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## **Income Tax - Information Release\***

### **IT 2007-08 – Residency Guidelines - Tax Imposed on Resident and Nonresident Individuals for Post-2006 Taxable Years**

#### *Introduction*

This information release discusses how Ohio personal income tax is imposed on resident and nonresident individuals for taxable years beginning after December 31, 2006 but prior to March 23, 2015. This information release does not apply to taxable years beginning before January 1, 2007, or taxable years ending after March 23, 2015. For information on these taxable years, please see Information Releases IT 2015-02 and IT 2007-01.

On July 8, 2015, the Supreme Court of Ohio decided *Cunningham v. Testa*, 2015-Ohio-2744. The case interpreted Ohio's presumption of domicile tests contained in R.C. 5747.24 and is appropriately referenced herein.

The full text of current R.C. 5747.24 can be found at: <http://codes.ohio.gov/orc/5747.24>

The full text of current Ohio Adm.Code 5703-7-16 can be found at: <http://codes.ohio.gov/oac/5703-7-16v1>

The full text of *Cunningham v. Testa* can be found at: <http://www.supremecourt.ohio.gov/rod/docs/>

#### *Observations/ Law*

**Ohio's Individual Income Tax.** Ohio imposes individual income tax on individuals residing in this state, earning or receiving income in this state, or earning or receiving certain lottery winnings, prizes, or awards from the Ohio Lottery Commission. Each such individual (or married couple who file a joint federal return), except those not required to file a return pursuant to R.C. 5747.08, must file an Ohio income tax return. This filing requirement also applies to each nonresident individual whose federal adjusted gross income includes any income earned or received in Ohio by a pass-through entity unless the entity files a composite Ohio return on behalf of its nonresident owners. The filing requirement applies even if an individual is allowed a nonresident or resident credit under R.C. 5747.05(A) or (B), respectively, that eliminates most or all Ohio individual income tax.

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\* An information release does not create legal obligations by its own force. Only an administrative rule can "confer the force of law on a requirement." See *Progressive Plastics, Inc. v. Testa*, 133 Ohio St.3d 490, 2012-Ohio-4759.

**Who is a resident?** R.C. 5747.01(l) defines a “resident” of Ohio for purposes of the Ohio income tax. A “resident” is an individual who is domiciled in this state, subject to the tests contained in R.C. 5747.24. A “nonresident” is an individual that is not a resident. While the tax law does not specifically define who is domiciled in this state, there is substantial case law on the determination of “domicile” for tax and other purposes. **Importantly**, “[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.” *Cunningham v. Testa*, 2015-Ohio-2744, ¶18 (quoting *Maple v. Tracy*, BTA Nos. 98-T-268 and 98-T-312, 1999 WL 706543, \*3 (Sept. 3, 1999)). Factors that the Tax Commissioner cannot consider in determining domicile can be found in Ohio Adm. Code 5703-7-16(A).

**What is domicile?** While a person may have more than one abode at any given time, s/he can have only one domicile. *Saalfeld v. Saalfeld*, 86 Ohio App. 225 (1949). Domicile has been defined as a place where an individual has his “true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning.” *Sturgeon v. Korte* (1878), 34 Ohio St. 525. As held by the United States Supreme Court in *Williams v. N. Carolina*, 325 U.S. 226 (1944) “Domicile implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance.”

Abandonment of one's domicile is effected only when a person chooses a new domicile, establishes actual residence in the place chosen and shows a clear intent that it be the principal and permanent residence. *E. Cleveland v. Landingham*, 97 Ohio App.3d 385 (1994). To that end, once a domicile has been established, it is presumed to continue until it is shown by a preponderance of the evidence that it has been abandoned in favor of a new one. *Cleveland v. Surella* (1989), 61 Ohio App.3d 302; *Saalfeld, supra*, 226.

**Contact Periods.** R.C. 5747.24<sup>1</sup> contains a “contact period test” for determining the taxpayer’s burden of proof regarding the issue of residency for purposes of the Ohio individual income tax. The test examines an individual’s “contact periods” in Ohio during the taxable year to arrive at a presumption of whether or not that individual is an Ohio resident for that taxable year. Please note, the test uses “contact periods” as opposed to “days.” The taxpayer’s total number of contact periods for a given tax year are used to determine his/her burden of proof in establishing his/her status as a nonresident of Ohio.

An individual has a contact period with the state when 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 two consecutive days in this state. R.C. 5747.24(A)(1)(a). For example, an individual spending any portion of two consecutive days in Ohio (e.g., portions of Monday and Tuesday) has one contact period in Ohio, but an individual spending any portion of each of two nonconsecutive days in Ohio, (e.g., Monday and Wednesday, but not Tuesday) has no contact period in Ohio for those two days.

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

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<sup>1</sup> This law was amended for tax years beginning after March 30, 2015. Please see Ohio Income Tax Information Release IT 2015-02 for more information.

***The irrebuttable presumption of non-Ohio domicile.*** An individual is irrebuttably presumed not to be domiciled in Ohio for any portion of the taxable year if the individual **has fewer than 183 contact periods in Ohio** during the taxable year **and meets ALL the following criteria:**

- (i) The individual did not change domicile to or from Ohio during the taxable year (i.e. the individual was not a “part-year resident”),
- (ii) By May 30 of the immediately succeeding calendar year the individual files the affidavit of non-Ohio domicile,
- (iii) In the affidavit, the individual verifies that s/he was not domiciled in Ohio pursuant to generally accepted common law notions of domicile,
- (iv) In the affidavit, the individual verifies at least one abode outside Ohio during the entire taxable year,
- (v) The affidavit does not contain any false statements.

**Importantly**, the Tax Commissioner may challenge the truth of **any** statement contained on the affidavit of non-Ohio domicile including the taxpayer’s “explicit claim under R.C. 5747.24(B)(1) to be domiciled outside of Ohio.” *Cunningham*, 2015-Ohio-2744, ¶122.

### *Guidance*

***The important of residency.*** Ohio grants a credit under R.C. 5747.05(B) to residents for the lesser of income subjected to tax in another state, or the amount of tax paid to another state on that income. In contrast, nonresidents receive a credit under R.C. 5747.05(A) for all income not earned or received in Ohio. So, for example, if the income is from a state that imposes no tax, a resident will get no credit, but a nonresident will. If the income is earned in Ohio, both the resident and the nonresident will be subject to Ohio tax.

***Concept of Domicile.*** As the case law shows, an individual can have only one domicile at any given point in time. Most individuals retain their domicile throughout the taxable year, even if they spend all or a substantial portion of the year away from that domicile during the year. For example, an individual who regularly spends spring and summer in Ohio and autumn and winter in Florida may be domiciled either in Ohio or Florida for the entire year, depending on what the relevant facts demonstrate, and would be away from that domicile while in the other state. The contact period test of R.C. 5747.24, discussed below, applies for purposes of determining the taxpayer’s burden of proof in establishing an individual’s residency status in Ohio for the taxable year.

It is important to note, an individual who regularly splits time between two states is not a “part-year resident,” as the individual has probably not switched domiciles back and forth between states during the year. More likely, the individual remains domiciled in only one state, and merely travels to the other state, albeit regularly. Since domicile does not change, the individual is either a full-year resident or nonresident. In contrast, if the individual does change domicile during a taxable year (i.e. a permanent move into or out of Ohio), then that individual is a part-year resident. See R.C. 5747.01(J) (“An individual who is a resident for only part of a taxable year is a nonresident for the remainder of that taxable year.”).

***The presumption of Ohio residency.*** An individual is rebuttably presumed to be domiciled in Ohio if:

- The individual **has fewer than 183 contact periods in Ohio** during the taxable year **but** does not meet any one of the criteria (i) through (v) above, or does not file the affidavit of non-Ohio domicile. Such an individual may rebut the presumption of full-year Ohio domicile by proving by a preponderance of the evidence that the individual was not domiciled in Ohio for all or part of the year.
- The individual **has at least 183 contact periods in Ohio** during the taxable year and is not a part-year resident. Such an individual may rebut the presumption of full-year Ohio domicile by proving by clear and convincing evidence that the individual was not domiciled in Ohio for all or part of the year.

**Who should file the affidavit?** Any individual who wants the presumption of being a nonresident of Ohio must file the affidavit for each such tax year the individual seeks the presumption. The following are a couple of commonly seen factual scenarios in which a taxpayer has filed the affidavit:

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

A copy of the Affidavit of Non-Ohio Residency/Domicile can be found at: <http://www.tax.ohio.gov/Forms.aspx>

### *Questions?*

Taxpayers may visit [www.tax.ohio.gov](http://www.tax.ohio.gov). Questions may be submitted by clicking on the “Contact” link found at the top right of the page and then choosing the “Email Us” option. Taxpayers with additional questions regarding this subject may contact Individual Income Taxpayer Services at 1-800-282-1780.