ORIGINAL

In the
Supreme Court of Ohio

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

AMENDED MERIT BRIEF OF APPELLANT
JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO

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TABLE OF CONTENTS

APPENDIX:

SEPARATE VOLUME:

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION/SUMMARY

For 2008, the Cunninghams, appellees, did not file any Ohio personal income tax return. Mrs. Cunningham did not file a sworn statement of non-domicile in Ohio either; she simply didn't pay her taxes. As the Board of Tax Appeals ("BTA") properly held, Mrs. Cunningham was domiciled in Ohio and is required to pay 2008 income taxes. Mrs. Cunningham has not appealed the BTA's determination in this regard. As for Dr. Cunningham, he did file an affidavit of non-domicile in hopes of obtaining a "presumption" of non-domicile pursuant to R.C. 5747.24(B)(1). In order to be entitled to the presumption of non-domicile in Ohio, R.C. 5747.24(B)(1) requires a verified statement that includes certain contents:

"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 statute goes on to provide if the statement is "false," then the individual is presumed to be domiciled in Ohio and must bear the burden of proving domicile in some other state by the preponderance of the evidence. R.C. 5747.24(B)(2)(b). The affidavit form on which an individual makes the verified statement is promulgated by the Tax Commissioner and requires the individual to attest that he meets the statutory requirements:

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

1. I was not domiciled in Ohio at any time during taxable year 2008. I was domiciled in _____.
2. 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 with the USA) and country (if not within the USA where I lived if different from statement 1, above."

ST 47.

In this way, the affidavit form promulgated by the Tax Commissioner requires the same verified affirmations as the statute.

Dr. Cunningham filled out the affidavit form and swore that that Ohio was *not* his domicile and that Tennessee *was* his state of domicile. ST 47. Both of those statements are false. Before the Tax Commissioner and at hearing before BTA, Dr. Cunningham admitted that Tennessee was not his state of domicile. And, in fact, his relationship with Ohio is identical to his wife's.

These facts should have been enough to allow the Tax Commissioner to disregard the affidavit of non-domicile, and to find Dr. Cunningham an Ohio resident subject to income tax during 2008. Because the affidavit was false, Dr. Cunningham bore the burden of proving domicile outside Ohio under the ordinary common law definition of domicile—which he cannot do. R.C. 5747.24(C).

Under Ohio's long-settled common law definition, "the domicile of a person [is] where he 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*, 34 Ohio St. 525, 535 (1878) (quoting Story's Conflict of Laws, § 39); *In re Paich's Estate*, 90 Ohio L. Abs. 470 (8th Dist. 1962). As early as 1878, this Court regarded domicile principles as "well settled rules * * * [that were in existence] when the constitution was adopted." *Sturgeon*, 34 Ohio St. at 535.

Under any objective measure, the Cunninghams were domiciled in Ohio before, during, and after 2008 under the common law standard. The Cunninghams were born and raised in Ohio. BTA Hearing Transcript (Tr.) at 63-64; 136-137. They raised their own children here, in Ohio homes. Hr. Tr. at 63-65; 86, 102; Ex F, G; Statutory Transcript ("ST") at 7, 18-37. The

Cunninghams were licensed professionals in Ohio, who pursued their careers in the state and retired here. Tr. at 69-72; 72-74; 137-139. The Cunninghams paid Ohio taxes until 2007, prior to this assessment, and concede that they were domiciled in Ohio for all previous tax years. Tr. at 74.

The Cunninghams have continually reaffirmed *under penalty of law* that Ohio is their domicile in order to vote, drive, register vehicles, and receive real property tax reductions (through the Homestead Exemption and the Owner-Occupied Reductions provided in R.C 323.152 and R.C. 323.153). Tr. at 58, 140; Hearing Ex. C; 58, 83, 84, 141-142, 143; Hearing Ex. D; 88, 91, 144; Hearing Ex. B, ST at 13-15. Even the Cunningham's dogs were registered in Hamilton County. Tr. at 66, 125. By their own actions, their intentions are clear—the Cunninghams have regarded Ohio as home, and intend to return here whenever they leave.

At the Tax Commissioner's administrative hearing and the BTA evidentiary hearing, the Cunninghams disavowed a Tennessee domicile. It is advantageously convenient that the Cunninghams no longer assert that Tennessee was their state of domicile for 2008. Tr. at 97, 98, 99, 100, 101. Under the Tennessee income tax law, individuals domiciled in that state must pay tax on all interest and dividend income earned or received in a tax year. Tr. at 56, 57, 101, 143; Exs. A, H, I; Joint Hearing Ex. 1. Had the Cunninghams been domiciled in Tennessee in 2008, they would have been required to have paid Tennessee taxes on such income. They have never made such a payment to Tennessee.

Moreover, according to the Cunninghams' own testimony at the BTA hearing, they improperly benefitted—by avoiding Ohio and federal income taxation—by listing their Tennessee property as a qualifying "vacation home" on their federal tax returns. Tr. at 42, 112; Joint Hearing Ex. 1. Specifically, in their federal income tax returns for several years, including

for 2008, the Cunninghams claimed substantial reductions to their federal adjusted gross income (and therefore their reported Ohio income) on the basis that that they spent less than two weeks in the Tennessee vacation home—a statement that supports the Tax Commissioner's finding that the claim of Tennessee domicile was false. Id.

Despite these repeated representations under penalty of perjury in their federal income tax returns for 2008 and for several other tax years, the Cunninghams testified at the BTA that their federal income tax returns were incorrect—they actually spent far more time than two weeks in the Tennessee home in 2008 (albeit not enough time to establish domicile there). Tr. at 109. Yet despite admitting that they were not entitled to reduce their federal adjusted gross income as they did in their 2008 return, the Cunninghams have not filed an amended return since then. Tr. At 45.

This vacation-home example perfectly demonstrates that, for the Cunninghams, the questions of where they lived and for how long depend upon the tax consequences of the answer. When it helps the Cunninghams to avoid Ohio income tax, they swear that they are domiciled in Tennessee. ST at 47. But quite the contrary is true when Ohio-domicile status helps the Cunninghams to avoid other taxes. To avoid Tennessee income tax, they claim that they are not domiciled in Tennessee. Tr. at 97, 98, 99, 100, 101. And, to reduce their taxable income for their federal income tax returns (which, in turn reduces their taxable Ohio income), the Cunninghams swore to have a primary address in Ohio and to have spent less than 14 days in their Tennessee vacation home. Tr. at 42, 112; Joint Hearing Ex. 1-7. Similarly, for Ohio real property taxation, the Cunninghams are happy to attest that they are domiciled in their Cincinnati-area family home so as to obtain Ohio property tax reductions based on Ohio

domicile status, while still filing statements of non-domicile for income tax purposes in the same years. Tr. at 88, 91, 144; Hearing Ex. B, ST at 13-15.

The Tax Commissioner determined that Mrs. Cunningham was domiciled in Ohio and therefore was an Ohio "resident" for income tax purposes under R.C. 5747.01(I) and 5747.24. The BTA affirmed this determination.

With regard to Dr. Cunningham, the Tax Commissioner properly determined that Dr. Cunningham's affidavit of non-domicile was false. Not only was the statement that Ohio was not the Cunninghams' domicile state false, but also the assertion that his place of domicile was Tennessee. Because Dr. Cunningham's affidavit contained false statements, it was disregarded by the Tax Commissioner.

In light of the false statements, the Tax Commissioner applied the same standard of proof of residency to Dr. Cunningham as to his wife, according to the operation of R.C. 5747.24(B) and (C). This is natural, because the Cunninghams shared exactly the same set of facts regarding Ohio domicile. Also naturally, the Tax Commissioner concluded that, as a person with an Ohio domicile, Dr. Cunningham was responsible for Ohio income tax.

The BTA reversed the Tax Commissioner's determination that the affidavit was false. In doing so, the BTA completely ignored the false statement in the affidavit that Dr. Cunningham was domiciled in Tennessee. This false statement alone was enough to set aside the affidavit.

Moreover, the BTA erred in it's understanding of the meaning of "domicile" under R.C. 5724. According to the BTA, the Tax Commissioner is "overreading" R.C. 5747.24 by requiring a sworn statement regarding non-Ohio domicile under that term's well-settled and long established plain meaning. BTA Decision at 4. Far from it, the Tax Commissioner merely read the statute *as written*, and took seriously the plain language of the statutory command that the

individual file a verified statement which states that "[d]uring the entire taxable year, the individual was not domiciled in this state." R.C. 5747.24(B)(1)(a).

It is the BTA that "reads more into the statute" than exists in its plain language. In the BTA's view, the term "domicile" has different meanings under each division of R.C. 5747.24, even though the term is not separately defined and is used in an undifferentiated way throughout the statute. Respectfully, it is the BTA that is "overreading," the statute by crafting, *sua sponte*, different definitions *for the same word in the same statute.*

For the BTA, the term "domicile" in R.C. 5747.24(B) means merely the number of contact periods in Ohio plus an out of state abode, while under R.C. 5747.24(C) and (D), "domicile" has the same meaning as under common law. Thus, according to the BTA, when Dr. Cunningham filed his statement of non-domicile, he was merely and properly attesting to his number of contact periods and that he owned an out-of-state abode. Therefore, according to the BTA, he is entitled to presumptively non-resident status.

In other words, for the BTA, only two facts are relevant under R.C. 5747.24(B): whether the individual spent more than half the year outside Ohio (measured by "contact periods") and whether the individual owns an out of state abode. But for R.C. 5747.24(C) and (D), according to the BTA, the term domicile bears its ordinary common law meaning. The BTA's chameleon-like interpretation of the meaning of the term "domicile" in R.C. 5747.24 means that the term's meaning changes depending on what division of that statute the term appears.

Accordingly, the BTA decision brushes aside the facts of Dr. Cunningham's Ohio domicile as irrelevant. The statutes—according to the BTA's twisted reading—contain a loophole that can be exploited by certain Ohio domiciliaries to avoid Ohio income taxation altogether. Indeed, the BTA's holding means that Dr. Cunningham can be an Ohio resident for

every purpose but income tax—thereby avoiding income tax not just in Ohio, *but in any other state as well.* The law does not contemplate such a result. Nor can the statutes bear the strain of the BTA's interpretation. This artificial reading of the statute fails on multiple grounds.

First and foremost, the plain language of the statute requires a statement regarding "domicile" under R.C. 5747.24(B)(1)(a). The word "domicile" is used in the statute, and it is an individual taxpayer's "domicile" outside of Ohio that must be verified by the individual—not through some other measure like contact periods. R.C. 5747.24(B)(1)(a).

The term "domicile" is not separately defined for R.C. 5747.24 or any of the various divisions within that statute. When no separate definition is provided, this Court presumes that the General Assembly uses the ordinary meaning of words like "domicile" when it enacts a statute, including the term's evolved, technical legal meaning. *See* R.C. 1.42; *Hoffman v. State Med. Bd.*, 113 Ohio St.3d 376, 2007-Ohio-2201, ¶ 26. And, the General Assembly is presumed to know the existing common law (including the well-settled precedent on domicile) when passing a law. *See Walden v. State*, 47 Ohio St.3d 47, 56 (1989). Accordingly, statutes must be read with the existing common law definitions in mind. *Id.*

Further, if the General Assembly intended to ascribe a different meaning to "domicile," such meaning would be in derogation of the well-settled common law, and a plain and unambiguous statement that the General Assembly intended to vary from the settled meaning is required. *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, ¶ 29; *Carrel v. Allied Prods. Corp.*, 78 Ohio St.3d 284, 287 (1997). Such a statement is not present in R.C. 5747.24.

Furthermore, a reading of the whole statute shows that the General Assembly used the undifferentiated term "domicile" throughout the divisions. The phrase cannot have a different

meaning under a particular division *of the same statute* where no separate definition is provided. *State ex rel. Asti*, 107 Ohio St.3d 262, 2005-Ohio-6432, at ¶ 28; *Schuholz*, 111 Ohio St. at 325 (1924). Because each division of R.C.5747.24 uses the same term "domicile" in an undifferentiated manner, each division shares the same plain meaning. *See State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, ¶ 28; *Schuholz v. Walker*, 111 Ohio St. 308, 325 (1924) ("a word repeatedly used in the statute will be presumed to bear the same meaning throughout the statute."); *Henry v. Trs.*, 48 Ohio St. 671, 676 (1891).

Thus, by the plain language of R.C. 5747.24(B), in order to be entitled to file a statement of non-domicile, one must actually not have an Ohio domicile.

Even stranger, the BTA's reading of the statute would allow Dr. Cunningham to claim that he has *no domicile anywhere* for purposes of income taxation. That cannot be right. First, it upends the long-established principle that everyone must be domiciled somewhere and that the law presumes each person has a domicile. *Sturgeon*, 34 Ohio St. at 534 ("The law ascribes a domicile to every person, and no person can be without one."); *Saalfield*, 86 Ohio App. at 226 ("Every person must be domiciled somewhere.").

Second, even if there was any ambiguity in the statute (and there is not), the ordinary rules of construction require that "domicile" means common-law domicile.

Essentially, the BTA's reading would defeat the intended operation of the statute. R.C. 5747.24 is the Ohio income tax residency statute and its purpose is to provide the various burdens of proof under which domicile is to be measured. Pursuant to R.C. 5747.24, the amount of time one spends outside Ohio corresponds with the burden of proof required to show out of state domicile—the more time out of state, the easier it is to prove non-Ohio domicile: (1) Under R.C. R.C. 5747.24(B)(1)(a), a person domiciled outside Ohio, who spends more than half the

year outside the state, and owns an out of state abode, may attest to non-domicile by affidavit and obtain a "presumption" of non-domicile. The burden is then shifted to the Tax Commissioner to demonstrate that the affidavit is "false." (2) Under R.C. 5747.24(C), if a person spends more than half the year outside Ohio, but does *not* file an affidavit, the person is presumed to have an Ohio domicile, and must rebut the presumption with "a preponderance of the evidence to the contrary." (3) Finally, under R.C. 5747.24(D), a person who spends more than half the year *inside* Ohio is presumed to have an Ohio domicile, and must rebut the presumption with "clear and convincing evidence to the contrary." Under any division of R.C. 5747.24, the relevant inquiry is "domicile."

The BTA's reading of R.C. 5747.24 would upend the General Assembly's statutory scheme by changing the fundamental purpose of the statute. Under the BTA's view, R.C. 5747.24 is not about burdens of proof, but, rather, creates a different standard of domicile for a certain group of Ohio domiciliaries who—unlike everyone else—maybe domiciled in Ohio under the common law, but not for income tax purposes. This is a fundamental overexpansion of the legislative will, as expressed in the plain language of R.C. 5747.24.

More fundamentally, such an understanding would threaten to create constitutional problems with R.C. 5747.24, and this Court interprets statutes in a manner that avoids constitutional conflicts. *McFee v. Nursing Care Mgmt. of Am., Inc.*, 126 Ohio St.3d 183, 2010-Ohio-2744, ¶ 27; *State v. Sinito*, 43 Ohio St.2d 98, 101 (1975). Essentially, the BTA's holding means that Ohio is a "no income tax state," but only for a certain category of Ohio domiciliary. Namely, those persons (like Dr. Cunningham) who spend less than half the year here, have an out-of-state abode, *and* file a statement of non-domicile, would be entitled to be domiciled here

for all other purposes, but need not pay income tax. Yet *everyone else* is subject to income tax under the common law domicile standard.

Thus, under the BTA's view, among similarly situated Ohio domiciliaries, the difference between filing a form or not creates differences in the legal standard for taxability and the presumption that applies. This difference plays out in this very case—Dr. Cunningham filed a statement of non-domicile and claims that a different standard of domicile applies to him. His wife, on the other hand, shares the same facts and circumstances *save for the non-domicile statement*—and therefore bears the burden of proving a change in domicile under common law, a burden that she *could not carry*. Because of the filing of a single form, Dr. Cunningham has a "nowhere domicile" and pays no Ohio income tax. In contrast, because Mrs. Cunningham didn't file the form, she is an Ohio domiciliary and subject to Ohio income tax. But these disparate results under the law, with the exception of the filing of the statement, arise from *under the otherwise identical set of facts.* This set of circumstances could cause problems of constitutional dimensions, and the statute cannot be interpreted in such a manner.

Finally, when the BTA concluded its review of this matter, it failed to order a remand of the matter to the Tax Commissioner for consideration of the allocation and calculation of the Cunninghams' income that is subject to Ohio taxation. In not doing so, the BTA essentially left the matter of the income tax liability, as it pertained to Mrs. Cunningham, unresolved.

For the reasons set forth in this brief, the Tax Commissioner respectfully requests that this Court reverse the BTA's decision that Dr. Cunningham did not have an Ohio domicile for the 2008 tax year. Alternately, if the disposition is that only Mrs. Cunningham has an Ohio domicile, the Tax Commissioner respectfully requests this Court to remand the cause to the BTA, with an order to

remand the matter to the Tax Commissioner for further consideration of the allocation and calculation of Mrs. Cunningham's income that is subject to Ohio taxation.

II. STATEMENT OF FACTS AND STATEMENT OF THE CASE

A. Statement of the Facts

The Cunninghams were domiciled in Ohio long before and after the years at issue in this case, as they admit and repeatedly affirmed under penalty of law. Tr. at 58, 74, 140; Hearing Ex. C; 58, 83, 84, 141-142, 143; Hearing Ex. D; 88, 91, 144; Hearing Ex. B, ST at 13-15. The facts of the Cunninghams' domicile are set forth in greater detail in the Argument Section below, and will not be reproduced here, for the sake of brevity.

But, suffice it to say, the Cunninghams purposefully availed themselves of benefits available only to Ohio domiciliaries, including among other things, taking the Homestead Exemption and Owner-Occupied Reduction on their Cincinnati-area home, filing federal income tax returns as Ohio residents, voting in Ohio, and obtaining drivers' licenses in Ohio. Tr. at 58, 63-65, 69-74, 88, 91, 136-140, 144; Hearing Ex. C; 58, 83, 84, 141-142, 143; Hearing Ex. D; 88, 91, 144; Hearing Ex. B, ST at 12, 13-15. The Cunninghams obtained professional licenses in Ohio, and are retired here. Tr. at 69-72; 72-74; 137-139.

For every year prior to this assessment, the Cunninghams paid Ohio income taxes and concede that they were domiciled in Ohio for all previous tax years. Tr. at 74.

In the year at issue (and since 1992), the Cunninghams owned a large family home in the Cincinnati, Ohio, area where they raised their children and used as their mailing address. Tr. at 63-64; 84, 86, 91-92, 102; Hearing Ex. F, Hearing Ex. G; ST at 7, 15, 18-37. At the same time, they filed a federal income tax return for 2008 identifying their primary address as in Ohio. Joint Hearing Ex. 1 at 7. In this same return, they claimed their other house (in Tennessee) as a

"vacation home," where they resided for fewer than 14 days of the year, in order to obtain a reduction on income tax. Joint Hearing Ex. 1 at 7. By their own admissions and actions, the Cunninghams have never abandoned their Ohio domicile or established a new domicile elsewhere.

Still, on March 13, 2009, Dr. Cunningham filed with the Ohio Department of Taxation a statement of non-Ohio domicile for the 2008 tax year. ST at 47. On this form, Dr. Cunningham declared that his domicile was Tennessee and that he was not domiciled in Ohio. ST at 47; Hearing Ex. A. Mrs. Cunningham did not file such a statement for the 2008 tax year. *See* ST, Tr. at 132, 143; BTA Decision at 5. Moreover, the Cunninghams did not file a 2008 individual income tax return, or make any payments on their 2008 income tax liability.

B. Statement of the Case

The Tax Commissioner issued an assessment to the Cunninghams. ST at 45. The Cunninghams filed a petition for reassessment, in which they contended they were not residents of Ohio and were not required to file an Ohio income tax return. ST at 44.

The Tax Commissioner began his review of their argument by considering the statutory definition of "resident," at R.C. 5747.01(I), which provides that as relevant to this appeal, a resident is "[a]n individual who is domiciled in this state, subject to 5747.24 of the Revised Code." R.C 5747.24 is a burden-shifting statute, which provides a different burden of proof for demonstrating domicile depending on the amount of time that one spends in the state and whether one owns an abode outside Ohio. Generally, under R.C. 5747.24, the more time one spends outside Ohio, the lower the standard of proof of domicile. And, if one combines a high amount of time outside the state, with an out-of-state abode, and a sworn statement of non-domicile, then non-Ohio domicile is "presumed." The non-Ohio domicile presumption is

disregarded if the Tax Commissioner finds that the sworn statement of non-domicile is "false." And under any division of R.C. 5747.24, the relevant inquiry is "domicile."

The Tax Commissioner's review of this case reached the conclusion that Cunninghams were domiciled in Ohio and that Dr. Cunningham's affidavit was false. ST at 3. The statements were false, because Dr. Cunningham was domiciled in Ohio, and was not domiciled in Tennessee. ST at 3. In light of the false statements, the Tax Commissioner determined that the presumption of non-Ohio domicile in R.C. 5747.24(B) did not apply to Dr. Cunningham. Accordingly, the burden was upon Dr. Cunningham to demonstrate non-Ohio domicile by the "preponderance of evidence" under R.C. 5747.24(C). ST at 3. The Tax Commissioner determined that the Cunninghams failed to meet this burden to rebut the statutory presumption of Ohio domicile. ST at 3.

Ultimately, the Tax Commissioner determined that the Cunninghams remained domiciliaries of Ohio and were "subject to both the Ohio individual income tax and its concomitant filing requirement." ST at 3.

The Cunninghams appealed to the BTA. Notice of Appeal, dated December 19, 2011. In their Notice of Appeal, the Cunninghams contended that they met the requirements of R.C. 5747.24(B) and were entitled to the irrebutable presumption of non-domicile in Ohio. The Cunninghams also presented evidence to support their claim that they had fewer than 182 contact periods in Ohio for 2008. The BTA reviewed the Cunningham's domicile status separately, because only Dr. Cunningham filed the statement, and each taxpayer is required to file their own statement of non-Ohio domicile. *See* R.C. 5747.24 (referring to "an" or "the individual").

With respect to Dr. Cunningham, the BTA concluded that the "false statement" referred to in R.C. 5747.24(B) referred only to the number of contact periods in Ohio and whether the

affiant owned an abode outside of Ohio. Although the statute plainly requires that the taxpayer file a statement that "[d]uring the entire taxable year, the individual was not domiciled in this state," the BTA incorrectly concluded that the Tax Commissioner was not entitled to inquire into the truthfulness of that attestation. Thus, the BTA incorrectly concluded that the Tax Commissioner could not consider whether Dr. Cunningham truthfully attested to non-Ohio domicile. Id. Thereafter, the BTA concluded that Dr. Cunningham complied with all of the requirements of R.C. 5747.24(B) and was entitled to the irrebuttable presumption of non-domicile in Ohio for 2008. The BTA declined to find a conflict between the statement of non-domicile, declared under penalties of perjury, and Dr. Cunningham's admitted Ohio domicile status. Nor did the BTA did mention in its decision, Dr. Cunningham's false statement that Tennessee was his domicile.

In contrast to the BTA's findings applicable to Dr. Cunningham, the BTA concluded that Mrs. Cunningham retained her domicile in Ohio, because she filed no affidavit and had not presented sufficient evidence to show a change in domicile from Ohio.

Although the BTA found only one spouse subject to Ohio tax, the BTA did not make any attempt to apportion the spouses' relative income on their joint return in order to determine the amount of tax owed by Mrs. Cunningham to Ohio. That issue was not properly presented to the BTA for its review. But neither did the BTA remand the case to the Tax Commissioner to make that determination. As a result, Mrs. Cunningham's outstanding income tax liability remains unresolved.

The Tax Commissioner now seeks review before this Court. Notice of Appeal to Supreme Court (April 7, 2014).

III. LAW AND ARGUMENT

When the Supreme Court reviews decisions of the BTA, the Court determines whether the BTA's decision is reasonable and lawful. *Gallenstein v. Testa*, 138 Ohio St.3d 240, 2014-Ohio-98, ¶ 14. BTA decision is unreasonable and unlawful if it is based on incorrect legal conclusions, and a decision of this nature is reversed by a reviewing court. *Id.*

In this case, the BTA unreasonably and unlawfully failed to consider traditional notions of common law domicile in conjunction with its review of the R.C. 5747.24(B) statement that Dr. Cunningham filed in lieu of his Ohio 2008 income tax return. Of secondary concern is the BTA's failure to remand its conclusion with respect to Mrs. Cunningham to the Tax Commissioner for allocation and calculation of her outstanding income tax liability. The failure to remand leaves Mrs. Cunningham's tax liability unresolved. In both instances, the BTA reached incorrect legal conclusions and those decisions were unreasonable and unlawful. Thus, this Court should reverse the BTA's decision that Dr. Cunningham did not have an Ohio domicile for the 2008 tax year. Alternately, if the disposition is that only Mrs. Cunningham has an Ohio domicile, the Tax Commissioner respectfully requests this Court to remand the cause to the BTA, with an order to remand the matter to the Tax Commissioner for further consideration of the allocation and calculation of Mrs. Cunningham's income that is subject to Ohio taxation.

Proposition of Law No. 1:

> **Under the widely-held and long-settled common law, a person's domicile is the place where a person has a true, fixed, permanent home. Once established, domicile continues until the person abandons it and intends to abandon it. Every person must have a domicile somewhere and no person may have more than one domicile at the same time.**

A. The well-settled and widely-held legal principles of domicile

The legal concept of domicile is well-established in Ohio. As a general principle, the domicile of a person is the place where the person has a true, fixed, permanent home and

principal establishment. *In re Paich's Estate*, 90 Ohio Law Abs. at 473. It is the place to which a person intends to return whenever the person is absent and from which the person has no present intent to move. *Sturgeon*, 34 Ohio St. at 535; In re *Paich's Estate*, at 473. Thus, domicile has two components: an actual residence in a particular jurisdiction and an intention to make a permanent home in the jurisdiction. *In re Estate of Hutson*, 165 Ohio St. at 119; *In re Protest of Brooks*, 155 Ohio App.3d 384, 2003-Ohio-6525, ¶ 22.

It is a fundamental principle of law that every person must have a domicile somewhere, that that no person may have more than one domicile at the same time. *City of Springfield v. Betts*, 114 Ohio App.3d 70, 73 (2nd Dist. 1996); *Board of Ed. of City School Dist. of City of Oakwood v. Dille*, 109 Ohio App. 344, 348 (2nd Dist. 1959). Similarly, a domicile is not lost until a new one is acquired, and an original domicile is presumed to continue until a person has acquired another domicile by actual residence, with the intention of abandoning the original domicile. *Saalfeld*, 86 Ohio App. at 226; *Spires v. Spires*, 7 Ohio Misc. 197, 200-201 (C.P. 1966). A person with no permanent abode retains the last permanent domicile. *In re Estate of Hutson*, 165 Ohio St. at 119; *Grant v. Jones*, 39 Ohio St. 506 (1883).

The burden of proving a change in domicile is on the party who claims the change. *In re Sayle's Estate*, 51 Ohio Law Abs. 46, 47-48 (8th Dist. 1948). In this regard, a person would need to show by a preponderance of the evidence that he or she (1) intended to change domicile, (2) intended to select a new domicile, and (3) accompanied such intention with acts indicating a bona fide selection of a new domicile. *Saalfield*, at 226. Evidence of where a person lives, or the residence, is usually considered to be the abode and domicile of the person. *In re Paich's Estate*, at 473. Whether a person intended to change that domicile is dependent upon the manifestations of that persons intention, such as: the person's own acts and declarations, and

consideration of the person's surrounding circumstances, such as family relations, business pursuit and vocation in life, mode of life, means, fortune, earning capacity, conduct, habits, disposition, age, prospects, residence, lapse of time, voting, and payment of taxes. *Smerda v. Smerda*, 35 O.O. 472, 475 (C.P. 1947).

These foregoing principles of domicile are not unique to Ohio. These concepts of domicile as contained within Ohio's common law are the same throughout the United States. *See, e.g.*, 25 Am.Jur. 2d Domicil, Sections 1-70 (2004) (citing to cases from throughout the country). In fact, the federal standard for domicile is also that "place where a person has a true, fixed, and permanent home and principal establishment and to which he has the intention of returning whenever he is absent therefrom." Law of Federal Courts (6th Ed. 2002), Section 26, The Meaning of Citizenship (for federal purposes, domicile is pertinent to determinations of diversity jurisdiction). Decisions from other jurisdictions provide further clarification and elucidation on the subject. For instance:

> -Although one spouse's domicile is not determinative of the other spouse's domicile and each may establish a domicile as each chooses, a husband and wife are presumed to have the same domicile. *McClendon v. Bel*, 797 So.2d 700, 704 (La. Ct. App. 2000); *Blount v. Boston*, 718 A.2d 1111, 1123-1124 (Md. 1998).
>
> -If person claims to have changed domicile, but the evidence of whether a change occurred is conflicting, the original, or former, domicile is favored over the claimed newer domicile. *Ex parte Weissinger*, 22 So.2d 510, 514 (Ala. 1945); *Elwert v. Elwert*, 248 P.2d 847, 853 (Or. 1952).
>
> -A person's statements of his or her intent as to domicile are admissible and should be considered in determining the person's domicile. *Blount*, at 1115. But additional evidence should also be considered, such as where the person votes, obtains a driver's license and registers vehicles, pays property taxes, and carries on a business or occupation. 25 Am.Jur. 2d Domicil, Sections 62-68.
>
> -If there is a conflict between the person's stated intent of domicile and the person's actions, the actions have greater evidentiary value because the actions of a person speak louder than his or her words. *District of Columbia v. Murphy*, 314 U.S. 441, 454-455, 62 S.Ct. 303, 86 L.Ed.2d 329 (1941); *Bay State Wholesale Drug Co. v. Whitman*, 182 N.E.

361, 363 (Ma. 1932); *Oglesby v. Williams*, 812 A.2d 1061, 1071-1072 (Md. 2002); *Petition of Pippy*, 711 A.2d 1048, 1058-1059 (Pa. Commw. Ct. 1998).

B. Ohio has been the domicile of the Cunninghams before, during, and after 2008

The BTA determined that Mrs. Cunningham was domiciled in Ohio and the Cunninghams have not challenged that determination. Because Dr. Cunningham shares essential the same facts regarding domicile as his wife, the BTA would presumably have found him an Ohio domiciliary, were it not for the BTA's twisted reading of R.C. 5747.24.

In spite of the BTA's decision, the indicia of domicile that are shared by the Cunninghams are manifestly correct and the Cunninghams do not contest these facts. Further, the indicia of domicile in this case clearly evidence that not only have the Cunninghams established domicile in Ohio, as detailed below, but that the statements made by Dr. Cunningham on his affidavit of non-Ohio domicile—that he was not domiciled in Ohio and was domiciled in Tennessee—was patently false. ST at 47.

1. The Cunninghams have spent their lives in Ohio and paid Ohio income taxes in every prior year.

The Cunninghams were born and raised in Ohio. Tr. at 63-64; 136-137. They raised their children here and the children attended Ohio schools. Tr. at 64-65. The Cunninghams maintained and inhabited a large family home in Ohio, which they used as their mailing address. Tr. at 63-64; 86, 102; Hearing Ex. F, Hearing Ex. G; ST at 7, 18-37. Dr. Cunningham is an endodontist. He practiced in this state and obtained and maintained his professional licensure here for his entire professional career. Tr. at 69-72. He incorporated his businesses in Ohio and established his practice near his family home. Tr. at 72-74. Mrs. Cunningham was a teacher. She received her teaching license in Ohio, spent her whole teaching career here, and draws a pension from the State Teachers' Retirement System. Tr. 137-139.

The Cunninghams paid Ohio taxes until 2007, prior to this assessment, and concede that they were domiciled in Ohio for previous tax years. Tr. at 74. The Cunninghams filed a joint federal income tax return for 2008 and identified Ohio as the primary address. Joint Hearing Ex. 1.

These foregoing general facts about the Cunninghams indicate that they have clearly intended to make Ohio their home and is the place to which they intend to return when absent. *Sturgeon*, 34 Ohio St. at 535; *In re Protest of Brooks*, 155 Ohio App.3d at ¶ 22.

2. *The Cunninghams have maintained a large homestead in the Cincinnati area for twenty-two years.*

The Cunninghams own a large family dwelling in Hamilton County. St. 15. They have owned it and lived in it for twenty-two years- since 1992. Tr. at 84. They raised their children in this house. Hr. Tr. at 91-92. The house sits on nearly five acres, has 6 bedrooms, four full and two half baths, and is over 4,000 square feet. St. 15. The Auditor valued the house at over one million dollars. Id. The electric bills for the property show consistent, year-round power usage. See Hearing Ex. F. Thus, the Cunninghams clearly have an actual residence in Ohio. *In re Protest of Brooks*, 155 Ohio App.3d at ¶ 21-23.

3. *The Cunninghams have applied for, and taken, the real property tax reduction benefits of the Homestead Exemption and Owner-Occupied Reduction and both require affirmative representations of Ohio domicile status.*

The Cunninghams applied for, and received, both the Homestead Exemption and the Owner-Occupied Reduction for their Cincinnati-area homestead. Tr. at 88, 91, 144; Hearing Ex. B; ST at 12.

By definition, the property tax reductions are only available for "A dwelling * * * owned and occupied as a home by an individual whose **domicile** is in this state * * * ." R.C. 323.151 (emphasis added). Accordingly, the Homestead Exemption and the Owner-Occupied Reduction

are available only for property that is occupied by persons whose domicile is in Ohio. On the applications for both of these reductions, the Cunninghams provided a sworn statement that they qualified for the exemption. See Hearing Ex. B-1. When the Cunninghams applied for, and received, the two real property tax exemptions, they affirmatively represented that their domicile was Ohio. *See* R.C. 323.153(A) (Homestead Exemption); R.C. 323.152(B) (Owner-Occupied Reduction); R.C. 323.151 (definition of "homestead" for both reductions).

Moreover, the instructions for the Homestead Exemption application explain that the tax reduction is only available for the home that you "own and occupy as your principal place of residence." Id. And the instructions continue: "A person has only one principal place of residence; your principal place of residence determines, among other things, where you are registered to vote and where you declare residence *for income tax purposes*." Hearing Ex. B-3 (emphasis added).

The definition of "principle place of residence" used in these two real property tax exemptions is synonymous with the definition of common-law domicile: that a person can have only one domicile at a given time and that domicile represents the place where the person has a true, fixed, permanent home and principal establishment. *Dille*, 109 Ohio App. at 348; *In re Paich's Estate*, 90 Ohio Law Abs. at 473; *Spires*, 7 Ohio Misc. at 200-201.

4. *The Cunninghams have voted in Ohio for the last 20 years and they voted in Ohio in 2008.*

The Cunninghams have consistently voted as Ohio resident citizens over, at least, the last twenty years. In 2008, they requested absentee ballots for the primary and general elections and affirmatively represented that their residence in Ohio was fixed and the place to which they intended to return when absent. R.C. 3503.02; Tr. at 58, 140. The ballots the Cunninghams

voted on contained national and local issues and candidates, and the Cunninghams swore that they were qualified to vote on these matters. Tr. at 58, 140; Hearing Ex. C.

Ohio only permits voting in Ohio in the district in which a citizen has his residence. R.C. 3503.01. A person's residence is determined in accordance with R.C. 3503.02, which provides:

> "(A) That place shall be considered *the residence of a person in which the person's habitation is fixed and to which, whenever the person is absent, the person has the intention of returning.*
>
> "(B) A person shall not be considered to have lost the person's residence who leaves the person's home and goes into another state or county of this state, for temporary purposes only, with the intention of returning.
>
> * * *
>
> "(E) *If a person removes to another state with the intention of making such state the person's residence, the person shall be considered to have lost the person's residence in this state."*

R.C. 3503.02 (emphasis added). Pursuant to R.C. 3509.03(G), a voter seeking to utilize an absentee ballot must affirm that he is a qualified elector in the absentee ballot request. In other words, the statutory qualifications that determine voting eligibility use the same terminology as that used to determine common law domicile. Under R.C. 3599.11 false voter registration is punishable as a fifth degree felony.

5. *The Cunninghams have possessed Ohio driver's licenses and Ohio vehicle registrations for at least the past twenty years, including in 2008.*

Before, during, and after 2008, the Cunninghams possessed and obtained driver's licenses issued by Ohio. Tr. at 58, 83, 84, 141-142, 143; Hearing Ex. D. Mrs. Cunningham obtained a renewal of her Ohio driver's license in 2008, and Dr. Cunningham renewed his license in 2009. See Hearing Ex. D 6-7. See also Tr. at 58, 84, 142. The Cunninghams have also registered, licensed, and titled their motor vehicles in Ohio for the past twenty years. See Hearing Ex. D;

Tr. at 80-83, 141, 142. And in 2008, Dr. Cunningham purchased a 2002 Winnebago and registered it to his Cincinnati-area address. See Hearing Ex. D-23; Tr. at 81.

In Ohio, only Ohio residents, or persons who "reside[] in this state on a permanent basis," are entitled to driver's licenses. R.C. 4507.01. *See also Prouse, Dash & Crouch, LLP v. Dimarco*, 116 Ohio St.3d 167, 2007-Ohio-5753, ¶ 7. The Bureau of Motor Vehicles requires proof of residency for issuance of a driver's license. *See* Ohio Adm.Code 4501:1-1-35, Ohio Adm.Code 4501:1-1-21. Accordingly, the Cunninghams represented to the Ohio Bureau of Motor Vehicles that they were residents of Ohio and that they were residing in this state on a permanent basis. These representations are equivalent to declaring a domicile, because the Cunninghams are indicating that they have a residence in the state and that they intend to make that residence permanent. *In re Protest of Brooks*, 155 Ohio App.3d at ¶ 22.

C. The Cunninghams have not abandoned their Ohio domicile or established a new domicile outside of Ohio

As is also evident from the factual record in this case, the Cunninghams have not established a domicile somewhere other than Ohio. Thus, as concluded by the Tax Commissioner and disregarded by the BTA, the statement made by Dr. Cunningham on his statement of non-Ohio domicile - that he was domiciled in Tennessee - was patently false. ST 47. This lack of domicile in Tennessee is demonstrated in a number of the Cunninghams' actions, as detailed below.

First, the Cunningham's admission of Ohio domiciliary status, by paying Ohio income taxes for the tax years prior to 2008, gives rise to a strong presumption of Ohio domicile status for the 2008 tax year: to overcome the presumption, the Cunninghams must demonstrate by clear, objective, and probative evidence that they had *abandoned* their Ohio domicile and replaced it with a new one outside Ohio. *In re Estate of Hutson*, 165 Ohio St. 115, 119 (1956);

Sturgeon, 34 Ohio St. at 534-535; *Saalfield v. Saalfield*, 86 Ohio App. 225, 226 (12th Dist 1949); *City of E. Cleveland v. Landingham*, 97 Ohio App.3d 385, 390 (8th Dist 1994). The applicable Ohio income tax statutes have the same requirement. *See* R.C. 5747.24(B)(1)(b) and (C) (imposing an affirmative evidentiary burden of proof on taxpayers to show that they are not Ohio-domiciled, in the absence of verified, true statements of non-domicile status). At the BTA hearing, the Cunninghams could not, and did not, prove a change in domicile because their domicile never changed.

In the hearing of this matter, before the BTA Hearing Examiner, the Cunninghams acknowledged that they were not domiciled in Tennessee for the 2008 tax year. Tr. at 97. The Cunninghams also asserted that under any scenario, they did not live in Tennessee long enough in 2008 so as to be required to file personal income tax returns, and they in fact did not file any Tennessee income tax returns, even though they would have had qualifying taxable income (as in, dividends and interest) if they had been Tennessee residents. Tr. at 97-101, 143; Hearing Ex. H, Hearing Ex. I, and Joint Hearing Ex. 1.

The Cunninghams provided inconsistency and self-serving testimony regarding how they used the Tennessee house in 2008. In the testimony to the BTA, the Cunninghams stated that their use of the Tennessee house in 2008 was for more than 14 days. But on their jointly filed 2008 federal income tax return, the Cunninghams declared under oath that the Tennessee house was a vacation home and that their use of the Tennessee house in 2008 was for less than 14 days. By making this declaration, the Cunninghams were able to take certain deductions applicable to vacation homes, to reduce their federal taxable income, and to correspondingly reduce their income tax liability for federal and state income tax purposes.

The difference is significant and works a substantial inequity against Ohio—if the Cunninghams spent more than 14 days in Tennessee in 2008, as they claimed at hearing—then they improperly reduced their federal taxable income on their federal return for 2008 (and for several other tax years), and thereby improperly reduced their Ohio income tax liability for 2008 (as well as for several other tax years). Plainly put, the Cunninghams underreported their income and would owe more in tax. But, Ohio does not unilaterally adjust a taxpayer's federal adjusted gross income to account for improper reductions, because Ohio's income tax starts with the federal adjusted gross income amount. Instead, there should be an adjustment to the federal return first. Yet despite admitting that they were not entitled to reduce their federal adjusted gross income as they did in their 2008 return, the Cunninghams have not filed an amended return since then. Tr. At 45. Thus, whatever amount of income tax Ohio receives from the Cunninghams will be incorrectly understated.

Thus, the Cunninghams have either falsely attested to the IRS that they have vacation property in Tennessee or they have falsely testified to the BTA and Tax Commissioner: either they spent fewer than 14 days at the house in Tennessee (as they represented in their federal income tax return), or spent more than 14 days—several months in fact—at the Tennessee house (as they currently claim for Ohio taxation purposes).

Either way, it means that Dr. Cunningham's sworn statement that he was domiciled in Tennessee was false. It appears that the Cunninghams' perspective on the payment of income tax is to avoid the payment as they deem advisable, using whatever means is most to their advantage.

Moreover, the Cunninghams had the utility bills from the Tennessee house sent to their address in Ohio. Tr. at 101; ST 18-37. And, the property record card for the Tennessee house reflects that the owner's address is that of the Cunninghams' house in Ohio. ST at 7.

Consistent with the principles that every person must have a domicile somewhere, that a person can have only one domicile at a time, and that a domicile is not lost until a new domicile is acquired, the presumption that the Cunninghams retained the Ohio domicile applies. *In re Estate of Hutson*, 165 Ohio St. at 119; *Betts*, 114 Ohio App.3d at 73; *Dille*, 109 Ohio App.3d at 348; *Saalfeld*, 86 Ohio App. at 226; *Spires*, 7 Ohio Misc. at 201. Further, because of their admission that they have not acquired a new domicile, the evidence fully supports the conclusion that the Cunninghams did not intend to change their domicile from Ohio and took no actions to effect any change in their Ohio domicile. *Saalfeld*, 86 Ohio App. at 227, *In re Paich's Estate*, 90 Ohio Law Abs. at 473; *Smerda*, 35 O.O. at 475; Tr. at 97.

D. The Cunninghams claim they have no domicile

For the purposes of this appeal, the Cunninghams essentially claim that they have *no* domicile. But this is an impossible legal position. It is well-settled in the law that everyone has a domicile somewhere and a person's existing domicile is presumed to continue until the party claiming a change proves that a new domicile has been acquired. *Sturgeon*, 34 Ohio St. at 534 ("The law ascribes a domicile to every person, and no person can be without one."); *Betts*, 114 Ohio App. 3d at 73 ("Every person must be domiciled somewhere). Thus, the Cunninghams' claim that they are domiciled *nowhere* is legally untenable, because by operation of law, the Cunninghams' domicile is Ohio until a new one is established. *Saalfeld*, 86 Ohio App. at 226; *Spires*, 7 Ohio Misc. at 201.

E. Summary

As a matter of common law, the Cunninghams have a domicile and it is Ohio. Ohio is the location to which the Cunninghams have a true, fixed, permanent home, it is their principal establishment, and there is no other location, in Tennessee or otherwise, which the Cunninghams have established as their new domicile. It is these concepts of domicile that form the foundation for the interpretation of R.C. 5747.24, which is the next issue to be addressed. And even though this appeal pertains only to Dr. Cunningham's domicile status, it is these same concepts and indicia of domicile, possessed by both Dr. and Mrs. Cunningham, that provide the reasoning as to why the statements made by Dr. Cunningham on his statement of non-Ohio domicile are false: (1) because he was domiciled in Ohio, and (2) because he was not domiciled in Tennessee, all in an attempt to avoid payment of any income tax to any jurisdiction.

Proposition of Law No. 2:

The residency statute, R.C. 5747.24, expressly incorporates the substantive requirements of common-law domicile in each division and establishes which evidentiary burden applies to a determination of a taxpayer's residency in Ohio.

A. R.C. 5747.24 is a statute that sets the burden of proof for domicile at different degrees of difficulty corresponding with the amount of time that an individual spends in Ohio in a given tax year.

In Ohio, a "resident" must pay income tax. *See* R.C. Chapter 5747. A resident is defined as "[a]n individual who is domiciled in this state, subject to section 5747.24 of the Revised Code." R.C. 5747.01(I)(1). R.C. 5747.24 sets forth burdens of proof applicable to residency determinations based on the amount of time one spends in Ohio and whether one attests to out-of-state residence and non-Ohio domicile, as further explained below.

Pursuant to R.C. 5747.24, the more time a person spends in Ohio, the harder it becomes for that person to prove that he or she is does not have a domicile in this state. For instance, if a

person has 183 *or more* contact periods[1] with Ohio, that person is "presumed" to be domiciled in Ohio, and that presumption may be rebutted by the individual only with "clear and convincing evidence." R.C. 5747.24(D). Similarly, if an individual has *fewer than* 183 contact periods in the state, that person is again "presumed" to be domiciled in the state, but that presumption may be rebutted with a lesser evidentiary standard: a "preponderance of the evidence." R.C. 5747.24(C).

However, if an individual has 182 *or fewer* contact periods with the state, has an out-of-state abode, and files "a statement . . . verifying that the individual was not domiciled in this state," then the presumption shifts. In this instance, an individual is "presumed to be not domiciled in the state." R.C. 5747.24(B). The individual loses the presumption of non-domicile and is subject to the higher burden of proof in division (C) if the Tax Commissioner finds that that statement contains a "false statement." *Id.* If such a showing is made, the individual would then be considered to be presumed to have an Ohio domicile, subject to rebuttal with a preponderance of the evidence. *Id.*

Thus, the statute, viewed as a whole, is all about evidentiary burdens: as the number of an individual's contact periods in Ohio increases, there is a corresponding increase on the burden of proof that that person must carry to prove non-residency within the state. Again, the plain wording of the statute supports this conclusion: presumptions are in the nature of evidence and are entitled to the same weight and force in law as any other proven fact, in the absence of

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[1] R.C. 5747.24(A)(1) defines "contact period" as follows: "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."

It should be noted that while the "contact period" concept focuses on contact a taxpayer has with Ohio, the domicile concept focuses on contact a taxpayer has with another state.

evidence to rebut the presumption. *Wilson v. Moore*, 96 Ohio App. 110, 114 (3rd Dist. 1951); *Dalrymple v. State*, 16 Ohio C.D. 562, 565-566 (Ohio Cir. Ct. 1904); 42 Ohio Jur.3d Evidence and Witnesses, Section 108, Operation and effect of presumptions; presumptions as evidence (2014).

The following table illustrates the varying evidentiary burdens set forth by the three relevant divisions of R.C. 5747.24:

Division	If the taxpayer has . . .	. . . then the taxpayer is . . .	. . . and the burden of proof is:
R.C. 5747.24(B)	182 or fewer contact periods in Ohio * an out-of-state abode * a verified statement that: (1) the taxpayer is not domiciled in Ohio and (2) has an abode outside of Ohio	presumed to be not domiciled in Ohio	irrebuttable unless the Tax Commissioner finds the statement of non-domicile is false
R.C. 5747.24(C)	fewer than 183 contact periods in Ohio	presumed to be domiciled in Ohio	upon the taxpayer to rebut with a preponderance of the evidence
R.C. 5747.24(D)	at least 183 contact periods in Ohio	presumed to be domiciled in Ohio	upon the taxpayer to rebut with clear and convincing evidence

As the table illustrates, the number of "contact periods" one has in Ohio determines the burden of proof required to show non-domicile. Indeed, that is the only import of the "contact periods." The fewer the contact periods with Ohio, the easier it becomes to prove non-domicile.

In R.C. 5747.24(B)(1), the General Assembly provided that, for those with an out of state abode and who spend more than 183 contact periods outside Ohio, they may attain a presumption of non-domicile simply by filing a verified statement attesting that they are, in fact *not domiciled* in Ohio and own an out of state abode. The contact periods and out of state abode elements of

R.C. 5747.24(B) are preconditions—additional to the fact of non-domicile—for qualifications to file a statement verifying non-Ohio domicile.

Thus, in order to file a statement *at all*, one must have (1) 183 contact periods outside Ohio; and (2) and out-of-state abode. These facts are *preconditions* for the filing of a statement of non-domicile. Once an individual has met those preconditions, he may file a statement, provided that he is not actually domiciled in Ohio. And, in that statement, the General Assembly *expressly requires* that the individual verify that *he has no Ohio domicile.*

The critical blunder of the BTA in this case was to confuse the *preconditions for filing a statement* with the *required content of the statement.* In other words, "domicile" under R.C. 5747.24(B)(1) is not reduced to contact periods and an out of state abode (the "preconditions" to filing a statement), as the BTA held. Rather, the contact periods and out of state abode are separate preconditions—along with non-domicile—to the ability to file a statement under R.C. 5747.24(B). If one meets those preconditions, then one may—provided that he is not domiciled in Ohio—file a statement of non-domicile expressly attesting as much. Stated another way, if a person actually *is* domiciled in Ohio (as is Dr. Cunningham), then he cannot file a statement of non-domicile, even if he has had fewer than 182 contact periods in Ohio and owns an out-of-state abode. Thus, by the plain language of R.C. 5747.24(B), in order to be entitled to file a statement of non-domicile, one must actually not have an Ohio domicile.

Regardless, a determination of "domicile" is necessary under any division of R.C. 5747.24. For R.C. 5747.24(B), the taxpayer must attest, under oath, that he is "not domiciled" in Ohio, and that may be found to be false, as the Tax Commissioner did here. For R.C. 5747.24(C) and (D), domicile is the burden of the taxpayer, with varying degrees of proof based upon the time he has spent in Ohio.

B. The R.C. 5747.24 presumptions, as applied to the Cunninghams

Mrs. Cunningham did not file a statement of non-Ohio domicile for 2008. BTA Decision at 5. Thus, the BTA properly determined that with respect to Mrs. Cunningham, the provisions of R.C. 5747.24(C) determine her Ohio residency status, and accordingly, Mrs. Cunningham is presumed to be domiciled in Ohio. Moreover, the BTA properly applied R.C. 5747.24(C) to conclude that Mrs. Cunningham could not rebut the presumption of Ohio domicile status with a preponderance of the evidence to the contrary. Id. at 7. In reaching this conclusion, the BTA appropriately considered the evidence with respect to Mrs. Cunningham's domicile, including the facts that she possessed the home in Ohio, claimed real property tax exemptions in connection with that Ohio home, used the Ohio address for mail pertaining to the Tennessee house, and voted, registered vehicles, and obtained her driver's license in Ohio.

In contrast to Mrs. Cunningham, Dr. Cunningham did file a statement of non-domicile for 2008. Hearing Ex. A. Thus, for him, the provisions of R.C. 5747.24(B) apply. In this regard, the plain language of the statute requires the individual to make two affirmations: (1) that "[d]uring the entire taxable year," the taxpayer is "not domiciled" in Ohio; and (2) that the taxpayer maintains an abode outside Ohio. R.C. 5747.24(B)(1)(a), (b). But the Tax Commissioner concluded that Dr. Cunningham's statement of non-domicile was false, because Dr. Cunningham *was* actually domiciled in Ohio and Dr. Cunningham's statement of alternative domicile in Tennessee was false. ST at 3. Therefore, by operation of R.C. 5747.24(B), any "presumption" of non-Ohio domicile was invalidated and the provisions of R.C. 5747.24(C) should have applied to determine Dr. Cunningham's Ohio residency status. ST at 3.

The BTA declined to find that Dr. Cunningham's statement of non-Ohio domicile was false. BTA Decision at 5. The BTA did not consider domicile as an element to be considered in

conjunction with the additional statutory elements of contact periods and possession of an out of state abode to determine the evidentiary burden which applies to a determination of a taxpayer's residency in Ohio.

By reducing the meaning of domicile to only contact periods and possession of an out-of-state abode, the BTA held that taxpayers need not comport with the statutorily incorporated principles of common law domicile, and therefore, can claim "non-domicile" status for income tax purposes regardless of their actual domicile. But this is an incorrect reading of R.C. 5747.24 because the plain language of the statute incorporates the ordinary meaning of domicile and establishes which evidentiary burden applies to a determination of a taxpayer's residency in Ohio.

C. The plain language of R.C. 5747.24 incorporates the long-settled common-law meaning of domicile in each division in an undifferentiated manner.

1. The plain language of R.C. 5747.24 employs the ordinary, universal, and well-established meaning of "domicile."

The Supreme Court of Ohio has instructed that clear and unambiguous words in a statute are to be given their plain, ordinary meaning. *State v. Elam*, 68 Ohio St.3d 585, 587 (1994) ("The polestar of statutory interpretation is legislative intent, which a court best gleans from the words the General Assembly used and the purpose it sought to accomplish. Where the wording of a statute is clear and unambiguous, this court's only task is to give effect to the words used.") Further, the General Assembly is presumed to use the ordinary meaning of words in an enacted statute. *See* R.C. 1.42 ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."); *Hoffman,* 113 Ohio St.3d 376, 2007-Ohio-2201, at ¶ 26 ("An axiom of statutory

construction is that '[w]ords * * * that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.' ") (citing R.C. 1.42).

The plain language of the division at issue—R.C. 5747.24(B)—requires a statement regarding "domicile." The statute expressly requires that if a person wishes to file a statement of non-domicile, the person must attest that: "During the entire taxable year, the individual was **not domiciled** in this state." R.C. 5747.24(B)(1)(a). This requirement plainly sets forth that, in order to qualify for the "irrebuttable presumption" of non-residency, an individual must attest that he is not "domiciled" in Ohio under the settled, plain, and ordinary meaning of that word.

The term "domicile" has an ordinary and settled meaning. Black's Law Dictionary defines it as: "The place at which a person has been physically present and that the person regards as home; a person's true, fixed, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." Black's Law Dictionary Abridged, 8th Ed., (2005) 413. This mirrors Ohio's long-settled common law definition: "the domicile of a person [is] where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning." *Sturgeon*, 34 Ohio St. at 535 (quoting Story's Conflict of Laws, § 41); *In re Paich's Estate*, 90 Ohio Law Abs at 473. As early as 1878, the Court regarded domicile principles as "well settled rules * * * [that were in existence] when the constitution was adopted." *Sturgeon*, 34 Ohio St. at 535.

Thus, because the word domicile has an ordinary and commonly understood meaning, under plain language rules, this commonly understood meaning of domicile was the meaning used by the General Assembly in R.C. 5747.24(B).

2 *Under the plain meaning rules, statutes are read as a whole and words or phrases used more than once are given the same meaning, unless a different interpretation is set forth.*

This Court has instructed that courts should look at an entire statute when evaluating a particular word or phrase. *Commerce & Indus. Ins. Co. v. City of Toledo*, 45 Ohio St.3d 96, 102 (1989) ("[W]ords and phrases in a statute must be read in context of the whole statute.") When the General Assembly uses the same phrase repeatedly in the same statute, courts give it the same plain meaning and do not ascribe a different meaning on the basis of a supposed legislative intent. *See Schuholz*, 111 Ohio St. at 325 (1924); *Henry*, 48 Ohio St. at 676 (when the same term is used repeatedly in a statute, it is presumed to have the same meaning, and courts must not ascribe a different meaning on the ground of a supposed intention of the legislature).

That the General Assembly used the plain meaning of "domicile" in R.C. 5747.24, without any further description of how that term is different from its common law usage, is demonstrated by the fact that each division of R.C.5747.24 uses the term "domicile" in an undifferentiated manner. The term "domicile" is not separately defined in R.C. 5747.24(B), or any other division of the statute. The phrase cannot have a different meaning under a particular division where no different meaning is provided, and to not give a word uniform interpretation, when such deviation is not indicated by the legislation, renders the three divisions of R.C. 5747.24 senseless and non-operational. *State ex rel. Asti*, 107 Ohio St.3d 262, 2005-Ohio-6432, at ¶ 28; *Schuholz*, 111 Ohio St. at 325; *Henry*, 48 Ohio St. at 676. In other words, for the division of R.C. 5747.24 to read harmoniously, the term domicile must have a uniform meaning. Any other interpretation of R.C. 5747.24 creates unreasonable and absurd results. *Medcorp, Inc. v. Ohio Dept. Job & Family Servs.*, 121 Ohio St.3d 622, 2009-Ohio-2058, ¶ 13.

Further, the General Assembly could have written R.C. 5747.24 to say that domicile means contact periods and possession of an out of state abode. But it didn't. The General Assembly did not write R.C. 5747.24 to provide a different definition of domicile and the General Assembly is presumed to have used words and language that advisedly and intelligently expressed its intent of the legislation. *Watson v. Doolittle*, 10 Ohio App.2d 149, 143, 147 (6th Dist. 1967).

Instead, the General Assembly expressly required that an individual verify, under oath, that he is not domiciled in Ohio. R.C. 5747.24(B)(1)(a). If, and when, an individual has done so, that person qualifies for the statute's highest protection—an irrebuttable presumption of non-domicile, provided the attestation is not "false." R.C. 5747.24(B). This requirement that the statement not be "false" is consistent with, and amplifies, the general statute of R.C. 5703.26, which prohibits false or fraudulent "statements."

Logically, the provisions of R.C. 5747.24(B) that pertain to contact periods and possessing an out of state abode are merely *preconditions*—qualifications that must be met to file a statement verifying non-Ohio domicile, as explained above. Contrary to the BTA's decision, domicile under R.C. 5747.24(B)(1) does not merely equate to one's contact periods and possession of an out of state abode, but rather those are separate preconditions—along with non-domicile—to the ability to file a statement under R.C. 5747.24(B). Once the preconditions are met, one may then file a statement verifying that one does not have an Ohio domicile, under the plain meaning of that term.

3 Common law principles are incorporated into statutes as plain language, unless the statute expressly provides otherwise.

When the General Assembly enacts a statute that pertains to a matter also addressed by common law, the statute is to be read with a presumption of favoring the retention of long-

established and familiar principles, except when statutory purposes to the contrary are evident. *Pasquantino v. U.S.*, 544 U.S. 349, 359, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005); *State ex rel. Morris v. Sullivan*, 81 Ohio St. 79, 95-96 (1909). To abrogate a common law principle, a statute must "speak directly" to the question addressed by the common law. *U.S. v. Texas*, 507 U.S. 529, 534 113 S. Ct. 1631, 123 L.Ed2d 245 (1993); *Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222, at ¶ 29; *Carrel*, 78 Ohio St.3d at 287. Similarly, the absence of language does not demonstrate that the General Assembly intended to abrogate common law. *Mandelbaum*, at ¶ 29. This is because it is presumed that when the General Assembly enacted a statute, it was mindful of the applicable common law. *Estate of Graves v. Circleville*, 179 Ohio App.3d 479, 2008-Ohio-6052, ¶ 23, affirmed and remanded on other grounds, 124 Ohio St.3d 339, 2010-Ohio-168; *Fuller v. Glander*, 146 Ohio St. 283, 286 (1946); *Walden*, 47 Ohio St.3d at 56.

If R.C. 5747.24 were intended to change the settled, common law meaning of the word "domicile" in Ohio law, and by implication the definition of resident at R.C. 5747.01(I), the General Assembly would have expressly so provided. But the definition of resident in R.C. 5747.01(I) does **not** state that R.C. 5747.24 supplants or alters the common law standards for domicile. R.C. 5747.01(I) states that a resident is a person domiciled in Ohio "*subject to* section 5747.24 of the Revised Code." (Emphasis added). Nor does R.C. 5747.24 provide any alternate meaning for the term "domicile." Thus, the well-settled and commonly understood meaning of the word "domicile" is presumed to have been intended by the General Assembly, and a resident is *domiciled* in Ohio as that standard has evolved in the common law, *subject to* the evidentiary standards and requirements set forth in R.C. 5747.24.

D. Even under the tools of statutory construction, ordinary, plain, and common law meaning of "domicile" is incorporated into each division of R.C. 5747.24

In spite of the plain language of R.C. 5747.24(B) and even if interpretation of the term domicile as used in that provision is required, the rules of statutory construction require that the well-established common law definition of domicile be read in conjunction with the additional statutory elements of contact periods and possession of an out of state abode, in order to establish which evidentiary burden applies to a determination of a taxpayer's residency in Ohio.

1. The Tax Commissioner's administrative application of the statute is entitled to deference and is accorded weight in statutory interpretation.

The statutory requirement of a verification of non-domicile (as that term is defined in common law) is supported by the Tax Commissioner's contemporaneous application of the statute. R.C. 1.49(F) calls upon a reviewing court to consider the "administrative construction of a statute" and the Commissioner's "administrative construction" is entitled to deference, without risk of disruption unless that construction was unreasonable. *See State ex rel. Clark v. Great Lakes Constr. Co.*, 99 Ohio St.3d 320, 2003-Ohio-3802, ¶ 10; *UBS Fin. Servs., Inc. v. Levin*, 119 Ohio St.3d 286, 2008-Ohio-3821 ¶ 34-35.

The Commissioner is charged with enforcement of income tax and real property tax laws. In this regard, the Tax Commissioner is charged with developing and promulgating tax forms, and those forms, in turn, reflect the Tax Commissioner's interpretation and application of the underlying laws. In income taxation, R.C. 5747.24(B) provides that the statement of non-domicile shall be "on the form prescribed by the commissioner." Similarly, with regard to the Homestead Exemption, the Tax Commissioner promulgates the application forms. *See* R.C. 323.153(A)(3). These grants of form-making authority are consistent with the Tax Commissioner's general authority to: "Prescrib[e] all blank forms which the department is

authorized to prescribe, and to provide such forms and distribute the same as required by law and the rules of the department." R.C. 5703.05. *See also* R.C. 5747.18(A) (authorizing the Tax Commissioner to prescribe income tax forms). In fact, the parties do not dispute that the Tax Commissioner has the authority to review the statements and to determine if any false statements were made by the taxpayer.

The Tax Commissioner's forms demonstrate his understanding that domicile under R.C. 5747.24(B) means common law domicile. The Tax Commissioner's income tax non-domicile form—developed after the amendment of R.C. 5747.24—requires that a person affirm that he is not domiciled in Ohio and provide the state in which he is domiciled. See Hearing Ex. A. And the Homestead Exemption application similarly explains that a person's homestead is the same place that he or she considers to be his or her residence for other purposes, such as income tax and voting. See Hearing Ex. B.

Additionally, the non-domicile form created by the Tax Commissioner is completely consistent with the above principles of domicile. If a person creates new domicile by establishing a new abode, or place to live, the question on the non-domicile form requesting that the person declare that new domicile is an embodiment of the common law requirements pertaining to domicile. And if a person cannot declare a new domicile, perhaps because one has not yet been established, the default rule then applies: the old domicile remains. *In re Estate of Hutson*, 165 Ohio St. at 119. As a consequence, the form's requirement that the taxpayer list his alternate domicile is a question that is perfectly reasonable, and within the Tax Commissioner's purview.

In this regard, any contention that the domicile declaration on the Tax Commissioner's non-domicile form is invalid because the form requests information is in excess of the statutory

terminology should be disregarded. This type of argument miscomprehends the basic principles of domicile that are incorporated in the Tax Commissioner's form: that every person must have a domicile and that a domicile is not lost or changed until a new one is acquired. *Sturgeon*, 34 Ohio St. at 534 ("The law ascribes a domicile to every person, and no person can be without one."); *Betts*, 114 Ohio App.3d at 73 ("Every person must be domiciled somewhere"); *City of E. Cleveland*, 97 Ohio App.3d at 390; *Saalfield*, 86 Ohio App. at 226. In other words, a domicile continues until a new one is affirmatively chosen, and the old one is abandoned, which is when a person establishes an actual residence in the place chosen and intends that the residence be primary and permanent. *Id.*

Thus, the statutory requirement of an attestation of non-domicile (as that term is defined in common law) is supported by the Tax Commissioner's contemporaneous construction of the statute. That construction is reasonable, as is the Tax Commissioner's requirement that the taxpayer identify any new domicile. Moreover, the requirement that a taxpayer identify a new domicile is within the Tax Commissioner's purview, and there is no dispute that the Tax Commissioner possesses the ability to review attestations of non-domicile for truthfulness. Therefore, the Tax Commissioner's construction in this regard is entitled to deference. *UBS Fin. Servs.*, 119 Ohio St.3d 286, 2008-Ohio-3821, ¶ 34-35; *State ex rel. Clark*, 99 Ohio St.3d 320, 2003-Ohio-3802, at ¶ 10; *In re Packard's Estate*, 174 Ohio St. 349, 356 (1963). And in this case, the Cunninghams were required to identify a domicile, and answered that question falsely.

2. *The legislative history of R.C. 5747.24 does not advance the Cunninghams' case.*

Legislative intent is only relevant if a statute is ambiguous. *See* R.C. 1.49. But when, as here, the language is plain, the statute must be applied as written. *Sheet Metal Workers' Internatl. Assn., Local Union No. 33 v. Gene's Refrigeration, Heating & Air Conditioning, Inc.*,

122 Ohio St.3d 248, 2009-Ohio-2747, ¶ 29. Consequently, the BTA improperly relied on principles of legislative history to support its incorrect interpretation of R.C. 5747.24.

But even if the BTA were to have correctly relied on the legislative history of R.C. 5747.24, the BTA still reached incorrect conclusions. The legislative history of R.C. 5747.24—as seen through the revisions to the statute—support the Tax Commissioner's view that common law domicile is incorporated into the statute.

Under the prior version of R.C. 5747.24, the Tax Commissioner had to *request* a statement of non-domicile from someone with fewer than 120 contact periods in the state. See Hearing Ex. 9. However, under the current version of the law, a person could have significantly more contact periods with Ohio (182), and still qualify as a non-resident, but *only if* that person filed a statement of non-domicile.

The "presumption" that followed the statement of non-domicile under the old version had a different purpose—under the old law, the Tax Commissioner had a deadline under which to issue an assessment or request a statement. The "presumption" language remains in the current version of the statute but with a different purpose. Now, the presumption follows the taxpayer's filing of a statement—and the Tax Commissioner has no need to request a statement. Thus, the taxpayer is "presumed" to be a non-resident. But, the General Assembly also added to the current version of the statute a proviso that the statement would not suffice if it was "false." Id. If the statement is "false," that taxpayer loses the presumption of non-residency, and actually *gains* a presumption of residency, along with the burden to prove otherwise. R.C. 5747.24(B) and (C).

The current version of R.C. 5747.24 actually represents a shift from the old "bright line," under which the Tax Commissioner had to timely request a statement of non-domicile, to a

revised standard under which the taxpayer must verify the fact of domicile and—if done so falsely—risks the loss of the presumption of non-residency. It appears to have been the intent of the General Assembly to allow more taxpayers to claim non-residency (increasing the availability of a statement of non-domicile to those with more time inside Ohio), and to do so affirmatively. If the taxpayer asserts non-domicile, the new law shifts the burden onto the Tax Commissioner to find that the verified statement was "false." But the ability to claim non-domicile is conditioned on non-Ohio domicile. That requirement has never changed.

Moreover, it appears to have been the intent of the General Assembly to require a person to verify his domicile. For instance, the Legislate Service Commission summary expressly refers to the filing of the "statement" as a requirement for establishing non-domicile. See Cunninghams Post-Hearing Brief to the BTA at p. 23. And, of course, that statement *expressly requires an affirmation that the individual was "not domiciled" in Ohio.* R.C. 5747.24(B)(1)(a). Thus, the Tax Commissioner's view of the plain language of the statute is not impacted by the legislative history—the requirement that a person verify his "domicile" in his statement has always been a part of this statute.

The legislative history does not support the BTA's decision. While the General Assembly may have intended to change things, the statute is clear that the General Assembly intended domicile to be a consideration under each division of the statute. Further, the legislative history argument may explain the evolution of the statute, but it does not explain why the term domicile should be interpreted with different definitions, depending upon the division of R.C. 5747.24 at issue in any given matter.

3. *The BTA's interpretation of R.C. 5747.24(B) yields absurd results.*

"[W]hen interpreting a statute, courts must 'avoid an illogical or absurd result.'" *AT&T Communications of Ohio, Inc. v. Lynch*, 2012-Ohio-1975, 132 Ohio St.3d 92 ¶ 18 (quoting *State ex rel. Shisler v. Ohio Pub. Emps. Retirement Sys.*, 122 Ohio St.3d 148, 2009-Ohio-2522, ¶ 34 (Pfeifer, J., dissenting), citing *In re T.R.*, 120 Ohio St.3d 136, 2008-Ohio-5219 ¶ 16); *see, also*, R.C. 1.47 ("In enacting a statute, it is presumed that: * * * (C) A just and reasonable result is intended; (D) A result feasible of execution is intended.")

The BTA's reading of R.C. 5747.24 creates unreasonable and absurd results. If "domicile" means to have "more than 182 contact periods during the tax year and no out-of-state abode," R.C. 5747.24(C) and (D) are rendered meaningless, which is unreasonable and absurd. For instance, R.C. 5747.24(C) would read:

> 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 has not filed a statement of non-domicile] is presumed to [have more than 182 contact periods during the tax year and no out-of-state abode] 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 [have more than 182 contact periods and no out-of-state abode] 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.

But the language used by the General Assembly in R.C. 5747.24(C) and (D), *presumes* an individual is domiciled in Ohio if no statement of non-domicile has been filed, and an individual may only overcome this presumption with proof to the contrary. This begs the question—proof of what? Certainly not proof of contact periods, because R.C. 5747.24(C) allows a person to be *outside* the state for most or all of the tax year, but still be presumed domiciled in Ohio. In other words, under the version of "domicile" espoused by the BTA, R.C 5747.24(C) would read that

persons with fewer than 183 contact periods in Ohio during the tax year will be presumed to have more than 182 contact periods in Ohio during the tax year.

Even less intelligible would be the last sentence of (C) and (D), under which one would be able to rebut the presumption of having *more than 182 contact periods during the tax year* and no out-of-state abode for *part of the year* and still be presumed to *have more than 182 contact periods during the tax year* and no out-of-state abode of the *remainder of the year.* In essence, one would prove *fewer* than 182 contact periods during the tax year for *part* of the year, but still be presumed to have *more* than 182 contact periods during the tax year for the *remainder* of the year.

Bizarrely, under (D), a person with "at least 183 contact periods" would be presumed to have more than 182 contact periods during the tax year. There would be nothing for a person to rebut under (D), and such a person would face an "irrebuttable presumption" *of* Ohio domicile. This makes no sense.

In view of the foregoing, the only reasonable reading of the statute is that "domicile" means more than just contact periods.

4. *This Court will construe R.C. 5747.24(B) in a manner that avoids constitutional problems.*

As a general rule, all legislative enactments must be afforded a strong presumption of constitutionality and statutes must be construed in conformity with the Ohio and United States Constitutions. *State v. Anderson*, 57 Ohio St.3d 168, 171 (1991); *State v. Tanner,* 15 Ohio St.3d 1, 2 (1984); R.C. 1.47 ("In enacting a statute, it is presumed that * * * Compliance with the constitutions of the state and of the United States is intended."). Where there is more than one possible interpretation of a statute, the court must construe the statute to save it from constitutional infirmities. *McFee*, 126 Ohio St.3d 183, 2010-Ohio-2744, at ¶ 27 ("Under the

rules of statutory construction, if an ambiguous statute is susceptible of two interpretations and one of the interpretations comports with the Constitution, then that reading of the statute will prevail and the court will avoid striking the statute."); *Sinito*, 43 Ohio St.2d at 101.

In this case, the BTA's construction of R.C. 5747.24(B) treats similarly situated individuals who are domiciled in Ohio differently, based on whether the individual filed a statement of non-domicile. As a result of the BTA's decision, individuals who are domiciled in Ohio, but who spend less than half the year here, have an out of state abode, *and* file the statement, need not pay income tax, even though they are entitled to be domiciled here for all other purposes. In contrast, individuals who are domiciled in Ohio, but who spend less than half the year here, have an out of state abode, *but do not* file the statement, are presumed to be domiciled here for all purposes. *See* R.C. 5747.24(C). This difference played out in this very case. Under otherwise identical facts, Mrs. Cunningham is domiciled in Ohio because she did not file an affidavit, but Dr. Cunningham is not domiciled in Ohio because he did file an affidavit.

This disparity based on whether an individual files a form, or not, creates a privileged class of individuals domiciled in Ohio: a category of Ohio domiciliaries who are not subject to income tax on the basis of common law domicile, unlike other individuals who are domiciled in Ohio.

In any event, the BTA's interpretation and the Cunningham's assertion, that principles of common-law domicile are not incorporated into R.C. 5747.24 are inconsistent with the doctrine that constitutional infirmities should be avoided. *McFee*, 126 Ohio St.3d 183, 2010-Ohio-2744, at ¶ 27; *Sinito*, 43 Ohio St.2d at 101.

E. Summary.

As stated above, the crucial issue in R.C. 5747.24 is domicile. In spite of the plain language of R.C. 5747.24(B) and even if interpretation of the term domicile as used in that provision is required, the rules of statutory construction require that the well-established common law definition of domicile be read in conjunction with the additional statutory elements of contact periods and possession of an out of state abode, in order to establish which evidentiary burden applies to a determination of a taxpayer's residency in Ohio.

Proposition of Law No. 3:

The BTA must remand a decision in which an income tax liability is imposed on a taxpayer, but the Tax Commissioner has not first calculated or allocated the amount of that liability in a final determination.

Even if the BTA's decision was correct with respect to Dr. Cunningham's domicile and how that status is interpreted under R.C. 5747.24(B), an error nevertheless remains in the decision.

In its decision, the BTA concluded that Mrs. Cunningham failed to rebut her presumption of Ohio domicile status with a preponderance of the evidence. BTA Decision at 7. As a consequence, Mrs. Cunningham will have some amount of income tax liability to the state. The amount of that income tax liability, however, is undetermined. Both the petition for reassessment and the notice of appeal filed by the Cunninghams in this matter challenged the Tax Commissioner's imposition of *any* income tax on them. The Cunningham's asserted that "[n]o tax is due for 2008." ST at 44. Therefore, the issue of the actual amount of tax liability, in the event either of the Cunninghams were found to be domiciled in Ohio, was not properly raised before the Tax Commissioner or the BTA, and the BTA correctly declined to address the issue. BTA Decision at 3, fn. 2.

But when the BTA reached its conclusion with respect to Mrs. Cunningham, the BTA did not remand the matter to the Tax Commissioner for further proceedings in connection with the outstanding income tax liability. The BTA simply made no conclusion in this regard. The BTA most assuredly possessed the authority to order a remand, and the BTA's failure to impose the remand caused the matter to remain unresolved. *See* R.C. 5717.03(F) ("The orders of the board may affirm, reverse, vacate, modify or remand the * * * determinations[.]")

As a consequence, the Tax Commissioner requests this Court remand the proceedings to the BTA, with an order that the BTA remand this matter to the Tax Commissioner, so that the necessary additional proceedings with respect to Mrs. Cunningham's income tax liability may occur. *See* R.C. 2503.44 ("The supreme court may remand its final decrees, judgment, or orders in cases brought before it[.]") It was error for the BTA to not order a remand to the Tax Commissioner for consideration of the allocation and calculation of the Cunningham's income that is subject to Ohio taxation, so that this matter could be fully resolved and completed.

IV. CONCLUSION

For the foregoing reasons, the Tax Commissioner respectfully requests that this Court reverse the BTA's decision that Dr. Cunningham did not have an Ohio domicile for the 2008 tax year. Alternately, if the disposition is that only Mrs. Cunningham has an Ohio domicile, the Tax Commissioner respectfully requests this Court to remand the cause to the BTA, with an order to remand the matter to the Tax Commissioner for further consideration of the allocation and calculation of Mrs. Cunningham's income that is subject to Ohio taxation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellant Joseph W. Testa, Tax Commissioner of Ohio has been sent by regular U.S. mail this 21 day of July, 2014, to J. Donald Mottley, Taft, Stettinius & Hollis LLP, 21 E. State Street, Suite 1200, Columbus, OH 43215-4221.

Daniel W. Fausey

In the
Supreme Court of Ohio

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

APPENDIX TO MERIT BRIEF OF APPELLANT JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO

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14-0532

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

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

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

The Tax Commissioner complains of the following errors:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

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Tax Commissioner of Ohio

In the
Supreme Court of Ohio

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

PRAECIPE

TO THE SECRETARY OF THE OHIO BOARD OF TAX APPEALS:

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

Respectfully submitted,

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Counsel for Appellee,
Joseph W. Testa, Tax Commissioner of Ohio

CERTIFICATE OF SERVICE

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

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Counsel for Appellees
Kent & Sue Cunningham

Daniel W. Fausey

OHIO BOARD OF TAX APPEALS

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

APPEARANCES:

For the Appellants - Taft, Stettinius & Hollister LLP
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For the Appellee - Michael DeWine
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Entered MAR 15 2016

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

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

In the final determination, the Tax Commissioner explained that appellants claimed not to have been Ohio residents for 2008, based on their having fewer than 183 contact periods[1] in Ohio, owning a home in Tennessee, and Dr. Kent

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

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

EXHIBIT
A

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

> "[A]n individual who during a taxable year has no more than one-hundred eighty-two contact periods in this state, *** and who during the entire taxable year has at least one abode outside this state, is presumed not to be domiciled in this state during the taxable year if, on or before the fifteenth day of the fourth month following the close of the taxable year, the individual files with the tax commissioner, on the form prescribed by the commissioner, a statement from the individual verifying that the individual was not domiciled in this state under this division during the taxable year. In the statement, the individual shall verify both of the following:
>
> "(a) During the entire taxable year, the individual was not domiciled in this state;
>
> "(b) During the entire taxable year, the individual had at least one abode outside this state. The individual shall specify in the statement the location of each such abode outside this state.
>
> "The presumption that the individual was not domiciled in this state is irrebuttable unless the individual fails to timely file the statement as required or makes a false statement. If the individual fails to file the statement as required or makes a false statement, the individual is presumed under division (C) of this section to have been domiciled in this state the entire taxable year."

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

Footnote contd.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A.J. Groeber, Board Secretary

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

Ohio Department of TAXATION
Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: SEP 30 2011

Kent W. & Sue E. Cunningham
4975 Councilrock Ln.
Cincinnati, OH 45243

Re: Assessment No. 02201010543905
Individual Income Tax – 2008

This is the final determination of the Tax Commissioner with respect to a petition for reassessment pursuant to R.C. 5747.13 concerning the following individual income tax assessment:

Tax	Interest	Penalty	Total
$6,597.75	$318.85	$2,309.21	$9,225.81

The petitioners request that the assessment be canceled. The petitioners were assessed for failing to timely file their 2008 individual income tax return. Records reflect that the petitioners neither filed their 2008 Ohio income tax return nor paid their 2008 Ohio income tax liability.

The petitioners contend that they were not residents of Ohio in 2008 and were therefore not required to file an Ohio income tax return. Specifically, the petitioners maintain that for taxable year 2008, they had less than 183 contact periods with Ohio, owned a home in Tennessee, and filed an Affidavit of Non-Ohio Domicile. In support of their position, the petitioners submitted a copy of the affidavit and several utility billing statements.

Every resident of Ohio, part-year resident of Ohio, and nonresident with Ohio-sourced income must file an Ohio individual income tax return. R.C. 5747.08. Pursuant to R.C. 5747.01(I), an individual is a resident of Ohio if the individual is domiciled in Ohio, subject to the contact period tests set forth in R.C. 5747.24.

Under Ohio law, "Domicile" is comprised of the inhabitation of an abode in a particular place with an intention to remain there indefinitely. *Davis v. Limbach*, BTA No. 89-C-267 (1992). A person can have only one domicile at any given time. *Saalfeld v. Saalfeld*, 86 Ohio App. 225 (1949). 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. *Saalfeld, supra*, 226.

The contact period test determines an individual's residency status based on the amount of time an individual spends in Ohio. R.C. 5747.24. The amount of time spent in Ohio is measured in "contact periods." A contact period occurs when an individual is away overnight from the individual's abode located outside Ohio and while away overnight spends at least some portion of time, however minimal, of each of two consecutive days in Ohio. R.C. 5747.24(A)(1).

Pursuant to the contact period test set forth in R.C. 5747.24(B)(1), an individual is irrebutably presumed not to be domiciled in Ohio if, for the entire taxable year in question, the individual had less than 183 contact periods in Ohio, had at least one abode outside of Ohio, and timely filed an Affidavit of Non-Ohio Domicile, on which no false statements were made. R.C. 5747.24(B)(1) does not apply to an individual changing domicile from or to Ohio during the taxable year. Such an

SEP 30 2011

individual is domiciled in Ohio for that portion of the taxable year before or after the change, as applicable. R.C. 5747.24(B)(2).

Under R.C. 5747.24(C) and R.C. 5747.24(D), the burden shifts to the individual to prove that he or she was not domiciled in Ohio during the taxable year. R.C. 5747.24(C) provides that an individual who has less than 183 contact periods with Ohio and who is not irrebuttably presumed under R.C. 5747.24(B) to be not domiciled in this state is presumed to be domiciled in Ohio 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.

If an individual has at least 183 contact periods with Ohio, the individual is presumed to be domiciled in Ohio for the entire taxable year under R.C. 5747.24(D). An individual can rebut this presumption for any portion of the taxable year only with clear and convincing evidence to the contrary.

Records reflect that the petitioners owned residential property in Tennessee for the entire year in question. However, based on evidence set forth below, the Commissioner finds that the petitioners did not establish their domicile outside of Ohio for the entire taxable year 2008.

The petitioners filed a Homestead Exemption Application with the Hamilton County Auditor on January 24, 2008. As used in sections 323.151 to 323.159 of the Revised Code, "homestead" means either of the following:

> (a) A dwelling, including a unit in a multiple-unit dwelling and a manufactured home or mobile home taxed as real property pursuant to division (B) of section 4503.06 of the Revised Code, *owned and occupied as a home by an individual whose domicile is in this state* and who has not acquired ownership from a person, other than the individual's spouse, related by consanguinity or affinity for the purpose of qualifying for the real property tax reduction provided in section 323.152 of the Revised Code.
>
> (b) A unit in a housing cooperative that is *occupied as a home*, but not owned, *by an individual whose domicile is in this state*. R.C. 323.151. [Emphasis added].

On the Application, the petitioners declared, under the penalty of perjury, that they occupied, as their principal place of residence, the abode located at 4975 Councilrock Lane, Cincinnati, OH 45243. On the same petition, the petitioners also swore that the property located at 131 Doe Lane Lafollette, TN 37766 was a either a second home or a vacation home. This document suggests that the petitioners were residents for at least some portion of 2008 and that the petitioners did not intend to abandon their Ohio domicile. The petitioners received a homestead exemption based on this sworn statement.

The petitioners, in support of their claim of not being domiciled in Ohio, provided the Tax Commissioner with water, electricity, property tax, and telephone billing statements for their Tennessee abode. In the aggregate, the utility statements span from January 1, 2008 through

SEP 30 2011

October 31, 2008. While all of these statements appear to reflect costs associated with the Tennessee abode, it is evident that the majority of the statements were mailed to the petitioners' Ohio address, which further indicates that the petitioners did not intend to remain in Tennessee indefinitely and/or abandon their Ohio abode in favor of the abode in Tennessee. These statements do not show the petitioners' presence at, or use of, the Tennessee property, but only that the utilities were kept on.

To support their non-residency claim, the petitioners also provided the Tax Commissioner a copy of their Affidavit of Non-Ohio Domicile, on which they declared, under the penalty of perjury, that they were *not* domiciled in Ohio at any time during the taxable year 2008. This sworn statement contradicts the petitioners' prior sworn statement that they occupied, as their principal place of residence, their home in Cincinnati, and that the Tennessee home was a either a second home or a vacation home. Given the contradictory statements made by the petitioners, the Tax Commissioner necessarily concludes that the petitioners' Affidavit of Non-Ohio Domicile contains a false statement as described in R.C. 5747.24(B)(1). Furthermore, the petitioners provided no evidence of their contact periods with Ohio, other than as sworn on the statement. Consequently, the petitioners are not irrebuttably presumed under R.C. 5747.24(B) to be domiciled outside of Ohio. That is, the petitioners are presumed to be domiciled in Ohio for the entire taxable year under R.C. 5747.24(C).

R.C. 5747.24(C) provides that an individual who has less than 183 contact periods with Ohio is presumed to be domiciled in Ohio 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. Under R.C. 5747.24(C), the burden shifts to the taxpayer to prove that he or she was not domiciled in Ohio during the taxable year. In the case, the petitioners have failed to meet their burden.

To have established non-residency, it was necessary for the petitioners to show that they were not domiciled in Ohio and therefore not residents of Ohio. The petitioners swore under the penalty of perjury that they occupied their Ohio abode as their principle place of residence. The petitioners provided the Tax Commissioner with water, electricity, property tax, and telephone billing statements for their Tennessee abode, the majority of which were mailed to the petitioners' Ohio abode. The evidence shows that, in 2008, the petitioners remained domiciliaries of Ohio. The petitioners were subject to both the Ohio individual income tax and its concomitant filing requirement.

Accordingly, the assessment is affirmed.

Current records indicate that no payments have been applied to this assessment, leaving the entire balance due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Ohio Treasurer Josh Mandel." Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

SEP 30 2011

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF THE FINAL DETERMINATION RECORDED IN THE TAX COMMISSIONER'S JOURNAL.

JOSEPH W. TESTA
TAX COMMISSIONER

/s/ Joseph W. Testa

Joseph W. Testa
Tax Commissioner

Baldwin's Ohio Revised Code Annotated
Title LVII. Taxation (Refs & Annos)
Chapter 5747. Income Tax (Refs & Annos)
Nonresident Taxpayers

R.C. § 5747.24

5747.24 Domicile

Effective: April 4, 2007
Currentness

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

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

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

CREDIT(S)

(2006 H 73, eff. 4-4-07; 2000 S 287, eff. 12-21-00; 1993 S 123, eff. 10-29-93)

Notes of Decisions (2)

R.C. § 5747.24, OH ST § 5747.24
Current through Files 1 to 113, 117, 119, 121, 122, 124, 125, 128, 129, 131 to 134, 136 to 138 and Statewide Issue 1 of the 130th GA (2013-2014).

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