire year). R.C. 5747.24(B)(2) adds another substantive requirement: that the taxpayer not have changed state of domicile during that year. To these, R.C. 5747.24(B)(1) adds a procedural requirement that the taxpayer timely file a form containing certain statements described in that section, and the additional substantive requirement that the taxpayer not make a false statement on that form.

The procedural requirement of the form should not be read to create additional substantive requirements to qualify for an irrebuttable presumption. Except for the required language regarding domicile "under this division," the form required by R.C. 5747.24(B)(1) clearly is designed to notify the Tax Commissioner that the taxpayer claimed the irrebuttable presumption for the year and to provide information allowing the Tax Commissioner to verify that the substantive requirements for the presumption are met. Since the 2007 amendments to

R.C. 5747.24(B), the form must verify that the taxpayer had at least one non-Ohio abode for the entire year and must list each non-Ohio abode. R.C. 5747.24(B)(1). Ex. 9-4. This allows the Commissioner to research whether the addresses listed are in fact non-Ohio places of abode that the taxpayer had for the entire tax year. The filing of the form would also alert the Commissioner that he might want to ask the taxpayer to provide proof of non-Ohio contact periods under R.C. 5747.24(D), under which a taxpayer must prove contact periods by a preponderance of the evidence if the Commissioner challenges their number.

Under the Tax Commissioner's reading of the statute, however, the form required by R.C. 5747.24(B)(1) also imposes substantive requirements for an irrebuttable presumption that are not contained elsewhere in the statute. As just noted, the form requires that the location of non-Ohio abodes be identified, but the substantive requirement that the taxpayer have at least one non-Ohio abode for the entire year appears in the part of R.C. 5747.24(B)(1) that lists the substantive requirements for the irrebuttable presumption. There is no mention, outside of the requirement that the taxpayer verify non-Ohio domicile on the form, that the taxpayer must be domiciled in Ohio under the common law test to obtain an irrebuttable presumption. This, combined with the requirement that the taxpayer affirm only non-Ohio domicile "under this division," make it implausible that the required language on the form was intended to create a substantive requirement for a taxpayer to have common law domicile outside Ohio. Rather, it is more logical that the requirement to verify non-Ohio domicile "under this division" was intended to verify that the taxpayer had met the specifically enumerated requirements for the "bright line" test (the requirements "under this division") rather than also meeting the additional requirements regarding common law domicile (which apply in many situations that are not "under this division").

The far more reasonable interpretation of R.C. 5747.24(B)(1)'s requirement that a taxpayer verify domicile "under this division" is that it requires only that the taxpayer verify meeting the specifically enumerated substantive requirements listed in that division, rather than that it requires the taxpayer to verify common law domicile outside of Ohio. Under that more reasonable interpretation, Dr. Cunningham did not make a "false statement" that he was not domiciled in Ohio "under this division," because he clearly met the requirements for the irrebuttable presumption if those requirements do not include that he having a common law domicile outside of Ohio. Next, we address why the second claimed "false statement" on Dr. Cunningham's affidavit was not a false statement within the meaning of R.C. 5747.24(B)(1) and thus should not deny him an irrebuttable presumption of non-Ohio income tax domicile.

4. *R.C. 5747.24(B) requires the taxpayer to verify at least one non-Ohio place of abode for the year and to list all non-Ohio places of abode, but does not require the taxpayer to identify a place of common law domicile outside of Ohio.*

The Tax Commissioner claims that Dr. Cunningham made a second "false statement" on his Affidavit of Non-Ohio Domicile because stated that he was domiciled in Tennessee but was not. But R.C. 5747.24(B)(1) does not require that taxpayer to have, or to identify on the required form, a domicile outside of Ohio. Rather, it requires the taxpayer to have at least one "place of abode" outside Ohio for the entire year, and to list the non-Ohio place(s) of abode. R.C. 5747.24(B)(1). It is undisputed that Dr. Cunningham had only one place of abode outside of Ohio, and that it was in Tennessee. By correctly identifying Tennessee as the location of his only non-Ohio abode, he complied with the requirement in the statute itself that he "specify in the statement the location of each such abode outside this state." R.C. 5747.24(B)(1)(b).

The relevant portion of Dr. Cunningham's Affidavit (Ex. A-1) reads as follows:

“1. I was not domiciled in Ohio at any time during taxable year 2008. I was domiciled in _____ . (name of state(s) where domiciled).

“2. I had at least one abode (place where I lived) outside of Ohio for the entire taxable year. Name of city (or cities), states (if within the USA) and country (if not within the USA) where I lived if different from statement 1 above.

_____”.

Dr. Cunningham wrote “TN” for “Tennessee” on the blank on line 1, and placed nothing in the blank after item 2.

Dr. Cunningham explained in his testimony why he reasonably believed that, since his only non-Ohio place of abode was in Tennessee, it was correct to list Tennessee as the answer to “I was domiciled in” on line 1. Tr. at 97 - 99, 122 – 123. Having listed it there, however, he clearly was not required to also list it after line 2, since it requires abodes to be listed only “if different from statement 1 above” on the form.

Dr. Cunningham may very well have been confused about whether to list Tennessee as the answer to the blank at the end of line 1. or the blank after line 2. But, if he was confused, the Tax Commissioner could have avoided that confusion by not asking the taxpayer to state on the form something that the statute does not require to be stated on the form. Further, by adding this to the form, the Tax Commissioner is obviously trying either to add a substantive requirement to the statute, or provide an opportunity for the taxpayer to make a mistake that the Commissioner would then use to allege that the taxpayer had made a “false statement” on the form and thus was ineligible for an irrebuttable presumption of non-Ohio income tax domicile. That, in fact, is what happened here. The Tax Commissioner alleges that Dr. Cunningham falsely stated that he was domiciled in Tennessee, as well as falsely stating that he was not domiciled in Ohio, and that

each of these is an independent basis for denying Dr. Cunningham the irrebuttable presumption. Amended Merit Brief of Appellant at 2.

In this regard, the Tax Commissioner's position impermissible permits the Commissioner to add to the substantive requirements for "bright line" non-residency for income tax purposes merely by the wording of his form. The statute does not require a declaration of a place of domicile outside of Ohio – only a place of abode outside of Ohio – but the Commissioner's form asks for a declaration of a place of domicile outside Ohio. *See* R.C. 5747.24(B)(1); Ex. A-1. The Commissioner, as here, can attempt to deny an irrebuttable presumption based on an allegedly false statement regarding a matter which the Commissioner put on the form that the statute does not require on the form. There is nothing in the statute indicating that the Commissioner may add substantive requirements for the irrebuttable presumption to those provided in the statute itself, and his ability to adopt a form should not be taken to apply the authority to add those requirements. Further, R.C. 5747.24(B)(1) does not expressly deny an irrebuttable presumption to one who makes a false statement on the form adopted by the Commissioner, but rather a false statement on the "statement" required by that section. The statement required by that section must identify a non-Ohio place of abode, but not a non-Ohio domicile. A more reasonable reading of the "false statement" language in R.C. 5747.24(B)(1) is that it denies an irrebuttable presumption only to one who makes a false statement with regard to the matters that the statute requires to be in the taxpayer's statement – not with regard to text that the Commissioner has added that is not required by the statute. Read in this fashion, Dr. Cunningham could not have made a "false statement" under R.C. 5747.24(B)(1) by listing Tennessee as his state of domicile, especially if he reasonably believed that he would be complying with the statute by listing his only non-Ohio place of abode on that part of the form.

The Tax Commissioner's position that a "false statement" on the form he adopts denies the taxpayer an irrebuttable presumption, even if the form deviates from the statutory requirements for the taxpayer's statement, would also allow the Commissioner to amend the definition of "domicile" for income tax purposes. Perhaps he has attempted just that. The form asks the taxpayer to state that the individual "was not domiciled in Ohio at any time during 2008." While the statute requires that in the taxpayer's statement, it also plainly requires that the statement be with regard to domicile "under this division" (under R.C. 5747.24(B)). The Tax Commissioner's form makes no reference to "under this division" in its statement regarding domicile. This should be read to be equivalent to the statement required by the statute – that the taxpayer affirms domicile under the "bright line" test language. But the Commissioner's broad view of the scope of "false statement" under R.C. 5747.24(B) would allow him to require the taxpayer to affirm common law domicile, not just "bright line" domicile, outside Ohio or be denied the irrebuttable presumption. Perhaps the Commissioner has attempted to do that here, since his argument that a "false statement" was made relies entirely on a "false statement" in the context of the wording of the form, not to a false statement regarding a matter that the statute says must be included on the taxpayer's statement. Amended Merit Brief of Appellant at 1 - 2.

Since the statute requires that the taxpayer declare one or more places of non-Ohio abode, but not a place of non-Ohio domicile, Dr. Cunningham did not make a "false statement" on his required statement within the meaning of R.C. 5747.24(B) by listing his only non-Ohio abode on line 1 of the Commissioner's form rather than on line 2. He complied with the statute by listing his non-Ohio abode. The Commissioner could not add to the statute a requirement for a non-Ohio domicile to be listed on the statement.

5. *A taxpayer may qualify as a non-Ohio resident for state income tax purposes under R.C. 5747.24(B) and at the same time have a primary residence in Ohio for Homestead Exemption purposes.*

The Commissioner's Final Determination refused to recognize Dr. Cunningham's Affidavit, and thus his irrebuttable presumption of non-Ohio domicile for purposes of our state income tax, because the Cunninghams applied for Homestead Exemption on their Ohio property. ST 2, 4 on January 4, 2008. In their application, they stated that the Ohio home was their "principal place of residence." ST 2; Ex. B. The Board of Tax Appeals found that there was no conflict, on the facts of this case, between claiming Homestead Exemption for the Cincinnati property and claiming non-Ohio domicile under the income tax statute. Board of Tax Appeals Decision at 5, fn. 5. Their basis for that was that, based on testimony by Dr. Cunningham that the Board found "credible," the Cunninghams "spent more time at their Ohio home than at their Tennessee home" and spent approximately 3 months "traveling outside Ohio and Tennessee during 2008." *Id.* On this basis, they found that the statement on the Cunningham's Homestead Exemption application that the Cincinnati home was their "primary residence" could be true, even if they were not domiciled in Ohio for income tax purposes. *Id.*

This finding by the Board of Tax Appeals is reasonable and lawful and thus should be upheld. Their decision to accept Dr. Cunningham's testimony as credible, and to find that the Cincinnati home was the couple's "primary residence," is entitled to deference. *AERC Saw Mill Village, Inc. v. Franklin County Board of Revision*, 127 Ohio St.3d 44, 2010-Ohio-4468, 936 N.E.2d 472, ¶ 15. The Board's legal conclusion that the requirements for Homestead Exemption are different from those for bright-line income tax domicile is also correct. As noted in earlier sections, "bright line" non-Ohio domicile for Ohio income tax purposes does not require common law domicile outside Ohio, and thus is not inconsistent with have a "primary residence"

in Ohio. Thus, the test for Homestead Exemption and for “bright line” non-Ohio domicile are different. Since the Board’s factual conclusions are supported by the record, and since its legal conclusion was correct, this part of the Board’s decision should be affirmed. *See id.*

Since filing a Homestead Exemption Application is not incompatible with claiming an irrebuttable presumption of non-Ohio income tax domicile, the original basis for the Tax Commissioner’s denial of Dr. Cunningham’s claim for an irrebuttable presumption was wrong as a matter of law. The Board of Tax Appeals correctly decided that Dr. Cunningham was not an income tax resident of Ohio in 2008 under the “bright line” test, even though he signed a Homestead Exemption application

III. CONCLUSION

The Board of Tax Appeals’ decision that Dr. Cunningham met the requirements for being treated as a non-resident for 2008 Ohio income tax purposes under the “bright line” test of R.C. 5747.24(B) is both supported by reliable and probative evidence on the record and correct as a matter of law. Since their decision was thus neither unreasonable nor unlawful, it should be affirmed with regard to Dr. Cunningham’s not being a resident of Ohio for purposes of 2008 Ohio income tax. We concur with the Tax Commissioner, however, that the Board of Tax Appeals should be directed to remand to the Tax Commissioner the question of what Mrs. Cunningham’s tax liability is for 2008 based on its finding that she, but not he, is classified as an Ohio resident for 2008 state income tax purposes.

Respectfully submitted,



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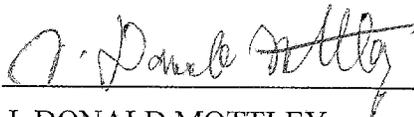
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellees, Kent W. & Sue E. Cunningham, has been sent by regular mail this 9th day of September, 2014, to DANIEL W. FAUSEY, Assistant Attorney General, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215.



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Counsel for Appellees, Kent & Sue Cunningham

APPENDIX

Prior Versions of R.C. 5747.24..... 28-31

<< OH ST 5747.24 >>

This section is to be ~~used~~ **applied** solely for the purposes of Chapters 5747. and 5748. of the Revised Code.

(A)~~(1)~~ As used in this section ~~and section 5747.25 of the Revised Code:~~

~~(a) Except as otherwise provided in division (A)(2) of this section, an~~ **(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 away overnight from that abode spends at least some portion, however minimal, of each of two consecutive days in this state.

~~(b)~~ **(2)** An individual is considered to be "away overnight from the individual's abode located 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 on one day and ending at any time on the next day.

~~(c) "Medical hardship" includes circumstances under which the individual or a member of the individual's immediate or extended family is admitted as a patient into a hospital located in this state, examined in this state by a medical professional, admitted into a nursing home in this state, receiving nursing care in this state while staying in a dwelling located in this state, or otherwise receiving ongoing, necessary medical care in this state. "Medical hardship" includes receiving treatment or care for acute or chronic illness or obstetric treatment or care.~~

~~(d) "Medical professional" means a person licensed under Chapter 4715., 4723., 4725., 4729., 4730., 4731., 4732., 4734., 4753., 4755., 4757., 4759., 4760., 4761., 4762., or 4773. of the Revised Code.~~

~~(e) "Immediate or extended family" of an individual means the individual's spouse, children, grandchildren, parents, grandparents, siblings, in-laws, or any of the individual's dependents.~~

~~(2) Up to thirty periods that would otherwise constitute contact periods under division (A)(1)(a) of this section shall not be considered contact periods during a taxable year if the individual spends any portion of either day of each such contact period for one or more of the following purposes:~~

~~(a) To provide services for no consideration or to raise funds for an organization described in section 501(c)(3) of the Internal Revenue Code. "Consideration" does not include any reimbursement of the individual's actual expenses directly or indirectly related to such activity.~~

~~(b) To attend to a medical hardship involving the individual or a member of the individual's immediate or extended family or to attend a funeral involving a member of the individual's immediate or extended family.~~

(B) An (1) Except as provided in division (B)(2) of this section, an individual who during a taxable year has no more than one hundred twenty eighty-two contact periods in this state, which need not be consecutive, and who during the entire taxable year has at least one abode outside this state, is presumed to be not domiciled in this state during the taxable year. The 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, in writing and by personal service or certified mail, return receipt requested, may request on the form prescribed by the commissioner, a statement from an the individual verifying that the individual was not domiciled in this state under this division during the taxable year. The commissioner shall not make such a request after the expiration of the period, if any, within which the commissioner may make an assessment under section 5747.13 of the Revised Code against the individual for the taxable year. Within sixty days after receiving the commissioner's request In the statement, the individual shall submit a written statement to the commissioner stating verify both of the following:

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

(2) (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 ~~submit~~ **timely file** the statement as required **or makes a false statement**. If the individual fails to ~~submit~~ **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.

In the case of an individual who dies **before the statement would otherwise be due**, the personal representative of the estate of the deceased individual may comply with this division by making to the best of the representative's knowledge and belief the statement under ~~this division~~ **(B) (1) of this section** with respect to the deceased individual, and ~~submitting~~ **filing** the statement to

with the commissioner within **the later of the date the statement would otherwise be due or sixty days after receiving the commissioner's request for it the date of the individual's death.**

An individual or personal representative of an estate who knowingly makes a false statement under this division **(B)(1) of this section** is guilty of perjury under section 2921.11 of the Revised Code.

(2) Division (B) of this section does not apply to an individual changing domicile from or to this state during the taxable year. Such an individual is domiciled in this state for that portion of the taxable year before or after the change, as applicable.

(C) An individual who during a taxable year has ~~less~~ **fewer** than one hundred eighty-three contact periods in this state, which need not be consecutive, and who is not irrebuttably presumed under division (B) of this section to be not domiciled in this state with respect to that taxable year, is presumed to be domiciled in this state for the entire taxable year, **except as provided in division (B)(2) of this section.** An individual can rebut this presumption for any portion of the taxable year only with a preponderance of the evidence to the contrary. An individual who rebuts the presumption under this division for any portion of the taxable year is presumed to be domiciled in this state for the remainder of the taxable year for which the individual does not provide a preponderance of the evidence to the contrary.

(D) An individual who during a taxable year has at least one hundred eighty-three contact periods in this state, which need not be consecutive, is presumed to be domiciled in this state for the entire taxable year, **except as provided in division (B)(2) of this section.** An individual can rebut this presumption for any portion of the taxable year only with clear and convincing evidence to the contrary. An individual who rebuts the presumption under this division for any portion of the taxable year is presumed to be domiciled in this state for the remainder of the taxable year for which the individual does not provide clear and convincing evidence to the contrary.

(E) If the tax commissioner challenges the number of contact periods an individual claims to have in this state during a taxable year, the individual bears the burden of proof to verify such number, by a preponderance of the evidence. An individual challenged by the commissioner is presumed to have a contact period in this state for any period for which ~~he~~ **the individual** does not prove by a preponderance of the evidence that the individual had no such contact period.

Amendment Note: 2006 H 73 rewrote this section, which prior thereto read:

"This section is to be used solely for the purposes of Chapters 5747. and 5748. of the Revised Code.

"(A)(1) As used in this section and section 5747.25 of the Revised Code:

"(a) Except as otherwise provided in division (A)(2) of this section, 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 away overnight from that abode spends at least some portion, however minimal, of each of two consecutive days in this state.

"(b) An individual is considered to be 'away overnight from the individual's abode located 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 on one day and ending at any time on the next day.

"(c) 'Medical hardship' includes circumstances under which the individual or a member of the individual's immediate or extended family is admitted as a patient into a hospital located in this state, examined in this state by a medical professional, admitted into a nursing home in this state, receiving nursing care in this state while staying in a dwelling located in this state, or otherwise receiving ongoing, necessary medical care in this state. 'Medical hardship' includes receiving treatment or care for acute or chronic illness or obstetric treatment or care.

"(d) 'Medical professional' means a person licensed under Chapter 4715., 4723., 4725., 4729., 4730., 4731., 4732., 4734., 4753., 4755., 4757., 4759., 4760., 4761., 4762., or 4773. of the Revised Code.

"(e) 'Immediate or extended family' of an individual means the individual's spouse, children, grandchildren, parents, grandparents, siblings, in-laws, or any of the individual's dependents.

"(2) Up to thirty periods that would otherwise constitute contact periods under division (A)(1)(a) of this section shall not be considered contact periods during a taxable year if the individual spends any portion of either day of each such contact period for one or more of the following purposes:

"(a) To provide services for no consideration or to raise funds for an organization described in section 501(c)(3) of the Internal Revenue Code. 'Consideration' does not include any reimbursement of the individual's actual expenses directly or indirectly related to such activity.

"(b) To attend to a medical hardship involving the individual or a member of the individual's immediate or extended family or to attend a funeral involving a member of the individual's immediate or extended family.

"(B) An individual who during a taxable year has no more than one hundred twenty contact periods in this state, which need not be consecutive, and who during the entire taxable year has at least one abode outside this state, is presumed to be not domiciled in this state during the taxable year. The tax commissioner, in writing and by personal service or certified mail, return receipt requested, may request a statement from an individual verifying that the individual was not domiciled in this state under this division during the taxable year. The commissioner shall not make such a request after the expiration of the period, if any, within which the commissioner may make an assessment under section 5747.13 of the Revised Code against the individual for the taxable year. Within sixty days after receiving the commissioner's request, the individual shall submit a written statement to the commissioner stating both of the following:

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

"(2) During the entire taxable year, the individual had at least one abode outside this state.

"The presumption that the individual was not domiciled in this state is irrebuttable unless the individual fails to submit the statement as required. If the individual fails to submit the statement as

required, the individual is presumed under division (C) of this section to have been domiciled in this state the entire taxable year.

"In the case of an individual who dies, the personal representative of the estate of the deceased individual may comply with this division by making to the best of the representative's knowledge and belief the statement under this division with respect to the deceased individual, and submitting the statement to the commissioner within sixty days after receiving the commissioner's request for it.

"An individual or personal representative of an estate who knowingly makes a false statement under this division is guilty of perjury under section 2921.11 of the Revised Code.

"(C) An individual who during a taxable year has less than one hundred eighty-three contact periods in this state, which need not be consecutive, and who is not irrebuttably presumed under division (B) of this section to be not domiciled in this state with respect to that taxable year, is presumed to be domiciled in this state for the entire taxable year. An individual can rebut this presumption for any portion of the taxable year only with a preponderance of the evidence to the contrary. An individual who rebuts the presumption under this division for any portion of the taxable year is presumed to be domiciled in this state for the remainder of the taxable year for which the individual does not provide a preponderance of the evidence to the contrary.

"(D) An individual who during a taxable year has at least one hundred eighty-three contact periods in this state, which need not be consecutive, is presumed to be domiciled in this state for the entire taxable year. An individual can rebut this presumption for any portion of the taxable year only with clear and convincing evidence to the contrary. An individual who rebuts the presumption under this division for any portion of the taxable year is presumed to be domiciled in this state for the remainder of the taxable year for which the individual does not provide clear and convincing evidence to the contrary.

"(E) If the tax commissioner challenges the number of contact periods an individual claims to have in this state during a taxable year, the individual bears the burden of proof to verify such number, by a preponderance of the evidence. An individual challenged by the commissioner is presumed to have a contact period in this state for any period for which he does not prove by a preponderance of the evidence that the individual had no such contact period."