

In the
Supreme Court of Ohio

KENT W. & SUE E. CUNNINGHAM,	:	Case No. 2014-0532
	:	
Appellees,	:	
	:	
v.	:	On Appeal from the
	:	Ohio Board of Tax Appeals
	:	
JOSEPH W. TESTA,	:	Board of Tax Appeals
TAX COMMISSIONER OF OHIO,	:	Case No. 2011-4641
	:	
Appellant.	:	
	:	

**APPELLEES' LIST OF ADDITIONAL AUTHORITIES TO BE RELIED UPON
DURING ORAL ARGUMENT**

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NOTICE PURSUANT TO S.CT.PRAC.R. 17.08

Pursuant to S.Ct.Prac. R. 17.08, Appellees, Kent and Sue Cunningham, hereby notify the Court that they intend to rely during oral argument upon the following authorities which are not cited in the briefs filed with the Court:

Cases

Calloway v. Ohio State Med. Bd., 2013 -Ohio- 2069, 990 N.E.2d 673

Nestle Co. v. Porterfield (1971), 28 Ohio St.2d 190, 277 N.E.2d 222

Schill v. Cincinnati Ins. Co., 141 Ohio St.3d 382, 2014-Ohio-4527

SHV North America Corp. v. Tracy (1994), 70 Ohio St.3d 395, 639 N.E.2d 64

State v. Adams, 3 Ohio App.3d 50 (1982), 443 N.E.2d 1047, 3 O.B.R. 57

State ex rel. Husted v. Brunner, 123 Ohio St.3d 288, 2009-Ohio-5327

State ex rel. Olsen v. Industrial Commission (1967), 9 Ohio St.2d 47, 223 N.E.2d 362

Warren v. Rebhan, Slip Opinion No. 2011-Ohio-6340, *unpublished**

Other authorities

Excerpt from Amended Substitute House Bill 494 of the 130th General Assembly (amendment to R.C. 5747.24)*

Excerpt from Legislative Service Commission Final Analysis of Amended Substitute House Bill 494 of the 130th General Assembly (discussion of amendment to R.C. 5747.24)*

Excerpt from Legislative Service Commission Analysis of House Bill 5 of the 130th General Assembly, As Introduced (discussion of R.C. 5747.24)*

Excerpt from Legislative Service Commission Final Analysis of Substitute House Bill 5 of the 130th General Assembly (discussion of residency provisions)*

Legislative Service Commission Final Analysis of Substitute House Bill 73 of the 126th General Assembly*

Ohio Department of Taxation Information Release IT 1996-01 Federal Law Pre-empting State Taxation of Retirement Plan Income (Revised May 2007)*

Ohio Department of Taxation Information Release IT 2006-04 Non-Resident Married Filing Jointly (Revised March 2007)*

Ohio Department of Taxation, Form IT DA-NM and Instructions (Taxable Year 2008)*

* Copy attached to this pleading.

Respectfully submitted,

/s J. Donald Mottley

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading, including attachments, has been sent by regular mail and via email attachment this 2nd day of March, 2015, to DANIEL W. FAUSEY, Assistant Attorney General, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215, Daniel.Fausey@ohioattorneygeneral.gov, Counsel for Appellant Tax Commissioner of Ohio.

/s J. Donald Mottley
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2011 WL 6157317

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eleventh District, Trumbull County.

City of WARREN, Ohio, Plaintiff–Appellant, v. Eric J. REBHAN, Co–Executor of the Estate of John C. Rebhan, Deceased, et al., Defendants–Appellees.

No. 2011–T–0011. | Decided Dec. 12, 2011.

Synopsis

Background: Neighboring municipality brought declaratory judgment action against township that was claiming to have been decedent’s domicile for estate tax purposes. The Court of Common Pleas, Probate Division, Trumbull County, CASE NO. 2011-T-0011, entered judgment declaring township as decedent’s domicile. Municipality appealed.

Holdings: The Court of Appeals, Cynthia Westcott Rice, J., held that:

[1] trial court recognized township’s burden to overcome presumption that decedent’s last known address in neighboring municipality remained his domicile for estate tax purposes, and

[2] evidence was sufficient to establish that township rather than neighboring municipality was decedent’s domicile for purposes of estate taxation on intangible personal property.

Affirmed.

West Headnotes (2)

[1] Declaratory Judgment Subjects of Relief in General Declaratory Judgment

Scope of Inquiry and Powers of Court

Trial court recognized township’s burden to overcome presumption that decedent’s last known address in neighboring municipality remained his domicile for estate tax purposes, in declaratory judgment action in which neighboring municipality and township each asserted right to collect estate taxes on intangible personal property; in entering judgment against municipality, trial court determined the responding parties met their reciprocal burden of proof and established, by a preponderance of the evidence, that decedent changed his domicile from the municipality property to the township property. R.C. 5731.51.

Cases that cite this headnote

[2] Declaratory Judgment Weight and Sufficiency

Evidence was sufficient to establish that township, rather than neighboring municipality, was decedent’s domicile for purposes of estate taxation on intangible personal property, in declaratory judgment action in which township and municipality each claimed domicile status in order to collect the tax; evidence showed that decedent intended to abandon his domicile in the municipality in favor of acquiring a new domicile in township, and the entirety of the evidence on this issue revealed that the nature of the decedent’s activities at the municipality dwelling was related to his antique collecting business. R.C. 5731.51.

1 Cases that cite this headnote

Civil Appeal from the Court of Common Pleas, Probate Division, Case No.2010 CVA 0016.

Attorneys and Law Firms

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Matthew G. Vansuch, Harrington, Hoppe & Mitchell, LTD, Warren, OH, for Defendants–Appellees, Vienna Township and Vienna Township Trustees Jeffrey E. Dreves, Heidi Brown, and Richard Dascenzo, Jr.

Mike DeWine, Ohio Attorney General, and Daniel Warner Fausey, Assistant Attorney General, Columbus, OH, for Defendant–Appellee, Joseph W. Testa as Tax Commissioner, Ohio Department of Taxation.

Opinion

CYNTHIA WESTCOTT RICE, J.

*1 { ¶ 1} Appellant, the city of Warren, Ohio (“Warren”), appeals from the judgment of the Trumbull County Court of Common Pleas, Probate Division, declaring Vienna Township, Ohio, the domicile of the decedent, John C. Rebhan, for purposes of estate taxation on intangible personal property pursuant to R.C. 5731.51. We affirm the trial court’s judgment.

{ ¶ 2} The decedent passed away on December 30, 2008. At the time of his death, the decedent owned four residences: a vacation home in Ft. Lauderdale, Florida; a vacation home on Lake Erie in Sandusky, Ohio; and two elaborate mansions in Trumbull County, Ohio—one in the city of Warren and the other in Vienna Township.

{ ¶ 3} The decedent’s estate was administered by the Trumbull County Probate Court in a separate case. On behalf of the estate, the decedent’s co-executors, his children Eric and Regina Rebhan, submitted payment on the estimated Ohio estate taxes and filed a tax return identifying the situs of their father’s domicile as Vienna Township. Estate taxes on real property and tangible personal property are distributed to the political subdivision where the property is located at the time of a decedent’s death. See R.C. 5731.50. Alternatively, the taxes on a decedent’s intangible personal property are distributed to the political subdivision where the decedent was domiciled at the time of death. R.C. 5731.51.

{ ¶ 4} While the Tax Commissioner of the state of Ohio was considering the correctness of the tax return, Warren filed a declaratory judgment action against Vienna Township, the members of its Board of Trustees, the

co-executors of decedent’s estate, Trumbull County Auditor Adrian Biviano, and the Tax Commissioner (collectively, “appellees”), effectively contesting the domicile of the decedent. The complaint sought a declaration that the decedent was domiciled in the city of Warren pursuant to his residence at 3625 E. Market Street, Warren, Ohio 44484. Appellees filed answers to the complaint, and the trial court set the matter for hearing.

{ ¶ 5} At the evidentiary hearing, the only issue before the trial court was whether, at the time of his death, the decedent was a domiciliary of the city of Warren pursuant to his residence at 3625 E. Market Street, Warren, Ohio (“Warren property”), or a domiciliary of Vienna Township pursuant to his residence at 5000 Creekside Boulevard, Vienna, Ohio (“Vienna property”). The following represents a summary of the facts adduced at the hearing:

{ ¶ 6} The decedent acquired 3625 E. Market Street, Warren, Ohio 44484 in the summer of 1976. At the time of the decedent’s death, he received his personal mail at the Warren property. Further, the Trumbull County Auditor’s records listed the Warren property as receiving the 2.5 percent tax reduction via the Homestead Exemption. And Ohio Department of Motor Vehicle records from 2000 through 2008 show various motor vehicle registrations identifying the decedent’s mailing address as 3625 E. Market Street, Warren, Ohio 44484. The decedent’s 2005 Chevrolet title, issued September 22, 2008, listed the decedent’s address as 3625 E. Market Street, Warren, Ohio 44484. And the decedent’s will, executed on September 2, 2004, stated the decedent’s address was 3625 E. Market Street, Warren, Ohio 44484.

*2 { ¶ 7} Notwithstanding these uncontested points, the evidence revealed the decedent had not lived in the Warren property for some time and, in recent years, had been using the residence exclusively as an office and a storage facility for his valuable antique collection. It was also uncontroverted that the residence on the Warren property required some maintenance and many of its outdoor fixtures, including its pool, were dilapidated and no longer operational.

{ ¶ 8} With respect to the Vienna property, evidence showed the decedent acquired the home at 5000 Creekside, Vienna, Ohio 44473 in October 1996. The decedent’s Florida death certificate reported the Vienna property was the decedent’s residence at the time of his death. Moreover, the decedent’s individual income tax returns from the years 2002 through 2008 listed the decedent’s home address as 5000 Creekside, Vienna,

Ohio 44473. Similarly, the decedent's W-2 wage and tax statement for the same years show the decedent as an employee of Warren Fabricating Corp., whose address was 5000 Creekside, Vienna, Ohio 44473. And the decedent's Bank One checking account listed 5000 Creekside, Vienna, Ohio 44473 as the decedent's address.

{ ¶ 9} The testimony of the decedent's children, ex-wife, close friends, and business associates demonstrated that the decedent had lived at the Vienna property from approximately 2000 or 2001 until the date of his death. The uncontroverted evidence also showed that, for at least five years before the decedent's death, family and holiday gatherings were held at the Vienna property. Alternatively, no such gatherings had been held at the Warren property since 1995, the date of Regina's wedding. Moreover, the evidence revealed that, prior to the decedent's death, the Vienna property was the residence at which the decedent ate, "unwound," slept, and ultimately, was the place he could be found, if needed. In light of these points, the decedent's children, ex-wife, friends, and close business associates testified the decedent, as far as they were aware, "lived" at the residence on the Vienna property.

{ ¶ 10} Based upon the foregoing evidence, the trial court concluded that, as early as 2002, the decedent intentionally changed his domicile from the Warren property to the Vienna property and accompanied such intention with acts indicating a selection of a new domicile. The court stated:

{ ¶ 11} "Over the years from 1996 through 2002, [the decedent] made the 'Warren Property' less habitable as a home and the 'Vienna Property' more habitable as a home. His intent to make a house a home is evidenced by his utilization of the 'Vienna property' and in contrast to convert the 'Warren Property' from a domicile/residence to an office and sanctuary for his valuable antique collections.

{ ¶ 12} " * * *

{ ¶ 13} "Therefore, this Court finds by the preponderance of the evidence that [the decedent] abandoned his domicile at the 'Warren Property' sometime in 2002 and acquired a new domicile in the 'Vienna Property' at that time, and continued to maintain the 'Vienna Property' as his domicile up until his death."

*3 { ¶ 14} From the foregoing final judgment, Warren filed a notice of appeal and now assigns two errors for our review. Its first assignment of error provides:

{ ¶ 15} "[The] Trial Court erred to the prejudice of the Appellant by imposing the burden of proof of change of domicile on the Appellant."

[1] { ¶ 16} Under this assignment of error, Warren asserts that because the decedent was domiciled in the city of Warren upon his purchase of the Warren property in 1976, the burden of proving a change in domicile was on the responding parties. We agree with Warren's construction of the law; however, there is nothing in the record that would indicate the trial court placed the burden upon Warren to establish a change in domicile.

{ ¶ 17} The trial court, in its judgment entry, stated: "[t]he burden of proof of domicile rests upon the party whose right to affirmative relief depends upon establishing his domicile or the domicile of another in a given place. In this case, that is the City." This statement is consistent with the law of domicile. The law in this area is well-established: " 'a person is presumed to continue his old domicile until it is clearly shown that he has acquired a new one.' " *Springfield v. Betts* (1996), 114 Ohio App.3d 70, 73, 682 N.E.2d 1025, quoting 36 Ohio Jurisprudence 3d (1982), Domicile, Section 19. In this case, evidence was presented to demonstrate that the decedent purchased the Warren property in 1976 and established his domicile at that property. This evidence was sufficient for Warren to meet its initial burden of proof. *E. Cleveland v. Landingham* (1994), 97 Ohio App.3d 385, 391, 646 N.E.2d 897. The trial court acknowledged this point where, in its judgment entry, it found: " * * * the collective testimony of the witnesses demonstrated that [the decedent's] original domicile and residence was the 'Warren Property' that he acquired in 1976."

{ ¶ 18} Once Warren established the decedent's domicile in the city of Warren, the burden *then* shifted to Appellee-Vienna "only because a person is presumed to continue in his own domicile until clearly shown that he has acquired a new one." *Id.* Accord *Holtz v. Holtz*, 2d Dist. No.2005-CA-43, 2006-Ohio-1812, at ¶ 19; *Betts*, supra.

{ ¶ 19} Here, Warren met this prima facie burden of demonstrating the decedent was a domiciliary of the city of Warren; by necessary implication, the burden of proof then shifted to the responding parties to demonstrate the decedent acquired a new domicile in Vienna Township.¹ Simply because the trial court did not expressly state that the burden of establishing a domiciliary change shifted to the responding parties, does not imply the court erred in drawing its legal conclusion. Rather, the trial court, in entering judgment against Warren, determined the

responding parties met their reciprocal burden of proof and established, by a preponderance of the evidence, that the decedent changed his domicile from the Warren property to the Vienna property.² There is nothing in the record to indicate the trial court required Warren to establish a change in the decedent's domicile. We therefore discern no problem in the manner the trial court allocated the relative burdens of proof or the way in which it analyzed the case.

*4 { ¶ 20} Warren's first assignment of error is without merit.

{ ¶ 21} For its second assignment of error, Warren alleges:

^{12]} { ¶ 22} "The trial court's decision is against the manifest weight of the evidence."

{ ¶ 23} The underlying action sought a declaration that the decedent was a domiciliary of the city of Warren. "The granting or denying of declaratory relief is a matter for judicial discretion, and where a court determines that a controversy is so contingent that declaratory relief does not lie, this court will not reverse unless the lower court's determination is clearly unreasonable." *Bilyeu v. Motorists Mut. Ins. Co.* (1973), 36 Ohio St.2d 35, 303 N.E.2d 871, syllabus; reaffirmed by *Mid-Am. Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 863 N.E.2d 142, 2007-Ohio-1248, at ¶ 14. In ruling that the Vienna property was the decedent's domicile at his death, the trial court denied Warren the relief it sought. At issue, therefore, is whether the trial court's ruling was reasonable in light of the evidence presented at the evidentiary hearing.

{ ¶ 24} It is a fundamental principle of law that a person must have a domicile. *Senn v. Cleveland*, 8th Dist. No. 84598, 2005-Ohio-765, at ¶ 38. That domicile, in the words of Justice Holmes, is a person's "pre-eminent headquarters." *Williamson v. Osenton* (1914), 232 U.S. 619, 625, 34 S.Ct. 442, 58 L.Ed. 758. This court has similarly observed that "[t]he domicile of a person is the place where he has his true, fixed, permanent home and principal establishment. It is the place to which he intends to return whenever he is absent, and from which he has no present intent to move." " *In re Estate of Mallory*, 11th Dist. No.2005-T-0028, 2006-Ohio-1265, at ¶ 16, quoting 36 Ohio Jurisprudence 3d (1982), Domicile, Section 2. It therefore follows that, while a person may have multiple residences, he may have only one domicile at any one time. See, e.g., *State ex rel. Klink v. Eyrich* (1952), 157 Ohio St. 338, 343, 105 N.E.2d 399.

{ ¶ 25} A person's domicile will persist and remain the same until he or she acquires a new one. *Landingham*, supra, at 390, 646 N.E.2d 897. "A person abandons his old domicile and acquires a new one only when he chooses a new domicile, establishes an actual residence in the chosen domicile, and demonstrates a clear intent that the new domicile become his primary and permanent residence." *Holtz*, supra, at ¶ 18. The acquisition of a new domicile requires two elements: the factum, or residence, and the animus, or an intention to remain. *Landingham*, supra, citing *Anderson v. May* (1951), 91 Ohio App. 557, 107 N.E.2d 358, reversed on separate grounds. The Supreme Court of Ohio, quoting an eloquent judgment entry from the Clermont County Probate Court, has consequently emphasized:

{ ¶ 26} " 'When a person's legal residence is once fixed * * * it requires both fact and intention to change it. In other words, to effect a change of domicile from one locality, country, or state to another, there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence in another place, with the intention of making the last acquired residence a permanent home. The acts of the person must correspond with such purpose. The change of residence must be voluntary; the residence at the place chosen for the domicile must be actual and to the fact of residence there must be added the animus manendi, which means the mind to remain.' " *In re Estate of Hutson* (1956), 165 Ohio St. 115, 119, 133 N.E.2d 347.

*5 { ¶ 27} Pursuant to *Hutson*, therefore, the abandonment of a former domicile and the acquisition of a new one happens only by the concurrence of both the fact of a new residence and the intent to remain in that residence.

{ ¶ 28} Under its second assignment of error, Warren asserts the trial court's ruling was unreasonable because the decedent did not intend to legally abandon his original domicile at the Warren property. We do not agree.

{ ¶ 29} Initially, Warren conflates the abandonment of property with the abandonment of one's domicile. Warren is correct that "abandoned property" is "property over which the owner has relinquished all right, title, claim, and possession with the intention of not reclaiming it or resuming its ownership, possession or enjoyment." *Doughman v. Long* (1987), 42 Ohio App.3d 17, 21, 536 N.E.2d 394. At issue in this case, however, is not whether the decedent abandoned the Warren property. Clearly, he did not. The relevant inquiry, rather, is whether the decedent intended to abandon his domicile in the city of

Warren in favor of acquiring a new domicile in Vienna Township.

{ ¶ 30} As discussed above, abandonment of one's domicile requires the selection of a new actual domicile coupled with an intention for the new residence to be one's principal and permanent home. See *Landingham*, supra, at 390, 646 N.E.2d 897. Here, the trial court found that the decedent abandoned his domicile at the Warren property in favor of the Vienna property based upon the evidence of the decedent's intention that could be gleaned from his actions and the testimony of those closest to him. Warren contends, however, the trial court erred in drawing this conclusion. In Warren's view, the decedent never abandoned the property because he visited it regularly and maintained it as his "bachelor pad."

{ ¶ 31} We must initially emphasize that there was absolutely no testimony or evidence to indicate the decedent treated the Warren property as a "bachelor pad." While it was uncontroverted that the decedent frequently, if not daily, visited the Warren property, the entirety of the evidence on this issue revealed that the nature of the decedent's activities at the Warren property related to his antique collecting business.

{ ¶ 32} The testimony was clear that the interior of the Warren property was completely full of expensive and rare antiques. Multiple witnesses, including Eric and Regina, the decedent's ex-wife Susan Rebhan, the decedent's close friend John Senoyuit, and his primary carpenter at the Vienna property, Brian Crain, stated the Warren property was difficult to even walk through because of the volume of antiques stored in every room of the house. In particular, Eric and Regina testified the kitchen, hallways, bedrooms, and even the basement were scattered, albeit systematically, with the decedent's vast collection. According to Eric, Regina, and Susan, one could not effectively walk through or even sit in a chair, let alone cook, sleep, or eat at the Warren property. Thus, the overwhelming weight of the evidence demonstrated that the Warren property, while utilized and visited by the decedent on a near daily basis, was not his principal residence, but was used for the sole purpose of his antique collecting avocation.

*6 { ¶ 33} Despite these points, Warren argues that the evidence demonstrated that the decedent's (1) receipt of his mail at the Warren property and (2) listing of the Warren property as his address on various legal certifications and registrations render the trial court's decision unreasonable. We do not agree.

{ ¶ 34} Eric and Regina testified the decedent received

his mail at the Warren property for both personal and business reasons. Each testified their father was an intensely private individual and, as a result, preferred that strangers not know that he actually lived in Vienna Township. By listing the Warren property as his mailing address, he could avoid potentially bothersome attention he might otherwise receive by having all of his mail delivered to the Vienna property. Furthermore, Eric and Regina also indicated that the decedent kept an office at the Warren property that he regularly visited at the end of each work day. By retaining the Warren property as his mailing address, the decedent could attend to his mail at an office rather than having it clutter his home. The decedent's decision to receive mail at the Warren property, in light of the foregoing evidence, is not inconsistent with the trial court's determination.

{ ¶ 35} Moreover, even though the decedent's driver's license, various motor vehicle registrations, and his will included the city of Warren address, these documents simply indicate that the Warren property was a residence of the decedent. And, using the city of Warren address would be consistent with Eric's and Regina's testimony that, as much as possible, the decedent valued his personal privacy. Regardless, appellees submitted various exhibits demonstrating the decedent utilized the Vienna property's address on separate official documents, e.g., the decedent's tax returns from 2002–2008, the decedent's W–2s from 2002–2008, the decedent's death certificate, and the decedent's bank account. In any event, the issue of **domicile** is not a "battle of forms." While the legal documents admitted into evidence are relevant to the inquiry, they cannot be considered dispositive of whether the decedent had an intention to acquire a new **domicile**.

{ ¶ 36} With this in mind, we acknowledge that it is difficult to ascertain what a person's intentions are at any given time; this is particularly so when the individual in question is not available to provide some insight into his or her thoughts and desires. In a case such as this, a court must therefore draw its conclusions from the facts and circumstances surrounding the case as developed by testimony and other evidence.

{ ¶ 37} With respect to the decedent's intent to change his domicile, it is uncontested that the Vienna property was habitable around 2000 or 2001. Eric testified the decedent actually moved into the Vienna property in 2000, after his bedroom was furnished. After this date, the decedent continued to make improvements on the Vienna property, pouring significant time and resources into the home. While doing so, the evidence revealed the decedent allowed the Warren property to fall into relative disrepair and turned it into a warehouse for his expansive collection

of antiques.

*7 { ¶ 38} The evidence demonstrated that the decedent's grandchildren only visited him at the Vienna property. The evidence further demonstrated that the decedent ate, slept, and held family functions and holiday gatherings at the Vienna property. Alternatively, there was no indication that the decedent met socially with friends or family at the Warren property; to the contrary, Eric, Regina, and Susan all testified the last social gathering held at the Warren property was in 1995 for Regina's wedding.

{ ¶ 39} The decedent's family and friends testified that when they wished to reach him, they would first try his cell phone, then try the Vienna property. When Regina prepared food for the decedent, she brought it to him at the Vienna property. When he went to dinner or functions with his friends, they would pick him up at the Vienna property. Finally, the decedent's family and friends unanimously testified that the decedent lived at the Vienna property and, in their view, it was his true home. Given the evidence, the only reasonable conclusion was that the Vienna property was the decedent's "preeminent headquarters" at which he made his home.

{ ¶ 40} While Warren offered sufficient evidence to establish the Warren property was the decedent's first

domicile, the evidence was uncontroverted that the decedent, between 2000 and 2002, selected a new domicile at 5000 Creekside Boulevard, Vienna, Ohio 44473. And this selection was accompanied by a bona fide intention, evidenced by the decedent's actions, that the Vienna property became his new domicile. We therefore hold the trial court's judgment declaring the Vienna property the decedent's domicile was a sound and reasonable exercise of its discretion.

{ ¶ 41} Warren's second assignment of error is without merit.

{ ¶ 42} For the reasons discussed in this opinion, the judgment of the Trumbull County Court of Common Pleas, Probate Division, is hereby affirmed.

TIMOTHY P. CANNON, P.J., and MARY JANE TRAPP, J., concur.

Parallel Citations

2011 -Ohio- 6340

Footnotes

¹ Appellee-Vienna asserts that Warren still bore the burden of establishing a change in **domicile** because the estate **tax** return identified the Vienna property as the decedent's **domicile**. Even though the co-executors listed the Vienna property as the decedent's **domicile** at the time of his death, this was merely a legal conclusion that was uncontested until Warren filed the underlying declaratory judgment action. The validity of the co-executors' blank declaration on the estate **tax** return was the basic subject of Warren's complaint. In essence, Warren asserted, for purposes of claiming estate **taxes** on the decedent's intangible property, that despite the co-executors' statement on the estate **tax** return, the Warren property, as the decedent's original **domicile**, had never changed. We therefore disagree with Appellee-Vienna's position that the co-executors' conclusory statement on the estate **tax** return was sufficient to require Warren to prove that the decedent changed his **domicile** from Vienna Township to the city of Warren.

² We recognize that Warren commingles procedural and substantive issues under the argument portion of its first assignment of error. Because, however, Warren's first assignment of error specifically challenges only a procedural error, we will address the entirety of its substantive arguments in our analysis of Warren's second assignment of error, which challenges the evidential weight of the trial court's decision.

AN ACT

To amend sections 133.01, 715.70, 715.71, 715.74, 4301.80, 4303.181, 4504.08, 4504.09, 5747.24, 5747.331, and 5751.52, to enact sections 4504.22 and 5595.01 to 5595.13 of the Revised Code, to amend Section 9 of Am. Sub. H.B. 386 of the 129th General Assembly, as subsequently amended, to amend Section 363.487 of Am. Sub. H.B. 59 of the 130th General Assembly, and to amend Section 363.10 of Am. Sub. H.B. 59 of the 130th General Assembly, as subsequently amended, to authorize counties to undertake regional transportation improvement projects funded by the issuance of securities and by revenue pledges from the state and political subdivisions and taxing districts located within the cooperating counties, to increase the amount of time a person may spend in Ohio before being presumed to be a resident for state income tax purposes, to authorize taxpayers eligible to claim a tax credit for qualified research and development loan payments to claim the credit, retroactive to taxable years beginning in 2008, against the income tax, to authorize municipal corporations and townships to create a community entertainment district as part of a joint economic development district contract, to make changes to video lottery terminal facilities, and to make an appropriation.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 133.01, 715.70, 715.71, 715.74, 4301.80, 4303.181, 4504.08, 4504.09, 5747.24, 5747.331, and 5751.52 be amended

income therefrom, including any profit made on the sale thereof, shall at all times be free from taxation within the state.

Sec. 5595.12. The governing board of a regional transportation improvement project shall not use any amount pledged or allocated to the board under this chapter for administrative expenses of the board without prior approval of the director of transportation. The director may approve expenses individually by line item or may approve an aggregate amount to be allocated for administrative expenses over a period of time not exceeding twelve months. The director may prescribe rules pursuant to Chapter 119. of the Revised Code necessary to implement this section.

Sec. 5595.13. Upon completion of the transportation improvements listed in the cooperative agreement, fulfillment of all contractual duties assumed by the governing board, and repayment of all bonds issued by the governing board, the regional transportation improvement project and the governing board shall dissolve by operation of law. Upon dissolution of the regional transportation improvement project, the boards of county commissioners that created the regional transportation improvement project shall assume title to all real and personal property acquired by the board in the fulfillment of its duties under this chapter. The property shall be divided and distributed in accordance with the cooperative agreement. Unless otherwise provided by contract, pledges of revenue to the governing board from the state or a political subdivision or taxing unit shall terminate by operation of law upon the dissolution of the regional transportation improvement project.

Sec. 5747.24. This section is to be applied solely for the purposes of Chapters 5747. and 5748. of the Revised Code.

(A) As used in this section:

(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.

(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.

(B)(1) Except as provided in division (B)(2) of this section, an individual who during a taxable year has no more than ~~one hundred eighty-two~~ two hundred twelve 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 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.

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 division (B)(1) of this section with respect to the deceased individual, and filing the statement with the commissioner within the later of the date the statement would otherwise be due or sixty days after the date of the individual's death.

An individual or personal representative of an estate who knowingly makes a false statement under 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 fewer than ~~one hundred eighty-three~~ two hundred thirteen 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~~ two hundred thirteen 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 the individual does not prove by a preponderance of the evidence that the individual had no such contact period.

Sec. 5747.331. (A) As used in this section:

(1) "Borrower" means any person that receives a loan from the director of development under section 166.21 of the Revised Code, regardless of whether the borrower is subject to the tax imposed by section 5747.02 of the Revised Code.

(2) "Related member" has the same meaning as in section 5733.042 of the Revised Code.

(3) "Qualified research and development loan payments" has the same meaning as in ~~division (D) of~~ section 166.21 of the Revised Code.

(B) Beginning with taxable year ~~2003 and ending with taxable~~ years beginning in ~~2007~~ 2003, a nonrefundable credit is allowed against the tax imposed by section 5747.02 of the Revised Code equal to a borrower's qualified research and development loan payments made during the calendar year that includes the last day of the taxable year for which the credit is claimed. The amount of the credit for a taxable year shall not exceed one hundred fifty thousand dollars. No taxpayer is entitled to claim a credit under this section unless it has obtained a certificate issued by the director of development under division (D) of section 166.21 of the Revised Code and submits a copy of the certificate with its report for the taxable year. Failure



Ohio Legislative Service Commission

Final Analysis

Joe McDaniels and
Amber Hardesty

Am. Sub. H.B. 494 130th General Assembly (As Passed by the General Assembly)

Reps. Schuring, C. Hagan, Slesnick, Slaby, Amstutz, Landis, Barborak, Blair, Boose, Brown, Burkley, Damschroder, Grossman, Hackett, Hill, Maag, Young, R. Adams, Hottinger, Williams, Rogers, J. Adams, Anielski, Antonio, Beck, Blessing, Green, Huffman, Johnson, McClain, Milkovich, Patterson, Romanchuk, Ruhl, Scherer, Sheehy, Terhar, Thompson

Sens. Beagle, Burke, Cafaro, Eklund, Lehner, Patton, Peterson, Schiavoni, Seitz

Effective date: March 20, 2015; appropriation effective December 19, 2014; one item vetoed

ACT SUMMARY

Regional Transportation Improvement Projects

- Authorizes the boards of county commissioners of two or more counties, upon approval of the Director of Transportation, to enter into a cooperative agreement that creates a regional transportation improvement project (RTIP) for the purpose of funding and completing transportation improvements.
- Requires that the cooperative agreement include a description or analysis of the deficiencies of the transportation system in the cooperating counties, a list of the transportation improvements to be undertaken in the project, the number of years the RTIP is effective, and directives on the operations and reporting requirements of the governing board.
- Requires the boards of county commissioners to hold public hearings on the cooperative agreement before adopting it.
- Requires that the RTIP and the cooperative agreement be administered by a governing board consisting of one county commissioner and the county engineer of each participating county.
- Specifies that the board and its members are subject to state sunshine laws.

- Authorizes the RTIP governing board to issue securities and to solicit and receive pledges of revenue from the state, participating counties, and political subdivisions and taxing districts located within the participating counties.
- Authorizes the RTIP governing board to request that the participating counties levy a motor vehicle license tax, subject to voter approval, to fund the transportation improvements specified in the cooperative agreement and other supplemental transportation improvements.
- Stipulates that a license tax levied on request of an RTIP governing board shall not apply to commercial trailers and semitrailers.
- Requires the RTIP governing board to appoint and obtain the approval of a transportation advisory council before requesting a license tax that applies to commercial trucks.
- Requires that the license tax be levied at a uniform rate of up to \$25 per vehicle across all counties participating in the RTIP.
- Authorizes the Department of Transportation (ODOT) to make its resources available to the governing board of an RTIP upon the board's request so long as the board reimburses ODOT for the board's agreed-upon share of the expenses.
- Stipulates that the RTIP and its governing board dissolve by operation of law upon completion of the transportation improvements listed in the cooperative agreement, fulfillment of all contractual duties, and repayment of all bonds.

Tax provisions

- Increases, by 30 days, the maximum amount of time a person may spend in Ohio before being presumed to be a resident for Ohio income tax purposes.
- Allows businesses entitled to a commercial activity tax credit for repaying state research and development loans to apply the credit instead against the income tax, including retroactively to closed tax periods.

Liquor law designation of JEDD-related entertainment districts

- Authorizes municipal corporations and townships to create a community entertainment district – a special designation under the liquor control law – as part of a joint economic development district (JEDD) contract.



administrative expenses. The Director may approve such expenses individually by line item or as an aggregate amount to be allocated over a period of time, up to 12 months. The Director may adopt rules prescribing procedures for approving the administrative expenses of RTIP governing boards.¹⁵

Assistance from ODOT

The act authorizes an RTIP governing board to submit a written request to the Director of Transportation for the assistance of the Department of Transportation (ODOT) in completing the transportation improvements prescribed by the cooperative agreement. After receiving such a request, the Director is authorized to make ODOT resources available to the governing board as necessary to fulfill the request. After receiving a request for assistance, the Director may require the governing board to submit documentation to substantiate that the board has sufficient resources to fund the board's share of the project. If the Director provides ODOT assistance, the act requires the governing board to pay its share of the expenses in accordance with the agreement with ODOT.¹⁶

Dissolution

The act requires that the RTIP and its governing board dissolve upon completion of the transportation improvements listed in the cooperative agreement, fulfillment of all contractual duties assumed by the governing board, and repayment of all bonds issued by the governing board. After the RTIP dissolves, the boards of county commissioners that created the RTIP assume title to all real and personal property acquired by the RTIP's governing board in fulfillment of its duties. Such property must be distributed among the counties in accordance with the cooperative agreement. Unless otherwise provided by contract, pledges of revenue to the governing board of the RTIP from the state, a political subdivision, or a taxing unit terminate upon the dissolution of the RTIP.¹⁷

Income tax residency test

The act modifies the test for determining an individual's state income tax residency by allowing an individual to spend more time in Ohio before being presumed to be a resident. Generally, the act permits a person to spend up to 30 additional days in Ohio – 212 in all – without being presumed to be a resident.

¹⁵ R.C. 5595.13.

¹⁶ R.C. 5595.07.

¹⁷ R.C. 5595.13.



Ohio's income tax applies to residents, and applies to nonresidents who have income that is attributable to Ohio under income apportionment and allocation rules set forth by law (e.g., wages from working in Ohio or income from conducting business in Ohio). Both residents and nonresidents must report all their federal adjusted gross income regardless of whether the source of the income is in Ohio or elsewhere, and the tax rates are applied to this income after various adjustments. Residents receive an Ohio credit for taxes paid to another state, up to the amount of Ohio tax that would be due on that non-Ohio income. Nonresidents receive a credit equal to the Ohio tax paid on income not attributable to Ohio.

The residency test depends primarily on the number of overnight stays, or "contact periods," a person has in Ohio during the person's taxable year. Technically, a contact period is any period of time that includes midnight. Law changed in part by the act establishes presumptions about residency that depend on the number of contact periods and whether a person has an "abode" outside Ohio. The presumptions are as follows:

- If a person has at least 183 contact periods, the person is presumed to be a full-year Ohio resident for income tax purposes. The presumption can be rebutted only with clear and convincing evidence and only for as much of the year as such evidence is provided.¹⁸
- If a person has less than 183 contact periods, the person is presumed to be a full-year Ohio resident unless (1) the person moved during the year, or (2) the person has a full-year abode outside Ohio and files a statement with the Tax Commissioner verifying that the person was not domiciled in Ohio during the entire year and had a full-year abode outside Ohio.¹⁹

If a person files such a statement and makes the required verifications, the person's nonresident status is not rebuttable by the state unless the person is not able to prove the number of contact periods. If a person does not file the statement, the person is presumed to be an Ohio resident but can rebut that presumption by providing a preponderance of evidence to the contrary.²⁰ The presumption can be rebutted for all or part of the year. Administrative rules specify 18 circumstances that may not be considered in rebutting or confirming the presumption, including such things as where a person's banks, medical providers, attorneys, accountants, lenders, relatives, and

¹⁸ R.C. 5747.24(D).

¹⁹ R.C. 5747.24(B).

²⁰ R.C. 5747.24(C).



political contributees are located.²¹ The rule also states that the number of contact periods and a person's activities during other years may be considered, as well as any other relevant factor other than those that specifically may not be considered.

The act increases the number of contact periods used in the presumptions from 183 to 213.

R&D loan repayment tax credit

The act authorizes entities that are receiving a tax credit for repaying state loans for research and development to begin claiming the credit against the personal income tax.²² Prior law required that all such credits be claimed against the commercial activity tax (CAT). Between 2003 and 2007, the R&D loan repayment credit could be claimed against the personal income tax or the corporation franchise tax, depending on which tax applied to the taxpayer. Beginning in 2008, the credit could be claimed only against the CAT. (The corporation franchise tax was repealed for nonfinancial corporations in 2009.) Taxpayers that were claiming the credit before 2008 and that could continue to claim credit carryovers in 2008 and later had to start applying any remaining credit balance against the CAT.

The CAT is levied on entities, not their individual owners, so prior law allowed the credit to be claimed only by the business entity that was repaying the loan. By allowing the credit to be claimed against the income tax, the act allows a credit held by a pass-through entity to be allocated among and claimed by each of the entity's individual owners.

The act states that its changes to the credit are "remedial" and apply retroactively to all tax periods beginning in or after 2008 (when the credit became available only against the CAT). It authorizes taxpayers to claim refunds that would be payable on the basis of the credit for those tax periods notwithstanding a limit in continuing law disallowing tax refund claims more than four years after tax is overpaid. However, the four-year limit continues to apply if a taxpayer does not file for the refund within one year after the act's 90-day effective date. The act also permits the Tax Commissioner to examine the records of a taxpayer and issue an assessment against a taxpayer that retroactively applies the credit beyond the existing four-year statute of limitation on examinations and assessments.

The R&D loan repayment credit is available to taxpayers that have borrowed money under the state's R&D loan program (R.C. 166.17 to 166.21), which provides

²¹ Ohio Administrative Code sec. 5703-07.

²² R.C. 5747.331 and 5751.52.





Ohio Legislative Service Commission

Bill Analysis

Mackenzie Damon, Sam Benham,
and Joe McDaniels

H.B. 5

130th General Assembly
(As Introduced)

Reps. Grossman and Henne

BILL SUMMARY

Imposition of new law and rules

- Requires municipal corporations levying an income tax as of January 1, 2015, and that intend to continue levying the tax thereafter to amend or repeal and re-enact their existing income tax ordinances in a form to comply with the bill's limitations; amended or re-enacted ordinances continuing an existing tax rate above 1% do not require voter approval.
- Expressly prohibits municipal corporations and tax administrators from adopting rules to administer a municipal income tax that conflict with statutory limitations on the tax or rules of the Municipal Tax Policy Board.
- Creates the Municipal Tax Policy Board, composed of seven Governor-appointed municipal tax administrators, to create rules, prescribe forms and other documents, provide instructional materials to taxpayers, and take other actions concerning the state-wide administration and enforcement of municipal income taxes.

Computation of taxable income

- Establishes a uniform tax base applicable to all municipal corporations levying an income tax by further defining the forms of income that municipal corporations must tax and the forms that they may not tax.
- Specifically adds to the income tax base of individuals the wages of individuals under the age of 18, certain deferred compensation and stock option-related income unless grandfathered by local ordinance, and self-employment income of religious leaders.

and entertainment). Currently, all municipal corporations must allow individuals to deduct such expenses to the extent deducted on IRS Form 2106.³⁵

Residency

The bill permits municipal corporations to treat an individual as a resident for municipal income tax purposes only if the individual is an Ohio resident for the purposes of the state income tax as determined under the state's "bright line" residency test. If an individual is an Ohio resident under this test, municipal corporations may apply their own criteria to determine whether the individual is a resident of the municipal corporation. Otherwise, no municipal corporation may treat an individual as a resident for municipal income tax purposes.

Under the bill, municipal residency determines the extent to which income is included in an individual's taxable income base (described above in the "**Taxable income**" section), whether an individual qualifies for any credit given for income taxes paid to another municipal corporation on the same income, and, in certain cases, whether an individual is subject to taxation by a municipal corporation.

Current state law does not address qualifications for municipal income tax residency. Residency is determined under municipal ordinances, many of which employ common law determinations of domicile depending on various indications of where a person intends to stay (e.g., maintaining a home, voting records, motor vehicle registration).

State residency test

The state income tax residency test is based primarily on two factors: the number of times during a taxable year an individual is present in Ohio for all or part of two consecutive days ("contact periods") and whether the individual maintains a home outside Ohio for the entire taxable year.³⁶ If an individual maintains a home outside Ohio throughout his or her taxable year and has 182 or fewer contact periods during the year, he or she is presumed not to be an Ohio resident for state income tax purposes. To ensure this presumption of nonresidency, an individual must file a statement verifying his or her status; if the statement is filed, the presumption may not be rebutted by the state unless the statement contains a falsity. Anyone else who has 182 or fewer contact periods is presumed to be an Ohio resident, but the individual may rebut the presumption for all or part of the year by a preponderance of evidence against the

³⁵ R.C. 718.01(A)(4) and (F) of current law.

³⁶ R.C. 5747.24.



presumption.³⁷ Finally, a person with more than 182 contact periods is presumed to be a resident, and the presumption may be rebutted only with clear and convincing evidence to the contrary.

Casual entrant exemption

Current law

Under current law, the "casual entrant rule" prohibits a municipal corporation from taxing the compensation paid to a nonresident individual who worked in the municipal corporation for 12 days or fewer in a year, or from requiring employers to withhold taxes against such individuals' wages.³⁸ This exclusion does not apply if (1) the individual's employer has its principal place of business in another municipal corporation that imposes an income tax and (2) that other municipal corporation will not tax the compensation earned on those 12 or fewer days. The exclusion also does not apply to professional entertainers, professional athletes, or promoters of professional entertainment or sports events and their employees (as reasonably defined by a municipal corporation).

Extension of casual entrant rule

The bill makes several changes to the casual entrant rule. First, the bill increases the number of days that a nonresident may work in a municipal corporation without incurring liability for the municipal corporation's income tax and without the individual's employer having to withhold tax for that municipal corporation, from 12 to 20 in a calendar year. The bill also specifies that the exclusion applies to the individual's "qualifying wages" (the amount subject to withholding by the individual's employer), rather than to the individual's "compensation," to make the terms consistent with the employer tax withholding requirement if the 20-day threshold is exceeded.

Under the bill, the exclusion will only apply if the individual's "principal place of work" is not located within the municipal corporation where the individual worked on the 20 or fewer days, and the employer withheld taxes on the compensation for the municipal corporation where the individual's principal workplace is located. In general, an employee's "principal place of work" is the location to which the employee reports for work duties on a regular and ordinary basis. The location may be a permanent location, such as an office or warehouse, or, if the employee does not regularly report to a permanent location, a temporary location that is not also the employee's home. If the

³⁷ A Department of Taxation administrative rule specifies factors that may and may not be considered in upholding or rebutting the presumption. Ohio Adm. Code sec. 5703-7-16.

³⁸ R.C. 718.01(C)(15) and 718.011.





Ohio Legislative Service Commission

Final Analysis

Mackenzie Damon, Sam Benham,
and Joe McDaniels

Sub. H.B. 5

130th General Assembly
(As Passed by the General Assembly)

Reps. Grossman and Henne, Amstutz, Beck, J. Adams, Blair, Brenner, Buchy, DeVitis, C. Hagan, Hood, Maag, Retherford, Roegner, Ruhl, Scherer, Sears, Terhar, Thompson, Young, Batchelder

Sens. Burke, Coley, Eklund, Faber, Jones, Jordan, Peterson, Schaffer, Seitz

Effective date: March 23, 2015

ACT SUMMARY

Imposition of new law and rules

- Requires municipal corporations levying an income tax as of January 1, 2016, and that intend to continue levying the tax thereafter to amend their existing income tax ordinances to include certain statements incorporating the act's limitations; amended ordinances continuing a pre-existing tax rate above 1% do not require further voter approval.
- Expressly allows a municipal corporation to offer a credit to residents for tax paid by residents to other municipal corporations, including tax paid by pass-through entities owned by the resident.
- Expressly prohibits municipal corporations and tax administrators from adopting rules to administer a municipal income tax that conflict with statutory limitations on the tax.

Computation of taxable income

- Establishes a uniform tax base applicable to all municipal corporations levying an income tax (with a few exceptions) by further defining the forms of income that municipal corporations must tax and the forms that they may not tax.

the expenses are related to the taxpayer's performance of personal services in that municipal corporation.²⁷

Residency

The act permits municipal corporations to treat an individual as a resident for municipal income tax purposes only if the individual is domiciled in the municipal corporation under standards outlined in the act. An individual is presumed to be domiciled in a municipal corporation if a tax administrator reasonably concludes that the individual is domiciled in that municipality or if the individual was domiciled in the municipality on the last day of the preceding taxable year. The individual may rebut this presumption by showing by a preponderance of the evidence that he or she was not domiciled in the municipality.

The act sets forth 25 factors that may be used in determining, or rebutting the presumption of, an individual's domicile. The act's factors consider the location of the following:

- (1) Financial institutions used by the individual or individual's spouse;
- (2) Issuers of credit cards or installment loans to the individual or spouse;
- (3) Institutional lenders that loaned money to the individual or spouse;
- (4) Investment facilities and advisors used by the individual or spouse;
- (5) Insurance companies or agents that sold a policy to the individual or spouse;
- (6) Attorneys or accountants used by the individual or spouse;
- (7) Health care professionals used by the individual or spouse;
- (8) Charitable organizations to which the individual or spouse donates or for which the individual or spouse serves on the board of directors;
- (9) Burial plots owned by the individual or spouse;
- (10) Business ventures or entities of which the individual or spouse owns over 25% or over which the individual exercises significant control;
- (11) A recitation in an estate planning document such as a will;

²⁷ R.C. 718.01(A)(2).



(12) The individual's friends, dependents, family members, and divorced or separated spouse;

(13) Educational institutions attended by the individual's dependents, provided a dependent's tuition is based on the residency of the individual or spouse in the municipality where the institution is located;

(14) Fiduciaries named in the individual's or spouse's estate planning documents;

(15) Businesses at which the individual or spouse shop;

(16) The individual's marriage;

(17) Recipients of political contributions made by the individual or spouse;

(18) Any "contact periods" the individual has with a municipality (contact periods are determined similarly to how they are determined for determining residency for the state income tax – an individual has a contact period with a municipality if the individual is away overnight from the individual's home located outside of the municipal corporation and while away overnight spends at least some portion of each of two consecutive days in the municipal corporation);

(19) The individual's domicile in past taxable years;

(20) Where the individual is registered to vote;

(21) The address on the individual's driver's license;

(22) Real estate for which the individual claims a tax benefit on the basis of the individual's residence;

(23) Homes owned or leased by the individual;

(24) Where the individual declares to be the individual's residency; and

(25) Where the individual is primarily employed.

No factor other than these 25 may be used in determining, or rebutting the presumption of, an individual's domicile.²⁸

Under the act, municipal residency determines the extent to which income is included in an individual's taxable income base (described above in the "**Taxable**

²⁸ R.C. 718.01(J) and 718.012.

income" section), whether an individual qualifies for any credit given for income taxes paid to another municipal corporation on the same income, and, in certain cases, whether an individual is subject to taxation by a municipal corporation.

Prior law did not address qualifications for municipal income tax residency. Residency was determined under municipal ordinances, many of which employ common law determinations of domicile depending on various indications of where a person intends to stay (e.g., maintaining a home, voting records, motor vehicle registration), similar to or the same as those prescribed by the act.

Occasional entrant exemption

Prior law

Under prior law, the "occasional entrant rule" prohibited a municipal corporation from taxing the compensation paid to a nonresident individual who worked in the municipal corporation for 12 days or fewer in a year, or from requiring employers to withhold taxes against such individuals' wages.²⁹ This exclusion did not apply if (1) the individual's employer had its principal place of business in another municipal corporation that imposed an income tax and (2) that other municipal corporation would not tax the compensation earned on those 12 or fewer days. Another exception, largely retained by the act, excluded professional entertainers, professional athletes, or promoters of professional entertainment or sports events and their employees, as reasonably defined by a municipal corporation, from the rule's operation.

Changes to the occasional entrant rule

The act makes several changes to the casual occasional rule.³⁰ First, for employees of larger businesses and individuals receiving nonwage compensation, the act expands the exemption by increasing the number of days a nonresident may work in a municipal corporation without incurring liability for the municipal corporation's income tax, from 12 to 20 in a calendar year. Second, for nonresident employees of smaller businesses, the act creates a new rule that prohibits the taxation of the employee's income by any municipality other than the municipality where the business' fixed location is located. Third, the act creates two exceptions to both of these provisions: one for workers at petroleum refineries, and one that allows any employee to receive a refund of taxes on the basis that the employee did not actually perform services in the municipality for which the taxes were withheld.

²⁹ R.C. 718.011 of prior law.

³⁰ R.C. 718.01(C)(16) and (17) and 718.011 of the act.





Stephen Estelle

Final Analysis
Legislative Service Commission

Sub. H.B. 73
126th General Assembly
(As Passed by the General Assembly)

Reps. Trakas, Kilbane, Latta, Gibbs, Blessing, Collier, Schaffer, Blasdel, Hagan, Brinkman, Gilb, Ujvagi, Taylor, Chandler, Combs, Domenick, C. Evans, D. Evans, Hartnett, Koziura, Oelslager, T. Patton, Peterson, Redfern, Reidelbach, Setzer, G. Smith

Sens. Fingerhut, Goodman, Schuler, Austria, Amstutz, Spada, Dann, Cates, Clancy, Coughlin, Grendell, Hottinger, Jacobson, Jordan, Mumper, Niehaus, Prentiss, Spada, Stivers, Harris, Armbruster, Kearney, Schuring

Effective date: *

ACT SUMMARY

- Increases the amount of time an individual may spend in Ohio before being presumed to be an Ohio resident for income tax purposes.
- Requires taxpayers to file a statement of nonresidency with the Tax Commissioner for the presumption to be irrebutable.
- Exempts active-duty military pay and allowances from the state income tax regardless of whether the serviceperson is serving in a declared combat zone.
- Forbids taxpayers from applying the exemption to pay and allowances received for active duty service while stationed in Ohio.
- Permits taxpayers to apply the exemption to school district income taxes using the same tax base as the state income tax.

* *The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared. Additionally, the analysis may not reflect action taken by the Governor.*

CONTENT AND OPERATION

Prior residency tests

Significance of residency

Determining an individual's residency is important when the individual earns income that is taxable under both Ohio law and the law of another state; the individual's residency affects the calculation of the individual's Ohio income tax. Specifically, residency determines which of certain credits are available to the individual. Under continuing law, if an individual is an Ohio resident, the individual may claim a credit for taxes paid to another state (up to the amount of the Ohio tax on the same income). If the individual is a nonresident, the individual may claim a credit for the amount of Ohio income tax on the portion of the nonresident's Ohio adjusted gross income that is not allocable to Ohio.

"Bright line" residency test

(R.C. 5747.01(G) and (H)(1), 5747.24, and 5747.25 (repealed))

For income tax purposes, a "resident" is an individual who is domiciled in Ohio. Domicile is a common-law concept. Its essence is captured in the following legal definition: **A person's true, fixed, and permanent home and principal establishment, to which that person intends to return and remain even though he or she may for a time reside elsewhere.** Black's Law Dictionary, 523-524 (8th ed.). Under continuing law, whether an individual is presumed to be domiciled in Ohio depends in part upon the number of "contact periods" the individual has in Ohio during the taxable year. An individual has one contact period in Ohio if the individual spends at least some portion, however minimal, of each of two consecutive days in Ohio while away overnight from an abode located outside Ohio.

Under prior law, the number of contact periods was divided into three levels: 0 - 120; 121 - 182; and 183 or more. If the individual had 120 or fewer contact periods in Ohio during the taxable year and had at least one abode outside Ohio during the entire taxable year, the individual was presumed to be *not* domiciled in Ohio during the taxable year. This presumption was conclusive unless the Tax Commissioner requested a statement from the individual verifying the number of contact periods and the non-Ohio abode and the individual failed to furnish the statement. If the individual did not furnish the statement, the individual was presumed to have been domiciled in Ohio for the entire taxable year. The individual could rebut the presumption, however, by presenting sufficient evidence the individual was domiciled elsewhere. The evidentiary standard was a preponderance of evidence.



If the individual had between 121 and 182 contact periods in Ohio during the taxable year, the individual was presumed to be domiciled in Ohio. This presumption also applied if the individual had fewer than 121 contact periods but did not have an abode outside Ohio throughout the year. The individual could rebut the presumption of Ohio domicile for any portion of the taxable year by presenting evidence the individual was domiciled elsewhere. The evidentiary standard was preponderance of the evidence. If the individual overcame the presumption for a portion of the taxable year, but not the entire year, the individual was presumed to be *not* domiciled in Ohio only for that portion.

If the individual had 183 contact periods or more, the individual was presumed to be domiciled in Ohio. To overcome this presumption, the individual had to present evidence to the contrary satisfying the clear and convincing evidence standard. Again, if the individual overcame the presumption for a portion of the taxable year, but not the entire year, the individual was presumed to be *not* domiciled in Ohio only for that portion.¹

Exempted contacts

(R.C. 5747.24(A)(2))

Prior law allowed an individual to have up to 30 contact periods in Ohio per year without the periods counting toward the residency test, but only if some part of the contact period was spent to attend to a medical hardship involving the individual or a member of the individual's family, to attend a funeral for a member of the individual's family, or to provide uncompensated service to, or to raise funds for, a charitable, educational, religious, scientific, or other kind of organization exempted from federal income taxation under section 501(c)(3) of the Internal Revenue Code.

Nonresident election

(R.C. 5747.25)

Under prior law, an individual who was presumed to be a resident of Ohio under the residency tests could elect to be treated as a nonresident in return for a reduction in the amount of the nonresident credit. An individual who made the election for any taxable year was considered to be a nonresident for the entire taxable year.

¹ *An administrative rule sets forth criteria for determining whether an individual has rebutted the presumption of domicile in Ohio with a preponderance of the evidence or with clear and convincing evidence. (Ohio Admin. Code 5703-7-16.)*



When an individual made the election, the number of contact periods the individual had in excess of 120 was used to calculate the amount of Ohio adjusted gross income allocable to Ohio for purposes of calculating the nonresident credit. The more contact periods an individual had in excess of 120, the larger the portion of income allocable to Ohio and, accordingly, the smaller the amount of the nonresident credit the individual could claim.

Changes to residency test

Basic test

The act increases the number of contact periods an individual may have before being presumed to be domiciled in Ohio from 120 to 182. In effect, the middle level of contact periods under prior law (121 - 182) has been eliminated, and the first level (0 - 120) has been expanded to 0 - 182. The act, however, requires the individual to file a statement with the Tax Commissioner, without request by the Commissioner, verifying that during the entire taxable year the individual was not domiciled in Ohio and had at least one abode outside Ohio. The individual must specify in the statement the location of each abode located outside Ohio. The statement must be filed by April 15 or, if the individual's taxable year does not coincide with the calendar year, by the 15th day of the fourth month after the end of the taxable year. If the individual satisfies each of these criteria--i.e., the individual has 182 contact periods or fewer, has an abode outside Ohio, and has timely filed the statement--the individual is conclusively presumed to be *not* domiciled in Ohio. This presumption does not apply to an individual changing domicile from or to Ohio during the taxable year. Such an individual is domiciled in Ohio for that portion of the taxable year before or after the change, as applicable. (R.C. 5747.24(B).)

An individual who has fewer than 183 contact periods in Ohio during the taxable year, but who either does not timely file the statement or does not have an abode outside Ohio, is presumed to be a resident unless the individual rebuts the presumption with a preponderance of the evidence to the contrary. An individual who has 183 or more contact periods is presumed to be a resident unless the individual rebuts the presumption with clear and convincing evidence to the contrary. (R.C. 5747.24(C) and (D).)

The act retains the provision authorizing the Tax Commissioner to challenge an individual's number of contact periods and requiring the individual to prove the number of contact periods by a preponderance of the evidence. (R.C. 5747.24(E).)



Exempted contacts eliminated

The act eliminates the 30-contact period exemption for time spent in Ohio to attend to a medical hardship, to attend a funeral, or to provide service to, or raise funds for, a section 501(c)(3) organization. (R.C. 5747.24(A)(2).)

Nonresident election eliminated

The act eliminates the law allowing an individual who is presumed to be a resident to elect nonresidency status in return for a reduction in the otherwise allowable nonresident credit. (R.C. 5747.25.)

Expansion of income tax exemption of military pay

(R.C. 5747.01(A)(22), 5747.011 (repealed), and 5748.01)

Under prior law, the pay and allowances of persons serving in a branch of the military, including the reserves and National Guard, were subject to state and school district income taxes, unless the pay and allowances were earned for service in a declared combat zone. The combat zone exclusion applies to the entire pay and allowances of enlisted personnel, noncommissioned officers, and warrant officers and to the highest enlisted-pay equivalent of other commissioned officers. Continuing law exempts deceased military servicepersons completely from state and school district income taxes (for the year of their death) if they died as a result of injuries or disease incurred in a combat zone or in a military or terroristic event in a foreign country. (R.C. 5747.023 and 5747.024.) All military pay and allowances currently are exempted from municipal income taxes. (R.C. 718.01(F)(1).)

The act expands the military pay and allowance exemption to include pay and allowances received by any person serving on active duty in the Army, Air Force, Navy, Marines, or Coast Guard, reserve components of those branches, or the National Guard, regardless of whether the service is performed in a declared combat zone. The exemption does not apply to pay and allowances for active duty service while the individual is stationed in Ohio. In addition to expanding the exemption to include all non-Ohio active duty pay and allowances, the expansion also permits commissioned officers, whose current exclusion is capped at the highest enlisted pay level (plus hostile fire and imminent danger pay supplements), to exclude pay and allowances in excess of the cap.

The expanded exemption applies as well to school district income taxes that are computed on the same basis as the state income tax base. Recent legislation, H.B. 530, authorized school districts to allow individuals to deduct from taxable



income military pay and allowances received while stationed outside Ohio. The act repeals that section so that the act's new exemption applies instead.

Effective date

(Section 3)

The act's changes to the residency test, its elimination of the exemption for certain contacts and of the nonresident election, and its exemption of active-duty military pay from the income tax apply to taxable years beginning on or after January 1, 2007.

HISTORY

ACTION	DATE
Introduced	02-22-05
Reported, H. Ways & Means	02-14-06
Re-referred to H. Ways & Means	02-16-06
Re-reported, H. Ways & Means	02-28-06
Passed House (80-15)	03-21-06
Reported, S. Ways & Means & Economic Development	12-12-06
Passed Senate (32-0)	12-13-06
House concurred in Senate amendments (95-0)	12-14-06

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Information Release

IT 1996-01 -- Personal Income Tax: Federal Law Preempting State Taxation of Retirement Plan Income - Issued March 11, 1996; Revised May 2007

The purpose of this information release is to address federal law preempting state income taxation of certain types of retirement plan income. Endnotes are indicated by *italics*, and are annotated at the bottom of the release.

This federal legislation was enacted in 1996 and amended in 2006 by public law 109-264.(1)

This legislation prohibits a state from imposing an income tax on "retirement income" of an individual who is neither a resident of nor a domiciliary of such state, as determined under the laws of such state at the time the income is received.

For purposes of this law, "retirement income" means income from any of the following:

- Governmental retirement system plans, "qualified" retirement plans,(2) and
- All other deferred compensation plans and "nonqualified" retirement plans(3) if such deferred compensation plan income or such "nonqualified" retirement plan income . . .

1. . . . is paid in a series of substantially equal periodic payments (not less frequently than annually) for the life or life expectancy of the recipient or the joint lives or joint life expectancy of the recipient and the recipient's beneficiary or

2. . . . is paid in a series of substantially equal periodic payments (not less frequently than annually) for a period of not less than ten years or

3. . . . is a payment after termination of the recipient's employment and is made under a plan, program or arrangement (to which such employment relates) maintained solely for the purpose of providing retirement benefits for employees in excess of (i) the limitations imposed by one or more sections 401(a)(17), 401(k), 401(m), 402(g), 403(b), 408(k), or 415 of such Code or (ii) any other limitation on contributions or benefits in such code on plans to which any of such sections apply.

Based upon this federal law, the numerator of the fraction used to calculate the Ohio nonresident income tax credit will include such income when such income is received by a nonresident of Ohio. Furthermore, based upon both this legislation and departmental policy, the following withholding tax guidelines are now applicable with respect to distributions from retirement plans:

Distributions from Ohio's state retirement funds (such as the Ohio Public Employees Retirement System): the administrator of the retirement plan shall withhold Ohio individual income tax from such distributions to nonresidents of Ohio only if the recipient so requests.

Distributions from other governmental retirement plans or from private sector "qualified" retirement plans: the administrator of the plan is required to withhold Ohio individual income tax from such distributions only if all four of the following apply:

1. The payor is an employer;
2. The payor maintains an office or transacts business within Ohio;
3. The payor is making payment of compensation to an employee;(4) and

4. The employee resides in Ohio at the time of the payment of that compensation.

Only if all four of the above tests are met will Ohio individual income tax withholding be required with respect to distributions from such plans. **Since most retirement plan recipients are no longer employees of the company from whom they receive pension benefits, in most situations Ohio does not require withholding from such plans described above.**

Distributions from all other deferred compensation plans and "nonqualified" retirement plans: Ohio individual income tax withholding is required only if all five of the following are present:

1. The payor is an employer;
2. The payor maintains an office or transacts business within Ohio;
3. The payor is making payments of compensation to an employee;
4. The employee either (i) worked in Ohio for the payor at the time the employee earned the right to receive such income from the payor or (ii) is residing in Ohio or is domiciled in Ohio at the time s/he receives the payment; and
5. The recipient is either a resident of Ohio at the time of the receipt of the payment, or, if the recipient is not a resident of Ohio at the time of the receipt of the payment, then . . .

. . . the payment does **not** represent one of several payments which are substantially equal, periodic payments or

. . . if the payment does represent one of several payments which are substantially equal, periodic payments, such payments either (i) are not made for the life expectancy of the recipient (or the joint lives or joint life expectancy of the recipient and the recipient's designated beneficiary) or (ii) are made for a period of less than ten years.

Only if all five of the above tests are met will Ohio individual income tax withholding be required with respect to distributions from plans other than government retirement plans and private sector qualified retirement plans.

Observations:

1. Except for individuals participating in "nonqualified" deferred compensation programs, in most situations most individuals receiving retirement plan payment are no longer employees of the organization. Thus, in most cases payments of retirement benefit from government-sponsored retirement system plans and from "qualified" retirement plans will not be subject to Ohio income tax withholding.

A plan is generally a "nonqualified" plan if the plan discriminates in favor of highly-compensated executives. Such plans can include deferred bonus programs which allow the recipient to receive her/his bonus over several years. In most cases the payor will be the employer (rather than a separate pension plan trust), and the payment will be subject to federal income tax withholding and will be reported on IRS form W-2. In those situations where such payments are reported on the IRS form W-2, such payments to nonresidents will be subject to Ohio individual income tax withholding only if the five above-listed requirements are present.

Because deferred bonuses are a form of a nonqualified deferred compensation program, we require income tax withholding with respect to payment of such deferred bonuses to nonresidents if all five of the above-listed requirements are present.

2. Now that the U. S. Congress has specifically addressed retirement income attributable to retirement plans, the Department of Taxation's position is that nonresidents who exercise stock options received on account of employment in Ohio must pay Ohio individual income tax on the Ohio-related

appreciation. For purposes of determining the Ohio-related appreciation, the nonresident will treat as Ohio income the value of the unexercised stock option at the time the individual left Ohio minus the value of the unexercised stock option at the time the individual received the option. In those cases where an individual receives a stock option prior to either moving to or working in Ohio, then the Ohio-related appreciation will be based upon the value of the unexercised stock option when the individual leaves Ohio minus the value of the unexercised stock option at the time the individual first became a resident of Ohio or first began working in Ohio.

For more information about this law, you can send us an e-mail by clicking on "Contact Us" on the left hand side of our home page then sending us an e-mail. You can also call us at the numbers listed below:

1-614-466-5285

Ohio Relay Service for the hearing-impaired: 1-800-750-0750

Endnotes:

(1) This legislation, among other things, amended section 114(b)(1)(I) of title 4, United States Code by inserting "(or any plan, program, or arrangement that is in writing, that provides for retirement payments in recognition of prior service to be made to a retired partner, and that is in effect immediately before retirement begins)" after "section 3121(v)(2)(C) of such Code". Because the Ohio Department of Taxation's policy has been to treat such income as being situated to the recipient's state of domicile (which is what the amendment now mandates), this amendment will not affect any individual's calculation of Ohio income tax.

(2) A "qualified" plan is one that meets the requirements of Internal Revenue Code Section 401(a) and is thus eligible for favorable income tax treatment.

(3) A "nonqualified" retirement plan is one not meeting the requirements of Internal Revenue Code Section 401(a).

(4) Based upon the first paragraph of Ohio Revised Code section 5747.01 ("... any term used in this chapter that is not otherwise defined in this section has the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes . . ."), the Ohio Department of Taxation treats an individual as an "employee" for Ohio withholding tax purposes if the Internal Revenue Service treats the individual as an employee for federal withholding tax purposes.

Information Release

IT 2007-08 — Personal Income Tax: Residency Guidelines - Tax Imposed on Resident and Nonresident Individuals for Post-2006 Taxable Years — Issued December 2007; Revised July 2008

This information release discusses how Ohio personal income tax is imposed on resident and nonresident individuals for taxable years beginning after December 31, 2006. This information release does not apply to taxable years beginning before January 1, 2007.(1)

Who is subject to the Ohio personal income tax?

Ohio imposes personal income tax on individuals(2) residing in this state, earning or receiving income in this state, or earning or receiving certain lottery winnings, prizes, or awards from the Ohio Lottery Commission. Each such individual (or married couple who file a joint federal return) with federal adjusted gross income exceeding the amounts specified in the instructions for the Ohio individual income tax return, form IT 1040, must file an Ohio income tax return. This filing requirement also applies to each nonresident individual whose federal adjusted gross income includes any income earned or received in Ohio by a pass-through entity unless the entity files a composite Ohio return on behalf of its nonresident owners. The filing requirement applies even if an individual is allowed a nonresident or resident credit under Ohio Revised Code section ("R.C.") 5747.05(A) or (B), respectively, that eliminates most or all Ohio individual income tax.

Who is a resident?

R.C. 5747.01(I) defines a "resident" of Ohio for purposes of the Ohio income tax. A "resident" is an individual who is domiciled in this state, subject to R.C. 5747.24. A "nonresident" is an individual that is not a resident. While the tax law does not specifically define who is domiciled in this state, there is substantial case law on the determination of "domicile" for tax and other purposes. However, Ohio Adm. Code 5703-7-16 does provide some factors that the Tax Commissioner cannot consider in making a determination of domicile.(3)

As the case law shows, an individual can have only one domicile at any given point in time. Most individuals retain their domicile throughout the taxable year, even if they spend all or a substantial portion of the year away from that domicile during the year.(4) For example, an individual who regularly spends spring and summer in Ohio and autumn and winter in Florida may be domiciled either in Ohio or Florida for the entire year, depending on what the relevant facts demonstrate, and would be away from that domicile while in the other state. The contact period test of R.C. 5747.24, discussed below, applies for purposes of determining whether or not that individual was a resident of Ohio for the taxable year. That individual has not switched domiciles back and forth between states during the year and is not a part-year resident of Ohio, but remains either a full-year resident or nonresident under the contact period test of R.C. 5747.24.

In contrast, there are situations where an individual changes domicile during the taxable year. For example, an individual domiciled in Ohio may retire and move to another state, or an individual domiciled in another state may move to Ohio for employment. R.C. 5747.01(J) provides in pertinent part: "An individual who is a resident for only part of a taxable year is a nonresident for the remainder of that taxable year." Such an individual is a part-year resident.

Why is residency important?

Ohio imposes income tax on all income of resident individuals but only imposes tax on the income of nonresident individuals that is earned or received in Ohio. While residents receive a credit under R.C. 5747.05(B) for income subjected to tax in another state, the credit cannot exceed the tax paid to the other state on that income. In contrast, nonresidents receive a credit under R.C. 5747.05(A) to eliminate tax on income not earned or received in Ohio. So, for example, if the income is from a state that imposes no tax, a resident will get no credit but a nonresident will. However, if the income is from Ohio, both the resident and the nonresident will be subject to Ohio tax.

The contact period test

R.C. 5747.24 contains a contact period test for determining whether an individual is a resident of Ohio for purposes of the Ohio personal income tax. The test examines an individual's "contact periods" in Ohio during the taxable year to arrive at a presumption of whether or not that individual is an Ohio

resident for that taxable year. Since the test is based on contact periods (not days) during the entire year to arrive at a presumption for that entire year, it does not apply to part-year residents as previously noted. An individual has a contact period with the state when the individual is away overnight from the individual's abode located outside this state⁽⁵⁾ and while away overnight from that abode spends at least some portion, however minimal, of two consecutive days in this state. [R.C. 5747.24(A)(1)(a)].

For example, an individual spending any portion of two consecutive days in Ohio (e.g., portions of Monday and Tuesday) has one contact period in Ohio, but an individual spending any portion of each of two nonconsecutive days in Ohio, (e.g., Monday and Wednesday, but not Tuesday) has no contact period in Ohio for those two days.

The presumptions under the contact period test depend on the number of contact periods in Ohio during the taxable year. If the Tax Commissioner challenges number of contact periods an individual claims to have in Ohio during the taxable year, the individual must verify the number claimed by a preponderance of the evidence. The individual is presumed to have a contact period for any period the individual does not prove was not a contact period. R.C. 5747.24(E).

Individuals presumed not to be domiciled in Ohio⁽⁶⁾

An individual is irrebutably presumed not to be domiciled in Ohio for any portion of the taxable year **if the individual meets all five of the following criteria:**

- (i) The individual has less than 183 contact periods in Ohio during the taxable year,
- (ii) The individual has at least one abode outside this state during the entire taxable year (the law does not define "abode"),
- (iii) The individual did not change domicile from or to Ohio during the taxable year (referred to as a part-year resident in the instructions to the form IT 1040),
- (iv) By May 30 of the immediately succeeding calendar year the individual files the affidavit of non-Ohio domicile,⁽⁷⁾ and
- (v) The affidavit does not contain any false statements.

If the individual did not change domicile from or to Ohio during the taxable year (*i.e.*, the individual was not a part-year resident of Ohio) and does not meet criteria (i), (ii), (iv) and (v) above, the individual is presumed to be a full-year Ohio domiciliary.

Who should file the affidavit?

- Any taxpayer who during the previous taxable year filed an Ohio income tax return as a resident or part-year resident and for the current year is claiming to be a nonresident/nondomiciliary, and, for the current taxable year has no income situated to Ohio under Ohio Revised Code sections 5747.20 - 5747.231.
- Any taxpayer who for the taxable year has no intent to file an Ohio income tax return and has (i) an abode in Ohio, (ii) a contact period in Ohio, and/or (iii) nexus with Ohio to the extent that the tax commissioner would have cause to question the taxpayer's non-filing.

Individuals presumed to be full-year Ohio domiciliaries

Fewer than 183 contact periods.⁽⁸⁾ An individual who has fewer than 183 contact periods in Ohio during the taxable year and is not a part-year resident, but does not meet criteria (ii), (iv), and (v) set forth above, is presumed to be a full-year Ohio domiciliary. Such an individual may rebut the presumption of full-year Ohio domicile by proving by a preponderance of the evidence that the individual was not domiciled in Ohio for all or part of the year.

At least 183 contact periods.⁽⁹⁾ An individual who has at least 183 contact periods in Ohio during the taxable year and is not a part-year resident is presumed to be a full-year Ohio domiciliary. Such an individual may rebut the presumption of full-year Ohio domicile by proving by clear and convincing evidence that the individual was not domiciled in Ohio for all or part of the year.

Questions

If you have any questions concerning this release, you may e-mail them to us either by going to our Web site at tax.ohio.gov and clicking on "Contact Us" or by calling us at (800) 282-1780.

FOOTNOTES:

(1) For a discussion of the law applicable to pre-2007 taxable years see information release # IT 2007-01.

(2) The tax also applies to estates and trusts, which are not addressed in this information release.

(3) For example, the location of an individual's financial accounts, the location at which the taxpayer receives professional services such as a doctor's visit, the location where the individual was married, etc.

(4) In *Maple v. Tracy* (Sep. 3, 1999), BTA Nos. 98-T-268 and 98-T-312, unreported, the Board of Tax Appeals took the opportunity to review the basic legal concepts of domicile:

"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. Blumenburg* (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. 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*, 226."

Domicile has been defined as a place where an individual has his "true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning." *Sturgeon v. Korte* (1878), 34 Ohio St. 525. As held by the United States Supreme Court in *Williams v. N. Carolina* (1944), 325 U.S. 226, "Domicile implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance." Abandonment of one's domicile is effected only when a person chooses a new domicile, establishes actual residence in the place chosen and shows a clear intent that it be the principal and permanent residence. *E. Cleveland v. Landingham* (1994), 97 Ohio App.3d 385.

(5) "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." R.C. 5747.24(A)(1)(b). There is no definition of "abode" in Ohio Revised Code Title 57.

(6) R.C. 5747.24(B) provides as follows:

(B)(1) Except as provided in division (B)(2) of this section, an individual who during a taxable year has no more than one hundred 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 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.

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 division (B)(1) of this section with respect to the deceased individual, and filing the statement with the commissioner within the later of the date the statement would otherwise be due or sixty days after the date of the individual's death.

An individual or personal representative of an estate who knowingly makes a false statement under 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.

(7) See form ITDA - NM (affidavit for nonmilitary), which is available on the department's Web site. Note that under R.C. 5747.24(B)(1) the affidavit is due on April 15. The second paragraph of R. C. 5703.35 authorizes the Tax Commissioner to extend for up to forty-five days, the due date for any report required by law to be filed with the Commissioner. Based upon this provision, the Commissioner has extended until May 30 the due date for filing the yearly affidavit, form ITDA-M or ITDA-NM.

(8) R.C. 5747.24(C) provides as follows:

(C) An individual who during a taxable year has 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.

(9) R.C. 5747.24(D) provides as follows:

(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.

Information Release

IT 2006-04 Personal Income Tax: Nonresident Married Filing Jointly -- Issued September, 2006; Revised March 2007

This information release contains the text of an administrative rule, Ohio Administrative Code 5703-7-18. The rule addresses the situation where a married couple files jointly for federal income tax purposes, but for Ohio income tax purposes one spouse is a nonresident. ***This rule is now final and effective.*** The substantive changes made following the public comment period in September - October 2006 include the following: (1) adding the phrase "as it existed on November 1, 2006" to the first sentence of paragraph (C) (1) (c) to define the language of the Servicemembers Civil Relief Act of 2003 referred to in the rule; and (2) modifying the examples in paragraphs (E) (1) and (2) to clarify the availability of the joint filing credit.

Rule 5703-7-18 Nonresident "married filing jointly".

(A) For purposes of this rule a "non-liable MFJ spouse" is an individual who for the taxable year meets all the requirements in paragraphs (A)(1) to (A)(3) of this rule.

(1) The individual's filing status for federal income tax purposes is "married filing jointly;"

(2) For purposes of Chapters 5747. and 5748. of the Revised Code, the individual is a full-year nonresident of this state; and

(3) The individual did not directly, or indirectly on account of either (or both) an equity investment in a pass-through entity or a distribution from a trust, earn or receive income which, for purposes of computing the nonresident credit allowed by division (A) of section 5747.05 of the Revised Code, would be apportioned or allocated to this state under sections 5747.20 to 5747.231 of the Revised Code.

(B) Section 5747.08 of the Revised Code requires that an individual's filing status for the taxable year for Ohio personal income tax purposes and for school district income tax purposes be the same as the individual's filing status for federal income tax purposes (Title 26 of the United States Code) for that taxable year. As such, each individual whose filing status for federal income tax purposes is "married filing jointly" for the taxable year must use the "married filing jointly" status for that taxable year for both Ohio personal income tax purposes and school district income tax purposes. This requirement applies even if one or both of the "married filing jointly" taxpayers are full-year nonresidents of Ohio.

(C)(1)(a) Except as set forth in paragraph (C)(1)(c) of this rule, when computing Ohio adjusted gross income less exemptions, no individual is allowed a deduction for any item of income or gain unless division (A) of section 5747.01 of the Revised Code expressly provides for the deduction.

(b) Nothing in division (A) of section 5747.01 of the Revised Code allows a deduction for income or gain of a non-liable MFJ spouse solely because such income or gain is neither earned nor received in this state.

(c) Paragraph (C)(1)(a) of this rule does not apply to military service compensation described in the Servicemembers Civil Relief Act of 2003, 50 U.S.C. 501 (hereinafter, "Servicemembers Act") as it existed on November 1, 2006. Pursuant to that act a nonresident, when computing Ohio adjusted gross income less exemptions, can deduct such compensation.

(2) All items of income and gain which are not allowed as a deduction under division (A) of section 5747.01 of the Revised Code, and all compensation which is not deducted pursuant to the Servicemembers Act, will enter into the computation of the nonresident credit. Paragraph (C)(2) of this rule applies even if the items and compensation are those of a non-liable MFJ spouse.

(D)(1) The non-liable MFJ spouse shall not be liable for any tax, interest penalty, or penalty due for the taxable year by the spouse of the non-liable MFJ spouse.

(2) The non-liable MFJ spouse shall not be required to sign the personal income tax return or the school district income tax return required to be filed for the taxable year by the spouse of the non-liable MFJ spouse.

(3) The non-liable MFJ spouse shall not be required to file the personal income tax return or the school district income tax return required to be filed for the taxable year by the spouse of the non-liable MFJ spouse.

(E) Paragraphs (E)(1), (E)(2), and (E)(3) of this rule each set forth an example illustrating the

application of this rule.

(1) H and W are a married couple with no dependents. H is a full-year resident of Ohio with wages of \$40,000 earned in this state. W is a full-year resident of Pennsylvania with wages of \$60,000 earned in that state. They have no other sources of income. They file a joint federal income tax return reporting federal adjusted gross income of \$100,000.

H is liable for Ohio tax, both as a resident of this state and as an individual with income earned or received from sources within this state. Since H and W filed a joint federal income tax return, H must compute tax beginning with the \$100,000 joint federal adjusted gross income. Accordingly, H must calculate Ohio income tax on \$100,000 less the deduction allowed under section 5747.025 of the Revised Code for two personal exemptions. H can then reduce the tax so calculated by two exemption credits allowed by section 5747.022 of the Revised Code and then reduce the net amount by the joint filing credit allowed by division (G) of section 5747.05 of the Revised Code. From that second net amount H can then claim, under division (A) of section 5747.05 of the Revised Code, the nonresident credit. In this example the nonresident credit will be sixty per cent ($\$60,000/\$100,000$) of the Ohio income tax after reduction for the exemption credit and for the joint filing credit. The remaining forty per cent of the calculated Ohio income tax after reduction for the exemption credit and for the joint filing credit is the net Ohio income tax that H owes before reduction for refundable credits such as estimated tax payments made.

Because for the taxable year W meets the definition of "non-liable MFJ spouse" set forth in paragraph (A) of this rule, W is not liable for any Ohio income tax and related interest, interest penalty, or penalty due for that taxable year; W is not required to sign the Ohio "married filing jointly" income tax return, and W is not required to file the Ohio "married filing jointly" income tax return (but H is required to sign and file the Ohio "married filing jointly" income tax return).

(2) H and W, a married couple with no dependents, are both full-year residents of a state other than Ohio. They are rental property owners in that state and earn profits from their rental activities of \$50,000 and \$30,000, respectively. W is also a limited partner in a partnership conducting business in Ohio (assume the partnership's property, payroll, and sales Ohio apportionment ratio is .500000). For the taxable year W has a \$20,000 distributive share of ordinary income from the limited partnership. Other than H's profit from rental properties located outside Ohio, H has no other sources of income. H's and W's filing status for federal income tax purposes for the year is married filing jointly. They have no other income and no adjustments to gross income; so, their adjusted gross income for federal income tax purposes is \$100,000.

Because W has a distributive share of income from a pass-through entity doing business in Ohio, W is liable for Ohio's personal income tax. Since H and W filed a joint federal income tax return, W must compute tax beginning with the \$100,000 joint federal adjusted gross income. Accordingly, W must calculate Ohio income tax on \$100,000 less the deduction allowed under section 5747.025 of the Revised Code for two personal exemptions. W can then reduce the tax so calculated by two exemption credits allowed by section 5747.022 of the Revised Code. From that net amount W can then claim, under division (A) of section 5747.05 of the Revised Code, the nonresident credit. For purposes of computing the nonresident credit, only \$10,000 of W's \$20,000 distributive share of partnership income is apportioned to Ohio; so, the nonresident credit will be ninety per cent ($\$90,000/\$100,000$) of the Ohio income tax after reduction for the exemption credit. The remaining ten per cent of the calculated Ohio income tax after reduction for the exemption credit is the net Ohio income tax that W owes before reduction for refundable credits such as estimated tax payments made.

Because for the taxable year H meets the definition of "non-liable MFJ spouse" set forth in paragraph (A) of this rule, H is not liable for any Ohio income tax and related interest, interest penalty, or penalty due for that taxable year; H is not required to sign the Ohio "married filing jointly" income tax return, and H is not required to file the Ohio "married filing jointly" income tax return (but W is required to sign and file the Ohio "married filing jointly" income tax return).

(3) For the taxable year immediately preceding the current taxable year, H and W were full-year residents of Ohio. At some time during the current taxable year W, but not H, leaves Ohio and establishes residency in another state. Meanwhile, H continues to reside full-time in Ohio. For the current taxable year their federal income tax return shows the following:

Their filing status is married filing jointly and they have no dependents. H has wages of \$25,000 earned in Ohio. W has wages of \$20,000 earned in Ohio (prior to establishing residency in the other state) and wages of \$30,000 earned in the other state (subsequent to establishing residency in the other state). W also has \$10,000 of long-term capital gain from the sale of publicly-traded securities (the sale occurred prior to W's establishing residency in the other state) and has \$15,000 of long-term capital gain from the sale of publicly-traded securities (the sale occurred subsequent to W's establishing

residency in the other state). They have no other items of income or deductions, so their federal adjusted gross income and their Ohio adjusted gross income is \$100,000.

For the taxable year H and W must file an Ohio income tax return and indicate a filing status of married filing jointly. They must enter on line 1 of their Ohio form IT-1040 for the taxable year the "married filing jointly" adjusted gross income of \$100,000 as shown on their federal income tax return. They can claim two personal exemption deductions and the credit allowed by sections 5747.025 and 5747.022 of the Revised Code, respectively. They then can claim the joint filing credit allowed by division (G) of section 5747.05 of the Revised Code. With respect to the income W earned after establishing residency in another state and with respect to the capital gain W recognized after establishing residency in another state, H and W can claim the nonresident credit allowed by division (A) of section 5747.05 of the Revised Code. In this example the nonresident credit will be forty-five per cent $([\$15,000 + \$30,000]/\$100,000)$ of the Ohio income tax after reduction for the exemption credit and for the joint filing credit.

Because for the taxable year neither W nor H meets the definition of "non-liable MFJ spouse" set forth in paragraph (A) of this rule, W and H are jointly and severally liable for any Ohio income tax and related interest, interest penalty, or penalty due. W and H are both required to sign the Ohio income tax return, and they are both required to file the "married filing jointly" Ohio income tax return.

Information Release

IT 2007-01 Personal Income Tax: Residency Guidelines -- Tax Imposed on Resident and Nonresident Individuals -- Issued January, 2007

This information release is to advise taxpayers of how Ohio personal income tax is imposed on resident and nonresident individuals for taxable years 2002 to 2006 (the income tax return for taxable year 2006 is due by April 16, 2007 unless the taxpayer has obtained from the IRS an extension of time to file).

This information release does not apply to taxable years beginning on or after January 1, 2007.

(1) (Footnoted information in this release is indicated by *italics*; footnotes are located at the bottom of the text.)

Who is subject to the Ohio personal income tax?

Ohio imposes personal income tax on individuals⁽²⁾ residing in or earning or receiving income in this state or earning or receiving certain lottery winnings, prizes, or awards from the Ohio Lottery Commission. Each individual (or married couple who file a joint federal return) with federal adjusted gross income exceeding the amounts specified in the instructions for the Ohio individual income tax return, form IT 1040, must file an Ohio income tax return. This filing requirement also applies to nonresident individuals with income earned or received in Ohio by a pass-through entity unless the entity files a composite Ohio return on behalf of its nonresident owners. The filing requirement applies even if an individual is allowed a nonresident or resident credit under Ohio Revised Code section ("R.C.") 5747.05(A) or (B), respectively, that eliminates most or all Ohio individual income tax.

Who is a resident?

R.C. 5747.01(I) defines a "resident" of Ohio for purposes of the Ohio income tax. A "resident" is an individual who is domiciled in this state, subject to R.C. 5747.24. A "nonresident" is an individual that is not a resident. While the tax law does not specifically define who is domiciled in this state, there is substantial case law on the determination of "domicile" for tax and other purposes. However, Ohio Adm. Code 5703-7-16 does provide some factors that the Tax Commissioner cannot consider in making a determination of domicile.⁽³⁾

As the case law shows, an individual can have only one domicile at any given point in time. Most individuals retain their domicile throughout the taxable year, even if they spend all or a substantial portion of the year away from that domicile during the year.⁽⁴⁾ For example, an individual who regularly spends spring and summer in Ohio and autumn and winter in Florida may be domiciled either in Ohio or Florida for the entire year, depending on what the relevant facts demonstrate, and would be away from that domicile while in the other state. The contact period test of R.C. 5747.24, discussed below, applies for purposes of determining whether or not that individual was a resident of Ohio for the taxable year. That individual has not switched domiciles back and forth between states during the year and is not a part-year resident of Ohio, but remains either a full-year resident or nonresident under the contact period test of R.C. 5747.24.

In contrast, there are situations where an individual changes domicile during the taxable year. For example, an individual domiciled in Ohio may retire and move to another state, or an individual domiciled in another state may move to Ohio for employment. R.C. 5747.01(J) provides in pertinent part: "An individual who is a resident for only part of a taxable year is a nonresident for the remainder of that taxable year." Such an individual is a part-year resident.

Why is residency important?

Ohio imposes income tax on all income of resident individuals but only imposes tax on the income of nonresident individuals that is earned or received in Ohio. While residents receive a credit under R.C. 5747.05(B) for income subjected to tax in another state, the credit cannot exceed the tax paid to the other state on that income. In contrast, nonresidents receive a credit under R.C. 5747.05(A) to eliminate tax on income not earned or received in Ohio. So, for example, if the income is from a state that imposes no tax, a resident will get no credit but a nonresident will. However, if the income is from Ohio, both the resident and the nonresident will be subject to Ohio tax.

The contact period test

R.C. 5747.24 contains a contact period test for determining whether an individual is a resident of Ohio for purposes of the Ohio personal income tax. The test examines an individual's "contact periods" in Ohio during the taxable year to arrive at a presumption of whether or not that individual is an Ohio

resident for that taxable year. Since the test is based on contact periods (not days) during the entire year to arrive at a presumption for that entire year, it does not apply to part-year residents as previously noted. An individual has a contact period with the state when the individual is away overnight from the individual's abode located outside this state⁽⁵⁾ and while away overnight from that abode spends at least some portion, however minimal, of two consecutive days in this state. R.C. 5747.24(A)(1)(a).

For example, an individual spending any portion of two consecutive days in Ohio (e.g., portions of Monday and Tuesday) has one contact period in Ohio, but an individual spending any portion of each of two nonconsecutive days in Ohio, (e.g., Monday and Wednesday, but not Tuesday) has no contact period in Ohio for those two days.

The presumptions under the contact period test depend on the number of contact periods in Ohio during the taxable year. If the Tax Commissioner challenges number of contact periods an individual claims to have in Ohio during the taxable year, the individual must verify the number claimed by a preponderance of the evidence. The individual is presumed to have a contact period for any period the individual does not prove was not a contact period. R.C. 5747.24(E).

Individuals presumed to be nonresidents

Up to 120 contact periods. (6) An individual with up to 120 contact periods (or up to 150 under certain circumstances (7)) is presumed not domiciled in Ohio if the individual has at least one abode outside this state during the entire taxable year. **If the individual does not have an abode outside of this state for the entire taxable year**, this test does not apply. The law provides that the Tax Commissioner may request that the individual verify, under penalties of perjury, that the individual was not domiciled in Ohio and maintained an abode outside this state for the entire taxable year. Unless the individual either fails to submit the statement within sixty days after receiving the request or makes a false statement, the presumption that the individual is not a resident becomes irrebuttable.

Individuals presumed to be residents

Less than 183 contact periods. (8) An individual who has less than 183 contact periods in Ohio and does not qualify under the "up to 120 contact periods" test discussed above (9) is presumed to be a full-year Ohio resident. Such an individual may rebut the presumption of residence by proving by a preponderance of the evidence that the individual is not a resident.

At least 183 contact periods. (10) An individual with at least 183 contact periods in Ohio is presumed to be a full-year Ohio resident. Such individual may rebut the presumption of residence by proving by clear and convincing evidence that the individual is not a resident.

Questions

If you have any questions concerning this release, you may e-mail them to us by going to our Web site at tax.ohio.gov and clicking the "Contact Us" link or call us at (800) 282-1780.

OHIO RELAY SERVICES FOR
THE HEARING OR SPEECH IMPAIRED

Phone: (800) 750-0750

FOOTNOTES:

(1) Later this year we will revise this information release for post-2006 taxable years to take into account law changes made by the 126th General Assembly in Sub. H.B. 73.

(2) The tax also applies to estates and trusts, which are not addressed in this information release.

(3) For example, the location of an individual's financial accounts, the location at which the taxpayer receives professional services such as a doctor's visit, the location where the individual was married, etc.

(4) In *Maple v. Tracy* (Sep. 3, 1999), BTA Nos. 98-T-268 and 98-T-312, unreported, the Board of Tax Appeals took the opportunity to review the basic legal concepts of domicile:

"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. Blumenburg* (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. 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*, 226."

Domicile has been defined as a place where an individual has his "true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning." *Sturgeon v. Korte* (1878), 34 Ohio St. 525. As held by the United States Supreme Court in *Williams v. N. Carolina* (1944), 325 U.S. 226, "Domicile implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance." Abandonment of one's domicile is effected only when a person chooses a new domicile, establishes actual residence in the place chosen and shows a clear intent that it be the principal and permanent residence. *E. Cleveland v. Landingham* (1994), 97 Ohio App.3d 385.

(5) "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." R.C. 5747.24(A)(1)(b).

(6) "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." R.C. 5747.24(B).

(7) R.C. 5747.24(A)(2) provides for up to an additional 30 contact periods if the person provides services or raises funds for an organization that is described in 501(c)(3) of the Internal Revenue Code or for a medical hardship involving the individual or the individual's extended family.

(8) "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." R.C. 5747.24(C).

(9) Individuals who do not qualify under the "up to 120 contact periods" test include not only those with over 120 contact periods, but also those with up to 120 contact periods who either fail to submit the required statement within sixty days after receiving a request for it or make a false statement.

(10) "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."

R.C. 5747.24(D).



Affidavit of Non-Ohio Domicile for Taxable Year 2008 – Nonmilitary

This form is for use only by each nonmilitary individual who is claiming to be a full-year nondomiciliary under Ohio Revised Code section 5747.24.

Due date: June 1, 2009 (Ohio law does not provide for any additional time to file). See Ohio Revised Code sections 5747.24, 5703.35 and 1.14.

Who must file: Please see instructions.

Filing this affidavit may impact the ability for you and/or your family members to obtain in-state tuition at an Ohio university, to vote in Ohio, and to obtain or keep an Ohio driver's license, etc. Filing this affidavit does **not** exempt you from timely filing your Ohio income tax return for 2008 and paying any tax due.

First name	M.I.	Last name	Social Security number
Address		County	
City, state, ZIP code			

Under penalties of perjury, I declare all the following to be true:

- I was not domiciled in Ohio at any time during taxable year 2008. I was domiciled in _____ (name of state(s) where domiciled).
- I had at least one abode (place where I lived) outside of Ohio for the entire taxable year. Name of city (or cities), state(s) (if within the USA) and country (if not within the USA) where I lived if different from statement 1, above.

- I had fewer than 183 contact periods* in Ohio during the taxable year.
- I shall shall not be filing a year 2008 Ohio individual income tax return.

Under penalties of perjury, I declare that to the best of my knowledge and belief the statements on this affidavit are true, correct and complete.

Your signature

Date

*Ohio Revised Code section 5747.24(A)(1) states that an individual "has one contact period in this state" if the individual is away overnight from his/her 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.

Federal Privacy Act Notice

Because we require you to provide us with a Social Security number, the *Federal Privacy Act of 1974* requires us to inform you that providing us with your Social Security number is mandatory. Ohio Revised Code sections 5703.05, 5703.057 and 5747.08 authorize us to request this information. We need your Social Security number in order to administer this tax. Your failure to supply any information requested on this affidavit will result in our inability to process this document.

Please do not attach to, or enclose with, your Ohio income tax return.

Mail to:
Ohio Department of Taxation
Attn: Tax Technical
4485 Northland Ridge Blvd.
Columbus, OH 43229-5404.

Questions? Call us toll-free at 1-800-282-1780.

IT DA-NM Instructions

Who Should File This Affidavit?

You must file this yearly affidavit if you are not in the military and you meet either of the following criteria:

- During the previous taxable year (2007) you filed an Ohio income tax return as a resident or part-year resident, for the current taxable year (2008) you are claiming to be a nonresident/nondomiciliary, and for the current taxable year you have no income situated to Ohio under Ohio Revised Code sections 5747.20 – 5747.231.
- For the current taxable year (2008) you have no intent to file an Ohio income tax return and you have (i) an abode in Ohio, (ii) a contact period in Ohio, and/or (iii) nexus with Ohio to the extent that the tax commissioner would have cause to question your non-filing.

If you meet either of the criteria set forth above, but you do not file this affidavit by June 1, 2009, under Ohio law you are presumed to be a full-year domiciliary.

What Is the Due Date for Filing This Affidavit?

The due date is June 1, 2009. R.C. section 5747.24 requires that, in order to preserve the presumption of full-year non-Ohio residency, the taxpayer must file this affidavit by the 15th day of the fourth month following the last day of the taxable year. However, R.C. section 5703.35 allows the tax commissioner to extend for 45 days the due date for any report. As such, you must file this tax return by June 1, 2009. The tax commissioner has no authority to extend beyond June 1, 2009 the due date for filing the year 2008 affidavit.

Where Do I Mail This Affidavit?

Please mail this affidavit to the street address set forth at the bottom of the affidavit. The postmark date must be no later than June 1, 2009. Please do not attach this affidavit to, or enclose with, your Ohio individual income tax return.

Do I Need To File This Affidavit if I Have Not Earned or Received Any Income in Ohio?

Even if you have no income that you earned or received in Ohio, you must timely file this affidavit by June 1, 2009 if you want to preserve the presumption of full-year non-Ohio domicile.

If I Timely File Ohio Form ITDA-NM, Do I Also Have To File Ohio Form IT 10, Information Notice of No Tax Due?

No taxpayer is required to file Ohio form IT 10. However, by filing Ohio form IT 10, you might not be considered a delinquent

taxpayer. So, if you have not earned or received any income in Ohio, you may want to consider filing both this affidavit and Ohio form IT 10. Please do not file the affidavit and notice together since there is a different address for the affidavit and for the notice.

Whom Do I Contact if I Have Additional Questions About This Affidavit?

For more information you can call the toll-free number on the front of this affidavit, or for faster service you can go to our Web site at tax.ohio.gov, click on "Contact Us" and electronically send your question(s) to us.

What Is the "Bright Line" Test Under Ohio Revised Code Section 5747.24?

This portion of Ohio law provides for a "bright line" test under which an individual is presumed to be a full-year nondomiciliary if all of the following circumstances are present:

- The individual has at least one abode outside Ohio for the entire year (the law does not define "abode"),
- The individual has no more than 182 contact periods in Ohio, and
- The individual timely submits to the Ohio Department of Taxation this affidavit, and the affidavit is not false.

What Is a "Contact Period" in Ohio?

An individual has one contact period in this state if the individual is away overnight from the individual's abode located outside the state and while away overnight from that abode spends at least some portion, however minimal, of each of two consecutive days in this state. Note that the individual does not have to spend the night in Ohio.

For example: An individual who claims to be domiciled in Florida has an abode in Florida for the entire year. On Jan. 2 of the taxable year the individual flies from Florida to Toledo. Later on Jan. 2 the individual drives to Michigan and spends the night in Michigan. On Jan. 3 the individual drives from Michigan back to Ohio. Late in the day on Jan. 3 the individual flies from Toledo back to the individual's abode in Florida.

The individual has one contact period in Ohio because the individual spent some portion of two consecutive days (Jan. 2 and Jan. 3) in Ohio and was away overnight (from sometime on Jan. 2 until sometime on Jan. 3) from the individual's abode in Florida.