

Ohio: House passes legislation modifying the residency test



David M. Kall | Thursday, November 16, 2017

In the 2015 case *Cunningham v. Testa*, the Ohio Supreme Court addressed whether a taxpayer's express claim that he was not domiciled in Ohio bound the Ohio Tax Commissioner without regard for the taxpayer's other statements and actions showing that he was domiciled in Ohio. The Court determined that the Tax Commissioner could review other evidence to determine whether the taxpayer was indeed domiciled in Ohio for income tax purposes. The Ohio General Assembly is now considering legislation passed by its House of Representatives earlier this month to modify that rule as discussed in *Cunningham*.

Background

The Ohio Supreme Court in *Cunningham* applied the criteria set forth in Ohio Revised Code section [5747.24\(B\)\(1\)](#) and ultimately held that the taxpayer at issue, Kent Cunningham, was domiciled in Ohio.

The statute preserves the common law of domicile and establishes presumptions and burdens of proof to determine whether the available evidence shows that a taxpayer is domiciled in Ohio. At common law, residence and domicile distinctly different, yet related, concepts. A "residence" is merely a place where someone may dwell for a period of time. "Domicile," on the other hand, is a residence where someone "intends to reside permanently or at least indefinitely."

Per Ohio Rev. Code Section 5747.24(D), taxpayers are presumed to be domiciled in Ohio if they have 213 or more "contact periods" with the State, but the taxpayer may rebut that presumption with "clear and convincing" evidence showing non-Ohio domicile. If taxpayers have fewer than 213 contacts periods with

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Ohio, the taxpayer is still presumed to be domiciled in Ohio, but may rebut that presumption if he or she satisfies the lesser “preponderance of the evidence” standard (i.e. more likely than not). O.R.C. 5747.24(C). A taxpayer establishes a “contact period” with Ohio by spending portions of two consecutive days in Ohio.

The Ohio statute, however, shifts the presumption of an Ohio domicile such that the taxpayer has an “irrebuttable presumption” of non-Ohio domicile, if the taxpayer files an affidavit with the Tax Department stating that he or she satisfies each of the following requirements:

- The taxpayer has 212 or fewer contact periods during the taxable year (182 or fewer under the former version of the statute at issue in *Cunningham*).
- The taxpayer has an out-of-state abode (i.e. place of residence).
- The taxpayer has a non-Ohio domicile and at least one non-Ohio abode.

In *Cunningham*, the Ohio Supreme Court recognized that the taxpayer, Mr. Cunningham, presented uncontroverted evidence that they had 182 or fewer contact periods (the threshold under the former version of the statute) with Ohio during the 2008 tax year at issue. But the court also ruled that the Tax Commissioner could investigate whether the taxpayer’s statement claiming a non-Ohio domicile was true or false. To Mr. Cunningham, the statement was true because he believed that the Ohio statute abrogated the common law of domicile and they had satisfied each of the statutory requirements for a non-Ohio domicile.

The court, however, ruled that the statute, R.C. 5747.24, did not abrogate the common law of domicile. Because Mr. Cunningham and his wife Sue admitted in briefing that they were common law domiciliaries in Ohio during the tax year at issue, and the evidence showed the same, the court held that they were domiciled in Ohio for income tax purposes.

The court considered the following evidence in rendering its decision:

This concession [of common law domicile in Ohio] is supported by various facts, including that Kent and Sue were both born, raised, and educated in Ohio; that they were married in Ohio; that they have lived in Ohio throughout their entire marriage up to the time of the BTA hearing in 2012 (except for several years in the 1970s); that their mail was generally delivered to their Cincinnati home and not forwarded to the Tennessee address; that they have lived in the Cincinnati area and raised a family there in three houses, including the home that they currently own in Indian Hill; and that they held Ohio driver's licenses and voted in Ohio in 2008, the tax year at issue.

The court also noted that the Cunninghams claimed a “homestead exemption” for property tax purposes on their Cincinnati home, which exemption is available only to Ohio domiciliaries. The court thus held that the Tax Commissioner had a substantial factual basis for rejecting Cunningham’s claim of non-Ohio domicile.

In making its ruling, the court reversed the Board of Tax Appeals’ holding that the taxpayer was “irrebuttably presumed to be not domiciled in Ohio for Ohio individual income tax purposes.” The reversal rendered the taxpayer liable for \$9,225.81 in Ohio income taxes, interest and penalties.

The court’s investigation of the factual record shows that the Ohio income tax residency determination is very fact specific under the current law. That is, whether a taxpayer is domiciled in Ohio for income tax purposes depends on all the facts and circumstances.

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New Legislation

Many taxpayers seeking bright line residency requirements were unhappy with the *Cunningham* decision. On the first day of Nov., 2017, the Majority Caucus blog for the Ohio House of Representatives **announced** that new legislation, **HB 292**, would “remedy the problem posed by” the *Cunningham* case.

According to the blog, *Cunningham* was overbroad, and opened the door for the tax commissioner to use other criteria to determine domicile: “Right now, snowbirds and other non-Ohio residents are open to literally dozens of common law factors that can cause their out-of-state residency—for state income tax purposes—to be questioned, making it challenging for these individuals to know how to comply.” HB 292 “will provide much-needed clarity to factors that can be examined” by the Ohio Department of Taxation (ODT).

HB 292 modifies the statute, O.R.C. 5747.24, that governs whether an individual is considered an Ohio or out-of-state resident for Ohio income tax purposes. The bill would provide an “irrebuttable” presumption of non-Ohio domicile to taxpayers who filed a statement with the Tax Commissioner stating that they met the following requirements:

1. The individual had no more than 212 contact periods with the State of Ohio during the tax year.
2. The individual had at least one abode outside the State during the entire tax year.
3. The individual did not claim a federal depreciation deduction for an out-of-state residence that is considered their primary domicile for federal tax purposes.
4. The individual did not hold a valid Ohio driver's license or identification card at any time during the tax year.
5. The individual did not receive the benefit of an Ohio homestead exemption for their primary residence real property tax purposes for that tax year.
6. The individual did not receive a 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 taxpayer statement filed with the Tax Commissioner discussed above “is false.” The bill also extends the deadline for taxpayers to file the statement to the 15th day of the tenth month following the close of the taxable year.

Bill Sponsor's Rationale

According to the bill's lead sponsor, State Representative Gary Scherer (R-Circleville), who has spent the majority of his career as a CPA, contends that HB 292 will add precision because the four new conditions, along with those already in the statute, will create an “irrefutable presumption of non-Ohio domicile. Individuals are still able to be determined a non-Ohio resident if they do not meet all the criteria, however having all of the above-listed conditions ensures that the individual's residency cannot be challenged.”

The Ohio Society of CPA's, Ohio State Bar Association, and the Ohio Department of Taxation worked together on the legislation.



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