

## TAX LAW ALERT

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### Bright lines getting blurrier

***Cunningham v. Testa*, Slip Opinion No. 2015-2744 (July 8, 2015)**

Recently, the Supreme Court of Ohio issued an opinion in *Cunningham v. Testa* which significantly alters the application of a statute for determining non-Ohio domicile for state tax purposes. Prior to the ruling, the statute seemed to set forth two factors which, when verified, would create an irrebuttable presumption of non-residency for state income tax purposes:

- (1) too few contact periods; and
- (2) an abode outside of Ohio.

Following this ruling, a taxpayer may now be forced to prove sufficient additional facts to show that he would legally be considered domiciled outside the state. The change represents a partial reversion back to a prior structure which existed at common law, a structure which was amended over 20 years ago due to its complexities. The case of *Cunningham v. Testa* casts serious doubt on the future validity of any bright-line test for determining Ohio domicile and will create uncertainty for taxpayers in the coming years.

#### Background

The taxpayer, Kent Cunningham, owned homes in both Ohio and Tennessee for the entirety of the 2008 tax year. Also, Cunningham undisputedly had fewer than 182 contact periods with the state of Ohio for that year. He filed a Form IT-DA, an "Affidavit of Non-Ohio Domicile," for the 2008 tax year. In the affidavit, he declared that he "was not domiciled in Ohio at any time during taxable year 2008" and affirmed that he "had fewer than 183 contact periods in Ohio during the taxable year."

During that same year, Cunningham claimed a homestead property tax exemption under O.R.C. § 322.151(A)(1). In claiming the homestead exemption, he asserted that his Ohio home was his principal place of residence and that he was domiciled in Ohio.

At the relevant time, the Ohio Revised Code stated that if a taxpayer had fewer than 183 contact periods (which essentially means an overnight

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stay in the state) and had an abode outside the state for the entire year, he could file an affidavit verifying his non-resident status and would be irrebuttably presumed to have a non-Ohio domicile. Provided that an affidavit is timely filed, the only way the presumption can be rebutted is if the taxpayer “makes a false statement.”



If found to have made a false statement, the presumption of non-Ohio domicile is not only removed, but is replaced with a rebuttable presumption that the taxpayer is actually domiciled in Ohio.

### **Disposition of the case**

Initially the Tax Commissioner determined that Cunningham made a false statement about his domicile in the state due to, in the eyes of the Tax Commissioner, his contradictory claims about his domicile made on affidavits for separate tax issues. Because the Tax Commissioner asserted that Cunningham had made a false statement, the taxpayer was presumed to be an Ohio resident.

On appeal, the Board of Tax Appeals (BTA) reversed the Tax Commissioner’s decision, finding instead that the taxpayer satisfied the bright-line test, which required only that the taxpayer:

- (1) have fewer than 182 (212 under the statute as currently enacted) contact periods with the state;
- (2) have an abode outside of the state; and
- (3) have timely verified these facts in an affidavit

Further, the BTA explained that the only way to lose a presumption against Ohio common law domicile is by making a false statement about the taxpayer’s contact periods or abode— not by making a false statement regarding domicile. In coming to this conclusion, the BTA reasoned that requiring taxpayers to declare their domicile would require an

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analysis of the facts and circumstances. This approach results in the same complexities of the common law test, the avoidance of which is likely the very reason the two-factor test was implemented over 20 years ago.

The Ohio Supreme Court, however, disagreed with the BTA. Instead, the Supreme Court found that the statute requires the verification of domicile separate and apart from the verification of contact periods and abode. The Court then explained that the Commissioner can make a false statement finding where he has “information that furnishes a substantial basis for rejecting the claim of non-Ohio domicile. . . .”

The dissent expressed concern with the majority’s opinion, explaining that, under the Court’s reading, the taxpayer gets, at best, a rebuttable presumption by filing the kind of affidavit described by the statute. Further, Justice French said that the decision by the majority essentially renders the bright-line test moot and explained that each determination must now include the taxpayer making a common law legal conclusion based upon the underlying facts.

### **Takeaway**

The Supreme Court overturned the BTA’s ruling, which emphasized the importance of the bright-line test. The Court instead ruled that domicile must be separately verified by taxpayers. It appears that taxpayers must now weigh the facts and circumstances to come to the legal conclusion that they are domiciled in Ohio in order to be entitled to any presumption. Further, the opinion suggests that even when a taxpayer meets the criteria to be entitled to an irrebuttable presumption of non-Ohio domicile, the Tax Commissioner can provide evidence that he was not a resident, meaning the presumption is no longer irrebuttable. The Cunningham case has created significant uncertainty as to what is required to prove non-resident status for tax purposes under Ohio law.

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