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## Income Tax - Information Release\*

### IT 2018-01 – Residency Guidelines - Tax Imposed on Resident and Nonresident Individuals for Taxable Years 2018 and Forward

#### *Introduction*

On June 15, 2018, Sub. H.B. 292 was signed into law. This Bill, in response to the Supreme Court of Ohio's decision in *Cunningham v. Testa*, changed the "irrebuttable presumption" of non-Ohio domicile for tax years 2018 and forward. This information release discusses how Ohio personal income tax is imposed on resident and nonresident individuals for taxable years beginning on or after January 1, 2018. For information on previous taxable years, please see Information Releases IT 2015-02, IT 2008-07, and/or IT 2007-01.

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

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

The full text of Sub. H.B. 292 can be found at: <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-292>

#### *Observations/ Law*

**Ohio's Individual Income Tax.** Ohio imposes individual income tax on individuals residing in Ohio, earning or receiving income in Ohio, 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.

**Who is a resident?** R.C. 5747.01(I) defines a "resident" of Ohio for purposes of the Ohio income tax. A "resident" is an individual who is domiciled in Ohio, 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

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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.

domiciled in Ohio, 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 cannot be considered 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.

**What is a Contact Period?** R.C. 5747.24 contains a “contact period test” for determining the taxpayer’s burden of proof to rebut the presumption of Ohio domicile/residency. Stated differently, the contact period test determines the burden of proof needed to show that an individual is a nonresident of Ohio. 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 Ohio and while away overnight from that abode spends at least some portion, however minimal, of two consecutive days in Ohio. 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 that time period.

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).

**The irrebuttable presumption of non-Ohio domicile.** Sub. H.B. 292 amended R.C. 5747.24 to impose new requirements for an individual to be irrebuttably presumed not to be domiciled in Ohio for the taxable year. Pursuant to newly enacted R.C. 5747.24(B), an individual is irrebuttably presumed not to be domiciled in Ohio for each taxable year for which the individual 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) The individual files the statement of Ohio nonresidency, form IT NRS, and attests that each of the following requirements are met:
  - a. The individual had no more than 212 contact periods with Ohio during the taxable year,
  - b. The individual had an abode outside of Ohio for the entire taxable year, on which the individual did not claim a depreciation deduction under I.R.C. §167,
  - c. The individual did not hold an Ohio driver’s license or identification card at any time during the taxable year,
  - d. The individual did not claim the homestead exemption and/or the owner-occupancy property tax reduction for an Ohio property during the taxable year, and
  - e. The individual did not claim to be an Ohio resident for the purpose of obtaining “in state” tuition at an Ohio institution of higher education;
- (iii) The statement is not false with respect to the requirements listed in (ii); and
- (iv) The individual files the statement on or before the 15<sup>th</sup> day of the 10<sup>th</sup> month following the close of the taxable year (i.e. October 15<sup>th</sup> for calendar year filers).

**The rebuttable presumption of Ohio domicile.** An individual who has an abode in Ohio during any portion of a taxable year, and who is not “irrebuttably” presumed to be a nonresident under R.C. 5747.24(B), is **presumed to be an Ohio resident** for that entire taxable year. Divisions (C) and (D) of R.C. 5747.24 outline the standard of proof by which an individual can rebut that presumption.

Division (C) of R.C. 5747.24 allows an individual with fewer than 213 contact periods to rebut the presumption of Ohio domicile, for all or a portion of the taxable year at issue, with “a preponderance of the evidence to the contrary.” The **preponderance of the evidence** standard has been identified as a balancing test, evaluating the evidence provided to determine if the given proposition is more likely than not to be true. *See State v. West*, 167 Ohio App.3d 598 (2006).

Division (D) of R.C. 5747.24 allows an individual with 213 or more contact periods to rebut the presumption of Ohio domicile, for all or a portion of the taxable year at issue, with “clear and convincing evidence to the contrary.” The Supreme Court of Ohio has defined **clear and convincing evidence** as “[T]he measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established.” *Cross v. Ledford*, 161 Ohio St. 469 at 477 (1954). The court went on to explain that it is an intermediary level of review, being more than a mere preponderance, but not requiring the certainty of beyond a reasonable doubt. *Id.*

### *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.

**The 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. Remember, the standard of proof that an individual needs to establish non-Ohio domicile is based on the contact period test, discussed above.

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 is **ineligible** for the irrebuttable presumption of non-Ohio domicile (e.g. the individual was a part-year Ohio resident, or held an Ohio driver’s license during the taxable year);
- The individual is eligible for the irrebuttable presumption, but **fails to timely file** the statement of Ohio nonresidency; or
- The statement of Ohio nonresidency is timely filed but contains **false information**.

Once an individual is presumed to be a resident, the common law concepts of domicile apply; the residency determination is not confined only to those items found on the statement of Ohio nonresidency. The individual can rebut the presumption of Ohio domicile by:

- A preponderance of the evidence that the individual was not domiciled in Ohio for all or part of the year, if the individual had fewer than 213 contact periods in Ohio during the taxable year, or
- Clear and convincing evidence that the individual was not domiciled in Ohio for all or part of the year, if the individual had at least 213 contact periods in Ohio during the taxable year.

In making this determination, the factors contained in Ohio Adm. Code 5703-7-16(A) cannot be used to either prove or disprove an individual’s domicile. Also, please note that the concept of domicile is **individual specific**; it is not determined on a “return basis.” As such, it is possible for two spouses, even if included on a joint return, to have difference residency statuses.

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

- The individual 1) filed an Ohio income tax return as a resident for the previous taxable year, 2) intends to file as nonresident of Ohio for the current taxable year, and 3) has no income situated to Ohio under R.C. 5747.20 through 5747.231.
- The individual has no intent to file an Ohio income tax return for the taxable year and has (i) an abode in Ohio, (ii) contact periods in Ohio, and/or (iii) nexus with Ohio to the extent that the tax commissioner would have cause to question the individual’s non-filing.

As a reminder, each individual (even if filing a joint Ohio return) who wants the presumption of Ohio

nonresidency must file the statement of Ohio nonresidency. A copy of the statement, form IT NRS, 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, or at 1-800-750-0750 for the hearing impaired.