

Ohio: Legislation to modify income tax residency test and reinstate tax appeal rights awaits governor's signature



David M. Kall | Thursday, June 7, 2018

We have been following legislation in the Ohio General Assembly that would modify the test for determining whether individuals reside in Ohio for state income tax purposes. The bill, [House Bill 292](#), would also reinstate the direct right of appeal from the Board of Tax Appeals to the Ohio Supreme Court for many cases, [which was eliminated last year](#).

Late last year on Nov. 1, 2017, HB 292 passed the Ohio House of Representatives. Then last month, on May 23, 2018, the proposed legislation took the next step forward as Substitute HB 292 passed the Ohio Senate with several new provisions. On June 7, 2018, the House concurred in the Senate amendments and the bill now awaits Gov. Kasich's signature.

INCOME TAX RESIDENCY TEST

House Bill 292 is designed to provide a "bright line test" for non-Ohio residents to establish their nonresident status for Ohio income tax purposes.

Current Ohio law, [Ohio Rev. Code Section 5747.24\(B\)](#), provides that individuals have an "irrebuttable presumption" of non-Ohio domicile, if they file an affidavit with the Department of Taxation stating that they satisfy each of the following requirements:

- The taxpayer has 212 or fewer contact periods during the taxable year;

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- The taxpayer has an out-of-state abode (place of residence); and
- The taxpayer has a non-Ohio domicile (such that the person does not intend to return to Ohio when they are away).

But in 2015, the Ohio Supreme Court ruled in *Cunningham v. Testa*, that the Tax Department may challenge the affidavit by showing that an individual's claim to have a non-Ohio domicile is false. In other words, the Supreme Court held that the affidavit did not prevent the Tax Department from using evidence to show that an individual is actually domiciled in Ohio because Ohio is where that person "intends to reside permanently or at least indefinitely."

HB 292 is an effort to provide more certainty to taxpayers by eliminating the requirement that individuals attest to having a non-Ohio domicile. The proposed legislation would provide an "irrebuttable" presumption of non-Ohio domicile to taxpayers who filed an affidavit with the tax commissioner stating that they met the following clearly discernible requirements:

- The individual had fewer than 213 "contact periods" with the State of Ohio during the tax year. A "contact period" with Ohio occurs where an individual spends portions of two consecutive days in Ohio, generally an overnight stay.
- The individual had at least one abode outside the state during the entire tax year for which they did not claim a federal depreciation deduction under I.R.C. § 167.
- The individual did not hold a valid Ohio driver's license or identification card at any time during the tax year.
- The individual did not receive the benefit of an Ohio homestead exemption for their primary residence real property tax purposes for that tax year.
- The individual did not receive an out-of-state tuition discount based on residency for attending an Ohio institution of higher education during that tax year.

The bill includes language that the presumption of non-Ohio domicile is "irrebuttable" unless the affidavit filed with the tax commissioner discussed above "is false." The bill also extends the deadline for taxpayers to file the affidavit to the 15th day of the tenth month following the close of the taxable year.

DIRECT RIGHT OF APPEAL TO THE OHIO SUPREME COURT

House Bill 292 would also reinstate the direct right of appeal from the Board of Tax Appeals (BTA) to the Ohio Supreme Court for most Ohio tax cases other than real property valuation disputes. As we reported at the time, the 2017 Ohio Budget Bill included a rider provision that did away with the longstanding right of appeal from the BTA to the Ohio Supreme Court.

From 1939 to 2017, any decision of the BTA could be appealed directly to the Ohio Supreme Court. In 1953, the General Assembly added a provision giving taxpayers an option to appeal the Board's decisions to either a county court of appeals or the Ohio Supreme Court. As the lion's share of tax appeals were to the Ohio Supreme Court, rulings on controversial provisions in Ohio tax law were generally decided uniformly in the same court.

Due to the 2017 law change, however, county courts of appeal became the exclusive route to appeal BTA decisions. The 2017 law codified in [O.R.C. 5717.04](#) also allowed taxpayers, after filing an appeal with the court of appeals, to request that the Ohio Supreme Court exercise discretionary jurisdiction to hear a direct appeal from the BTA. For the Supreme Court to exercise this jurisdiction, the case was required to involve a "substantial constitutional question or a question of general public interest."

If HB 292 becomes law, taxpayers would once again have a choice to appeal either to the Supreme Court or the county courts of appeal for BTA decisions on final determinations of the tax commissioner and BTA decisions on municipal income tax cases. BTA rulings on decisions from county boards of revision (i.e. real property valuation disputes) would be appealable only to county courts of appeals. HB 292 also removes the provisions regarding the Supreme Court's jurisdiction over cases

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involving a “substantial constitutional question or a question of general public interest.”



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