TAKING IT WITH THEM
THE DYNAMICS OF CHANGING A STATE
INCOME TAX RESIDENCE

by

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ORIGINS OF THE BIG MOVE

Some say that the tax collector's art is to pluck the most feathers with the least squawking. An opening axiom of this theory is that those with few feathers squawk louder. Regrettably, the consequent unwelcome attention that this practice inflicts on those of fuller plumage impels them to fly the tax coup. When they leave, their feathers leave with them.

During the working lives of most people, their livelihood shuts them into fixed taxing jurisdictions. Thus, the well-off stoically endure the state relieving them of more of the fruits of their labors than of the less-fortunate. Indeed, they often grudgingly acknowledge the general fairness of progressive tax incidence. Then, they retire. As retirees, they have time on their hands and philanthropy in their hearts. They serve at voluntary posts in their communities. They gift and devise money to local causes. They would dearly love to abide for the rest of their days in the communities of their working lives. However, in time, many come to view the incessant tax plucking by their home states and municipalities as an affront to their cherished bonds to their home communities. Love their communities as they do, they begin to question the price of staying.

In this setting, it slowly dawns on them that retirement has opened the door from the domain of their working days. Thus, the onset of each new grim northern winter starts to stir visions of palm trees in the new retirees. Many begin to winter in Florida.¹ It is a painful reality for states in northern climes that Florida imposes no income or estate tax on its citizens.² Nonetheless, a flurry of income tax returns

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² This article enlists Florida as its example because it is a popular retirement haven for Ohio residents and it has no income tax. However, all the same principles that this article discusses obviously apply with equal force both to the part-year absences of Ohioans in any other state and to residence changes to any other state. It also should shed some light on how to change tax residences between municipalities that levy income taxes.

³ There is a constitutional prohibition on all individual income taxation in Florida. Fla. Const. art. VII, §5(a). The Florida estate tax is an “absorption tax.” That is, the Florida Constitution mandates that its estate tax
from northern states follow the snowbirds to the south each winter. Their arrival is a natural spark to much deliberation on the benches that surround Florida’s endless shuffleboard courts about the advantages of the unthinkable. Understandably, the retirees wintering there find it a nuisance to troop into a preparer each year to complete those abominable state and local income tax returns. They grumble loudly over the onus of coughing up a tax to states and municipalities that seem ever more remote. As might be predicted, their preparers are quick to affirm that it would serve their tax interests to shift their residences to Florida. Whereupon, each year a whole new crop of northern citizens make that switch.

Thus, it comes to pass that the state and local income tax burden on these wealthy pensioners drives them away in droves. Such pensioners take with them their often bountiful taxable incomes and estates. Further, as mentioned, they also take with them the mature leadership with the free time and money to devote to the betterment of their respective communities. On the other hand, the less well-off stay. These subsistence elderly can pay much less tax, and frequently generate a need for state and local services to help sustain them. That need generates a corresponding call for even stiffer income taxes to help pay for that support. Inadvertently, therefore, state and local tax policy too often runs off the ants, while the grasshoppers stay put.

Sad to say, hard political reality hampers any meaningful cushioning of the tax impetus that fuels this all-too-frequent scenario. Easing taxes on the wealthy (even the elderly wealthy) is politically awkward, even when that easing arguably boosts the tax yield. Therefore, realistically, states usually strive only to mitigate the damage. If a state may not hold its wealthy retirees, at least it may refrain from also driving out their elusive capital. The departing retirees might well not wish to sever all their long-standing banking, professional service and other business ties in their one-time home states. Yet, capital in the hands of the retired is often extremely mobile. Typically, they may transfer it to another state with the stroke of a pen or even a telephone call. Therefore, the slightest tax curse on it would send it packing as well. Obviously, its continued presence in former home states is salutary. It allows others to use it to generate taxable income in the state. It is likewise around as a taxable ancillary estate upon the departed taxpayer’s later demise. With such considerations in mind, Ohio wisely tolerates the departure of some income generated within her borders to nonresidents, without tax burden.

may not exceed the aggregate amount that the United States or any other state allows its citizen’s estate to deduct from those other taxes. Fla. Const. art. VII, §5(a). Thus, effectively, the tax costs Florida residents nothing. The typical family of four with an annual household income of $61,372 pays $1,899.00 in Ohio tax burden and $164.00 in Florida tax burden. This figure apparently does not even take into account Ohio municipal taxation. Trich, The Taxes You Can No Longer Ignore, MONEY, (January, 1990). Alaska, Connecticut, New Hampshire, South Dakota, Tennessee, Texas, Washington and Wyoming also do not have income taxes on earned or unearned income. Id.

Ohio taxes the succession of the following property of nonresidents: “real property situated in this state, tangible personal property having an actual situs in this state, and intangible personal property employed in carrying on a business within this state unless exempted from tax under the provisions of section 5731.34
On January 12, 1990, the Ohio Tax Commissioner wrote a letter to Ohio tax practitioners stating the Ohio Department of Taxation was going to put in place a "Residence Program." Under this program, the Ohio Department of Taxation "will review the tax returns of all those who have filed Ohio income tax returns for wages earned in Ohio and list an out-of-state address on those returns." This letter reflects a new resolve in the Tax Commissioner's office. That resolve is to turn up the heat on those who appear to be thumbing their noses at Ohio taxation by claiming nonresidence. Historically, Ohio has been tolerant of snowbirds passing their summers in Ohio. However, Ohio now signals that this tolerance is at an end. Ohio tax officials are now fond of saying, "We are not your father's Tax Department." In mitigation, there is some indication that Ohio's new "get tough" agenda, with respect to tax residence changes, will initially target only "egregious" cases.

Since nonresidence is taking on "hot issue" status in Ohio, it is the purpose of this article to closely focus on two issues regarding the taxation of such nonresident income. The first issue is what constitutes a state income tax residence change. The second is to identify the income items originating from Ohio sources that may pass out to nonresidents free of the Ohio income tax. As we go along, we will take notice of how these two issues impact the taxpayers' federal income tax, as well as their Ohio and federal estate taxes.

Toward that end, we will posit the following hypothetical fact situation as the vehicle to work our way through the law that governs these two issues. Assume that the wealthy owners of a closely-held corporation spend their winters at their Florida condominium and their summers loosely overseeing their Ohio business. Their business is a "C" corporation that their adult children (or trusted management) now run for them. The corporation pays them salaries as officers and fees as directors. They rent substantial personal and real property to the corporation. However, they no longer assume much of an active role in its management. Further, they have substantial amounts lodged in certificates of deposits with Ohio banks. Their corporation is soon going to start paying them retirement incomes. They have set up a trust for the benefit of themselves and their children. As the trustees of this trust they have the right to hold or distribute funds to its beneficiaries. They are also the residents of a small city that levies a hefty municipal income tax. Thus, if they leave,
the revenue loss for that city will be substantial. Municipalities are often more aggressive with their tax collections than the state. Hence, these taxpayers may be sure that their home municipality will challenge any questionable residence change that they may attempt. With Ohio's newly hardened posture on residence changes, these taxpayers may expect to hear from the state as well.

Taking this "word to the wise," the taxpayers of our example want to learn how to change their tax residence to Florida. They also want to know what effect this contemplated tax residence switch will have on their liability for Ohio state and local income tax on the following income items: 1) their certificate of deposit interest that Ohio lending institutions pay them; 2) their "C" dividends that their Ohio corporation pays them; 3) their retirement income; 4) their corporate salaries; 5) their rental income; 6) the income that their inter vivos trust pays; 7) the gain from any stock in their Ohio corporation or other Ohio situs assets that they may sell; and 8) their directors' fees. They plan to take along or dispose of any income-producing assets that Ohio will continue to subject to income taxation after their residence change.

Three statutes form the legal nucleus of residence status and nonresident taxation in Ohio. First, Ohio Revised Code Section 5747.01 defines "residence" for Ohio income tax purposes. Second, Section 5747.20 articulates the standards for the taxation of "nonbusiness income" in Ohio. This statute governs the taxability of their Ohio-based interest, dividends, retirement income, salary, rentals, trust income and capital gains. Third, Section 5747.21 defines "business income" in Ohio. This statute governs the taxability of their directors' fees and any other business income that they might generate in Ohio.

**The Need for the Due Process Nexus**

We will start by outlining how Ohio taxes activities that take place in Ohio that pertain to individuals who reside outside her borders. To be sure, multiple state taxation may offend due process. There would be tax chaos if state taxing authorities could overreach into the tax domain of sister states. Therefore, the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution effectively provide that states may not deprive their citizens of their property without due process of law. As the United States Supreme Court expressed it in the landmark case of Wisconsin v. J.C. Penney Co., the "test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by..."
the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."

So, to tax, the United States Constitution requires that there be some minimal nexus between the taxing jurisdiction and the person or activity taxed. The Commerce Clause of the United States Constitution further precludes state taxes that impose an undue burden on interstate commerce. Both United States and Ohio cases reach this result. Let us go over a few.

**FEDERAL CASE LAW**

There are several United States Supreme Court cases that deny a state’s right to tax nonresidents owing to a want of nexus between them and the state that seeks to tax them. The case that perhaps best illustrates this principle is *National Bellas Hess, Inc. v. Department of Revenue.* In that case, the United States Supreme Court held that Illinois could not impose the collection of a use tax on an out-of-state vendor whose only contact with customers in that state was by common carrier and the U.S. Mail. The Court ruled that states may only tax nonresidents to the degree that such taxation makes them “bear a fair share of the cost of the local government whose protection it enjoys . . . [T]he Constitution requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.” The Court noted that, if it allowed Illinois to impose the duty on out-of-state mail order houses to collect its use tax, every other state would do likewise. The impact would be that “[t]he many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle [an enterprise] in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose a fair share of the cost of local government.”

**Ohio Case Law**

As it must, Ohio also observes the need for nexus as the foundation of its right to tax. Let us review three Ohio cases that address the nexus issue. First, in the case of *In Re Laffoon: Schneider, Ohio Tax Commissioner v. Laffoon,* the Ohio Supreme Court held that the special power of appointment by an Ohio resident over a Kentucky trust was not subject to the Ohio estate tax. It vindicated this decision by noting that the estate tax is a tax on the privilege of passing property at death by succession. However, Ohio has no power to pass property by succession in

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6 311 U.S. 435, 444 (1940).
8 386 U.S. 753 (1967).
9 Id. at 756.
10 Id. at 759-60.
11 4 Ohio St. 2d 89, 212 N.E.2d 801 (1965).
Kentucky. Therefore, it may not levy a tax on the privilege of doing so.\textsuperscript{13}

The second important Ohio case that rules on the nexus issue is the appeals court case of \textit{City of Columbus v. Firebaugh}.\textsuperscript{14} We will discuss that case at length later on. However, for now, suffice it to note that it denied a municipality the right to levy an income tax on people who were arguably domiciled there, but who had been working out of the country. The Court anchored its decision on the fact that the municipality did not provide these taxpayers with enough services to warrant a tax on them during their extended absence. Third, the Ohio Board of Tax Appeals in the case of \textit{Calanni v. Limbach}\textsuperscript{15} expressly followed the \textit{Firebaugh} case. It found a want of sufficient Ohio contacts for it to levy its income tax on a foreign service officer who had been physically out of Ohio (mostly overseas) for twenty-seven years.\textsuperscript{16}

\textbf{Relation to Quantum of Benefits that the State Supplies}

However, there is no want of Fifth Amendment nexus merely because the taxpayer's tax contribution to the jurisdiction in question far exceeds the value of the services and protections that the jurisdiction directly affords to them. For instance, the childless pay school taxes. The lead United States Supreme Court case in this area is \textit{Commonwealth Edison Co. v. Montana}.\textsuperscript{17} In that case, an out-of-state coal mining enterprise argued that the amount of severance tax that Montana imposed on its Montana coal mines far exceeded the value of any services that Montana provided to it. However, the Supreme Court rejected this argument. The Court found the nexus for the Montana tax in the fact that the coal the taxpayer mined was Montana coal. Further, the tax did not discriminate against nonresidents. Thus, the Court held:

"there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity... A tax is not an assessment of benefits. It is... a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from living in an organized society, established and safeguarded by the devotion of taxes to public purposes."

Thus, Ohio may usually tax those with an Ohio residence, even though they temporarily dwell elsewhere, because Ohio provides them services during even

\textsuperscript{13} \textit{Id.} at 97-99, 102, 212 N.E.2d at 806-808, 809.
\textsuperscript{14} 8 Ohio App. 3d 366, 457 N.E.2d 367 (1983).
\textsuperscript{16} \textit{Id.}
\textsuperscript{18} \textit{Id.} at 622-23.
lengthy excursions outside Ohio. This result might not change, even if they avoid Ohio for the whole taxable year.\textsuperscript{19} The justification for such taxation is that Ohio is preserving its social order and its economic opportunities until its temporarily absent citizens return to enjoy them. Accordingly, an Ohio-domiciled taxpayer may tap the lack of nexus defense only for lengthy absences from Ohio. How lengthy that might be is still an unsettled area of the law.

**STATE TAXATION OF INCOME GENERATED OUTSIDE ITS BORDERS**

Residence alone is adequate nexus to tax. Strictly speaking, a state may tax all the income of its residents, regardless of the origin of their income. As the Ohio Tax Commissioner’s letter puts it, “A taxpayer’s presence in Ohio is the determining factor for establishing residence in this state, rather than the taxpayer’s activities in other states.”\textsuperscript{20} Thus, the receipt of income by a resident is a taxable event.\textsuperscript{21} We recall that the justification for such expansive taxing jurisdiction is that a state’s residents enjoy the services of the state where they dwell. The laws and government of these states protect them and their property. It follows that the enjoyment of the privileges of residence that a state confers and the attendant right to invoke the protection of its laws cannot be separated from the responsibility to share in the costs of its government. Thus, Ohio may tax even the income that Ohio residents generate from sources in another state while in that state.\textsuperscript{22}

Let us go over some of the federal and Ohio case law that addresses this issue.

**Federal Case Law**

The United States Supreme Court addressed the constitutionality of state taxation of extraterritorial income of its residents in the 1936 case of *New York ex rel. Cohn v. Graves*. The Court ruled:

> A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. The tax, which is apportioned to the

\textsuperscript{19} The federal Soldier’s and Sailor’s Civil Relief Act makes a serviceman’s home state his domicile while he is a member of the American military. As a result, Ohio taxes such servicemen, no matter where they are stationed. Ohio Dept. Tax, Special Instruction No. 8, 7-31-72. The case of Mosher v. Limbach, No. 83-G-388, slip op., (Ohio Bd. Tax App. July 17, 1984), taxed a contract engineer on his extraterritorial earnings, because he maintained an apartment in Ohio so that his employer would reimburse him for his living expenses. The fact that he neither lived in Ohio nor earned any income in Ohio did not prevent this outcome.

\textsuperscript{20} Commissioner’s Letter, supra, note 4.


\textsuperscript{22} Ohio does allow a credit against its taxes based on the income that other states tax. OHIO REV. CODE ANN. §5747.05(B) (Anderson 1986 & Supp. 1989). However, this credit is of no avail to Florida residents, since Florida levies no income tax and is not a “reciprocal state” for state income taxation purposes. The reciprocal states are Indiana, Kentucky, Michigan, Pennsylvania and West Virginia.
ability of the taxpayer to pay it, is founded upon the protection afforded by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of the income when received.\textsuperscript{23}

Obviously, it would cripple a state's taxing power if taxpayers could avoid state taxation by merely removing themselves from a state while, at the same time, engaging in income-producing activity within its borders. It would be equally crippling, if they could avoid state taxation by removing their income-producing property from a state, while remaining themselves in that state. Owing to these realities, our constitutional system firmly establishes that states may tax people and activities that they find within their borders, regardless of residence. States may also tax the property and income of their residents, no matter where it finds them. The United States Supreme Court continues:

Neither the privilege nor the burden is affected by the character of the source from which the income is derived . . . . A state may tax its residents upon net income from a business whose physical assets, located wholly without the state, are beyond its taxing power . . . . It may tax net income from bonds held in trust and administered in another state . . . although the taxpayer's equitable interest may not be subjected to the tax . . . . It may tax net income from operations in interstate commerce although a tax on the commerce, is forbidden. . . .\textsuperscript{24}

\textit{Ohio Case Law}

Ohio cases also hold that Ohio may constitutionally tax the activities and property that its residents earn in other states. For instance, in the 1918 case of \textit{The Cleveland & Western Coal Co. v. O'Brien},\textsuperscript{25} the Ohio Supreme court found a corporation's Wisconsin bank account to be taxable in Ohio. This bank account served that corporation's completely separate Wisconsin business. In so holding, the Court went to great pains to point out that the same rule applied to individuals.\textsuperscript{26}

In the 1938 case of \textit{Braden v. Senior},\textsuperscript{27} the court considered the taxability to Ohio residents of readily transferable trust shares of a trust that held out-of-state real estate as its trust corpus. The taxpayers contended that Ohio had no right to tax these interests, because they represented interests in real estate situated beyond Ohio's borders. The court disagreed. It held that the trust certificates represented equitable property rights — sharply distinct from the underlying title at law to the real estate itself. Hence, Ohio could measure those property rights for tax purposes by the income that they paid to Ohio residents. The equitable right to enforce those

\textsuperscript{23} \textit{Cohn}, 300 U.S. at 313.
\textsuperscript{24} \textit{Id.} at 313-14.
\textsuperscript{25} 98 Ohio St. 14 (1918).
\textsuperscript{26} \textit{Id.} at 17.
\textsuperscript{27} 48 Ohio App. 255, 193 N.E. 80 (1934).
certificates had its situs at the Ohio residence of their owners. 28 Ohio could thereby tax them, notwithstanding the fact that they represented interests in out-of-state real estate.

Therefore, to shake off Ohio income tax liability, individuals must change their residence. In so doing, they must renounce most of the advantages that Ohio offers them. Thus, before taking the plunge, they must carefully ponder whether the tax advantages really outweigh the social, business and civic advantages of retaining their Ohio citizenship. It does not do to have the tax tail wag the dog.

**Residence**

The tax notion of "residence" is expansive. The law embeds in that term the illusive notion of "domicile," that we will discuss below. 29 Ohio, of course, does honor the tax sovereignty of her sister states. It cannot and does not tax the income that nonresidents earn outside Ohio. Ohio Revised Code Section 5747.01(1) defines a "resident" to be "(1) An individual who is domiciled in this state; (2) An individual who lives in and maintains a permanent place of abode in this state, and who does not maintain a permanent place of abode elsewhere, unless such individual, in the aggregate, lives more than three hundred thirty-five days of the taxable year outside this state." A person who is a "resident" for only part of a taxable year becomes a nonresident for the rest of that year. 30 A "nonresident" is anyone who fails to fall within the definition of resident. 31

Thus, for starters, anyone who abides on Ohio soil for thirty-one days (thirty-two in leap year) seems to be ipso facto a resident. The enforcement of this thirty-one day rule is necessarily lax. The State Patrol does not log people in and out at the borders. The Ohio Department of Taxation does not check the guest registers at vacation resorts to disclose which guests stay beyond the magic thirty days.

Therefore, the law in this area is in a high state of flux. Ohio Department of Taxation officials admit that the laws that establish an Ohio residency are "not crystal clear." 32 They even indicate that, administratively, they do not consider a thirty-one day stay in Ohio to be conclusive of residence. It might be more accurate to believe that they consider a thirty-one day stay to be only *prima facie* evidence of an Ohio residence. Reasonably, it turns out that what concerns them more is whether the stay is coupled with an accompanying array of Ohio social, civic and business contacts and the drawing of Ohio-source passive income (e.g. interest,

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28 Id. at 262, 193 N.E. at 83.
29 Grant v. Jones, 39 Ohio St. 506, 515 (1883).
30 See Horton v. Horner, 16 Ohio 145 (1847); Sinks v. Reese, 19 Ohio St. 306, 316-317 (1869); Renner v. Bennett, 21 Ohio St. 431, 449 (1871).
dividends and retirement benefits). In gauging such contacts, history is important. People who have never lived in Ohio are less vulnerable than people who had lengthy Ohio residences and now claim to have lately moved elsewhere. So, to be entirely safe, the threshold measure that the recently-moved taxpayers of our example must adopt, after their residence change, is to spend no more than thirty days in Ohio each year. If tax officials later challenge their move and they have other Ohio contacts, it might be fatal, ab initio, if they could not truthfully testify that they had complied with this rule.

Nevertheless, even a complete failure to set foot in Ohio all year does not necessarily discharge individuals from Ohio income taxation. They must also shed their Ohio domicile — our next topic.

**Domicile**

People sometimes use domicile and residence interchangeably. However, the two terms are not synonymous. The word “residence” denotes objective physical presence in a jurisdiction. By contrast, the word “domicile” originates in the Latin word for “home.” In fact, the legal concept roughly equates with the lay idea of home. It assumes mankind to be a territorial species. People do harbor natural sentiments of attachment to localities. The subjective objects of these attachments are their domiciles. Thus, when put into practice, the domicile notion connotes that a person may temporarily reside in one locality, but have a subjectively permanent home in another. For our purposes, we remember that the general rule is that domicile alone may afford a constitutional basis for taxation — subject, in Ohio, to some developing nexus limitations. This rule requires taxpayers to share in the cost of keeping their homes intact, against the day of their intended return. Thus, states may tax people with a local “domicile,” but who are physically “residents” of other states.

Residence alone does not positively determine domicile within our federal system. People may sometimes reside substantial periods of time in a place and not secure a domicile there. While ill-defined and subject to myriad confusing refinements, domicile status clothes people with specific governmental protections, opportunities and benefits. “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.” True, its elements differ according to the sort of right in litigation. However, its goal is to avert multiple obligations of individuals to the

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33 Cohn, 300 U.S. at 313.
34 See supra note 19.
37 The United States Supreme Court held that “neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil, where the exertion of state power is dependent upon domicil within its boundaries.” Worcester County Trust Co. v. Riley, 302 U.S. 292, 299 (1937).
state and municipal jurisdictions to which they may be connected. It also assures that an individual may exercise citizenship rights in at least one jurisdiction.  

Thus, domicile status touches the most intimate interests of society and individuals alike in such legal provinces as divorce and child custody jurisdiction, the tolling of statutes of limitation, the laws affecting the succession of property at death, political or municipal status (e.g. eligibility to vote and to hold office), public assistance, venue, federal diversity jurisdiction, jury duty, the admission of offspring into the public schools and lower tuition rates at the public colleges and universities. As Mr. Justice Oliver Wendell Holmes so aptly observed, "taxes are what we pay for civilized society. . . ." Obviously, however, there are many pragmatic difficulties inherent in the practical application of the domicile concept in the context of the federal system. The mobility of modern Americans compounds these difficulties.

Ohio's Statutory Standard

So, let us turn to Ohio's legal definition of "domicile." The Ohio Revised Code articulates no direct definition of domicile. However, Section 5747.01 provides that "Except as otherwise provided or clearly appearing from the context, any term used in this chapter has the same meaning as when used in comparable context in the Internal Revenue Code, and all other statutes of the United States relating to federal income taxes." The Ohio Revised Code supplies no definition of "domicile." So, we must venture forth on our quest to discover it with federal tax law.

Treasury Regulations 20.0-1(b)(1) and 25.2501-1(b) (pertaining to the Federal Estate and Gift Tax) recite that "a person acquires a domicile in a place by living there, for even a brief interval, with no definite present intention of later removing therefrom. Residence without the requisite intention to remain indefinitely, will not suffice to constitute domicile, nor will intention to change domicile effect such a change unless accompanied by actual removal." Therefore, the domicile ground rules bear both physical (residence) and mental (domiciliary intent) facets. By these regulations, people must both physically locate in a tax jurisdiction and mentally consider that jurisdiction to be their home, in order for them to successfully change their domicile.

The Case Law Standards

There is also much federal and Ohio case law to flesh out the domicile issue. Let us move on to examine some of the federal and state cases that most completely

38 Evidentiary Factors in the Determination of Domicile, 61 Harv. L. Rev. 1232, 1233 (1948) [hereinafter "Factors"].
address this issue. We will see that a person's domiciliary intent is the target of the courts’ inquiry. In this regard, we see that the courts often find that people's activities are stronger evidence of their true intent than their words. To these courts, "actions normally speak louder than words".

1. Texas v. Florida

The United States Supreme Court addressed tax domicile in the 1939 case of Texas v. Florida. In that case, a decedent had his family roots, his mansion and his personal effects in Massachusetts. He had substantial business dealings in New York and had lived there for a time to care for his ailing mother. He had had some past business dealings and a residence in Texas, which he continued to claim as his legal residence up until the time of his death, mostly to evade taxes in other states. He also had a residence in Florida, where he spent his winters for health reasons. The Supreme Court declared Massachusetts to be his true domicile.

The Court scoffed outright at the decedent's claims of a Texas domicile, because he had no physical dwelling place in Texas at the time of his death to back those claims. However, the Court took more time to disallow the claims of Florida or New York domicile, where the decedent maintained a more substantial presence. In mulling over the Florida and New York claims, the Court noted there are numerous factors besides a person's declarations that ascertain whether even his dwelling place is his home. These factors may include: "1. Its physical characteristics; 2. The time he spends therein; 3. The things he does therein; 4. The persons and things therein; 5. His mental attitude toward the place; 6. His intention when absent to return to the place; 7. Elements of other dwelling-places of the person concerned."

In the end, the Court found the dominant consideration in this fact situation to be "the intimacy of the relation between the person and the place." The Court emphasized that the decedent’s family roots ran deep in Massachusetts. He centered the activities of his various interests and hobbies there. He built his most elaborate residence there. He kept the vast bulk of his personal "books, furniture, or mementos of intimate personal or family association" in his Massachusetts residence. Thus, the Court declared:

"In such circumstances the actual fact as to the place of residence and decedent's real attitude and intention with respect to it as disclosed by his entire course of conduct are the controlling factors in ascertaining his domicile .... When one intends the facts to which the law attaches consequences, he must abide the consequences whether intended or

41 Id. at 414.
42 Id. at 413.
43 Id. at 422.
not . . . When he had established himself [in Massachusetts], all the circumstances of his life indicated that his real attitude and intention with respect to his residence there were to make it his principal home or abiding place to the exclusion of others.\textsuperscript{44}

2. Village of Indian Hill v. Atkins

In the 1949 case of \textit{Village of Indian Hill v. Atkins},\textsuperscript{45} the court of appeals weighed the domicile question. In this lead case on tax domicile in Ohio, a decedent’s son listed Cincinnati as the decedent’s domicile in his application to commence the probate of his estate. The Village of Indian Hill contended that the decedent had his domicile within its borders. It appealed the probate court’s finding that the local share of the state estate tax should go to the City of Cincinnati.

The deceased had owned a house in Indian Hill, where he had lived with his family. He hired, fired, supervised and paid his servants in Indian Hill. He gave his home there as his residence when he applied for his wartime ration books. He did sometimes refer to his house in that village as his home. He used the village as his home address when he applied for his automobile and truck license tags. Other people, including his son, had stated that Indian Hill was the decedent’s home.

However, by community repute, the Indian Hill house was the home of the decedent’s son. He had previously lived for many years in a home in Cincinnati. His business interests were in Cincinnati. “He was for many years recognized as one of that city’s prominent business men and was active in its economic and social life up to the time of his death.”\textsuperscript{46} In fact, he owned a hotel in Cincinnati where he had lived for a time after he sold his Cincinnati home, but before he procured his house in Indian Hill. He spent several winters in his Cincinnati hotel, although the room he stayed in there varied from year to year. He also passed several winters in various clubs of which he was a member. The decedent had continued to vote in Cincinnati until his death. He often expressed his own belief that he was a resident of Cincinnati and his disgust for the way in which Indian Hill was run.

The court of appeals saw the question at issue as: “Can one live or reside in one place and have a bona fide intention that another place shall be his domicil?”\textsuperscript{47} The Court answered that question affirmatively. It found that the deceased’s “firm resolve” that Cincinnati was his domicile was decisive. The fact that he had no fixed abode there did not change this result. It held that “[w]hen a person’s legal residence is once fixed, as it was in the case of decedent in Cincinnati, it requires both fact and intention to change it.”\textsuperscript{48} The court continued:

\textsuperscript{44} \textit{Id.} at 425.
\textsuperscript{46} \textit{Id.} at 212, 90 N.E.2d at 163.
\textsuperscript{47} \textit{Id.} at 213, 90 N.E.2d at 163.
\textsuperscript{48} \textit{Id.} at 213, 90 N.E.2d at 164.
In other words, to effect a change of domicil from one locality, state, or country to another, there must be an actual abandonment of the first domicil, coupled with an intention not to return to it, and there must be a new domicil acquired by actual residence in another place or jurisdiction, with the intention of making the last acquired residence a permanent home. Moreover, the acts of the person must correspond with such purpose. The change of residence must be voluntary; the residence at the place chosen must be actual; and to the fact of residence there must be added the *animus manendi*.49

The court notes that a person can only have one domicile at a time. That domicile stands until the person acquires another. Therefore, to change domiciles, there “must be choice of a new domicil, actual residence in the place chosen, and intent that it be the principal and permanent residence . . . There [must be] concurrence of act and intent.”50

We can see that the domicile indicators point both ways in this case. In such a situation, the party with the burden of proof loses. Thus, the Court’s prime task was to assign the burden of proof. On this issue, Indian Hill urged that a person’s physical residence is *prima facie* evidence of his domicile. The Village noted that residence is a continuous fact and that the law presumes it to perpetuate. However, the Appeals Court declined to lay the burden in that way. Instead, it imposed the burden of proving the domicile change on its proponent— the plaintiff, Indian Hills. The Court found that the evidence in the record justified the lower court’s finding that Indian Hills had failed to carry this burden.51 Therefore, it declared Cincinnati to have been the decedent’s tax domicile.

There are three Ohio cases which directly address domicile as an income tax issue. These cases are *City of Columbus v. Firebaugh*, *Angela J. Calanni v. Limbach* and *City of Cleveland v. Surella*. We will now discuss each.

3. City of Columbus v. Firebaugh

In the first case of *City of Columbus v. Firebaugh*,52 the court takes a welcome bite out of the repressive, but traditional, notion that domicile alone is warrant enough to tax. In *Firebaugh*, the taxpayers enjoyed a domicile in the City of Upper Arlington.53 However, they accepted a job assignment of at least two years in Afghanistan and physically situated there. While they intended to return to the *Columbus* area when they completed their assignment, they were not certain of that.

49 *Id.* at 213-214, 90 N.E.2d at 164. See also *Sturgeon v. Korte*, 34 Ohio St. 525, 535 (1878).
50 *Id.* at 214, 90 N.E.2d at 164. See also *Baraket v. Baraket*, 10 Ohio Op. 395, 396 (1937).
51 *Id.* at 216, 90 N.E.2d at 165; See also *Desmare v. United States*, 93 U.S. 605, 610 (1877).
53 The City of Columbus had a contract to collect the municipal income taxes for its suburb, Upper Arlington.
They rented out their Upper Arlington home to others during their absence, instead of selling it. The lease contained a provision that allowed the taxpayers to cancel the lease if they were to return to Upper Arlington. Because of conditions in Afghanistan, they returned to Upper Arlington after only a year and a half. The Upper Arlington ordinance taxed the income of “any individual who is domiciled in Upper Arlington.” The city brought a civil action to collect the income tax on the salary that the taxpayers had earned in Afghanistan.

The trial court found that these taxpayers necessarily continued their Upper Arlington domicile, since they did not intend to establish a residence in Afghanistan. That continuation justified subjecting their Afghanistan salary to the Upper Arlington income tax. However, the court of appeals reversed this ruling. As we observed earlier, the court held that taxation under such circumstances would violate the principle that a “tax must bear some fiscal relation to the protections, opportunities and benefits given by the municipality.” Therefore, it found difficulty with the notion of taxing nonresidents on moneys that they earned outside the taxing jurisdiction. It characterized “domicile” to ordinarily denote “physical presence coupled with intent to maintain a permanent residence therein indefinitely.”

There are two ways of looking at this case. On the one hand, Upper Arlington, undeniably, provided fire and police protection to the abode of these taxpayers while they were in Afghanistan. It also kept in place a well-ordered community against the day of their possible return. As anyone who has priced a fire truck lately or has ever negotiated with the local chapter of the Fraternal Order of Police will be quick to confirm, such services do not come cheap. On the other hand, the same may be said for the services provided to those who drive through any taxing jurisdiction on the interstate. Hence, there is obviously some point at which the quantum of services that a given taxing authority provides to some people falls short of the nexus threshold. That shortfall snaps the nexus link. In those instances, it is unconstitutional to tax. Therefore, the Firebaugh decision is eminently reasonable. The court properly found that the governmental services that Upper Arlington offered these taxpayers had not reached that point, and, thus, Upper Arlington could not tax them. This case finally parts company with the orthodox, but often unconscionable, doctrine that even remote domicile supports taxation.

4. Calanni v. Limbach

This 1988 Ohio Board of Tax Appeals case expressly follows the Firebaugh

54 8 Ohio App. 3d at 368, 457 N.E.2d at 369.
55 Id.
decision. That fact makes Firebaugh the operative law for Ohio administrative income tax appeals. As mentioned earlier, the taxpayer in this case was a foreign service officer. She had been born in Ohio and her mother still lived in Ohio. There was even a hint in the case that she had voted in Ohio by absentee ballot. Still, the Board noted:

During the many years since Ms. Calanni physically departed Ohio, in 1957, . . . she has not indicated an intent to be domiciled here, and has not expressed a positive intent to return to Ohio for future residence. Under this set of facts, any legal presumption of residency or domicile has been satisfactorily rebutted. . . . Accordingly, there is no legal connection or basis for the taxation of income earned outside [Ohio] by a nonresident.56

Obviously, this taxpayer’s twenty-seven year absence, without owning any Ohio property or physically residing in Ohio, makes this decision even more defensible than the Firebaugh case. Perhaps most importantly, it displays dramatically the oppressive outcomes to which carte blanche taxation, by domicile status alone, would lead.

5. City of Cleveland v. Surella

The case of City of Cleveland v. Surella57 arose from a criminal prosecution for failure to report income for purposes of the Cleveland municipal income tax. The defendant had physically moved from Cleveland and thereafter worked at a series of job sites outside Cleveland. However, his adult son moved into his Cleveland residence and the defendant paid the rent there for him. The defendant declared no new domicile and he continued to vote in Cleveland. He directed his various employers to mail his W-2 forms to his Cleveland address. The trial court convicted him for failing to report and pay his Cleveland income taxes. The court of appeals rightly affirmed that conviction—at least, rightly with respect to the manner in which the appellant had couched his defense at trial.

In his appeal, the appellant was naturally quick to cite the Firebaugh decision. However, the court observed that his case was different. This taxpayer had not been out of the country for eighteen months. In fact, he had been in and out of Cleveland during the whole period in question. The court relied heavily on the fact that he voted regularly in Cleveland. The court effectively held that voting in a place constitutes nearly per se domicile in that place.58 Therefore, the court invoked the general rule

58 Surella, supra, at 5. However, the court acknowledged that the case of State ex rel. Kaplan v. Kuhn, 8 Ohio N.P. 197, 201 (1901) held that voting was only evidence of intent and not conclusive proof of domicile. The Kaplan case held: "The officers of election may have made a mistake, and at best their decision as to citizenship cannot have weight or be . . . (in any sense) binding upon this court. That is the very issue here for trial." The Calanni case seems to follow the Kaplan approach to the lack of conclusiveness of voting in a taxing jurisdiction for domicile purposes.
that once taxpayers establish a domicile, that domicile continues until they acquire
another. The trial court thereby placed the burden of proof as to the claimed domicile
change on the defendant and then found that he had failed to carry that burden. The
Appeals Court found no Fifth Amendment violation in placing the domicile change
burden on the defense. Therefore, it had no problem in finding that the defendant’s
Cleveland domicile was reason enough to tax him. This outcome is harsh in that it
finds criminal liability for failure to report income based on domicile alone. However,
this case finds no fault with Firebaugh. It only finds that the Firebaugh
decision does not kick in with respect to the facts of this case.

In this case, notwithstanding the interesting presence of the defendant’s name
on the rent receipts, Cleveland evidently felt it impossible to prove who had lived
in the defendant’s house for the tax years in question. Therefore, the court simply
placed the heavy burden of proving non-domicile on the defendant and then
concluded that he had not met it. So far, so good. However, what smacks of the
draconian in this case is to erect the presumption that an itinerate laborer knew, for
criminal purposes, that he had a tax domicile in Cleveland. Indeed, judges and legal
scholars regularly differ on the subtleties of what constitutes domicile. To be sure,
the defendant apparently did not assert lack of knowledge as a defense. To be
equally sure, the necessary rule in criminal prosecutions is that “ignorance of the law
is no excuse.” Yet, legal authorities uniformly deem domicile to be an issue of
fact. Obviously, each finding of domicile hinges on a thorough analysis of the facts
and circumstances of a given situation. In this context, we observe that mistake of
fact is a time-honored defense in Ohio to a charge of criminal wrongdoing where

39 While we could devote considerable time to the fundamental unfairness of requiring criminal defendants
to prove affirmative defenses, both the Ohio Supreme Court and the United States Supreme court stamp their
approval on this lamentable practice. State v. Martin, 21 Ohio St. 3d 91, 488 N.E.2d 166 (1986) aff’d 480
U.S. 228 (1987); Martin v. Ohio, 480 U.S. 228 (1987), reh’g denied 481 U.S. 1024 (1987). Therefore, sad
to say, the Surella Court states the correct version of a closed issue.

60 After all, tax fraud is a felony of the fourth degree in Ohio. OHIO REV. CODE ANN. §5747.99(A) (Anderson
1986 & Supp. 1989). A felony of the fourth degree is punishable by six months to two years in prison and
Municipal ordinances make it a misdemeanor, which means that they may imprison violators for up to six
months and fine them up to $500.00. OHIO REV. CODE ANN. §715.67 (Anderson 1976). Consider the
potential for in terrorem tactics. It is easy to see how a little heavy-handedness with prosecutions or
threatened prosecutions on the part of state or municipal authorities would unfairly bully almost any
sensible person to relinquish even the best of claims to nondomicile to keep their names off police blotters
and out of the local newspapers. A criminal court is absolutely not the proper forum to resolve bona fide
domicile disputes. The remedies in the recently-enacted Ohio Taxpayers Bill of Rights may provide
prevailing taxpayers in such situations with at least some remedies. It consents to an action in the Ohio Court
of Claims against the state for frivolous disregard of taxpayer rights by state employees in tax matters. OHIO
Taxpayers’ Bill of Rights, 3.5 Ohio Tax Review 10 (1989).

61 However, either the trial court or the appeals Court could have picked up the defense as an Evidence Rule
103(d) “plain error.” Appellate Rule 12(A) only recites that errors not assigned and briefed “may be
disregarded.” Therefore, an appeals court, bending over backwards to be fair, might have remanded the case
for retrial with an instruction that the trial court consider the mistake of fact issue.


63 Sturgeon, 34 Ohio St. at 535. See also 84 C.J.S. Taxation 643 (1954 & Supp. 1990).
intent or knowledge is an element.\(^{64}\) Knowledge is an element of tax fraud in Ohio.\(^{65}\) Accordingly, it seems only reasonable that criminal courts should properly honor proof of a \textit{bona fide}, but mistaken belief of nondomicile, rooted in good reason for that belief, as an affirmative defense to state and local income tax crimes.

\section*{How to Change a Tax Domicile}

It is fundamental that Americans may change their domicile at pleasure. However, the person making such a change may not retain the advantages of domicile in one jurisdiction, while enjoying all the trappings of home life in another. Hence, in light of the holding in the \textit{Surella} case, it is only simple prudence that people planning a domicile change should line up an impressive array of proof beforehand. If they "jump through all the right hoops", they will thereby be able to one day carry the burden that the law seems to lay on them.

In this regard, we recall that people may have a domicile in a place where they do not live, as long as they intend to return one day.\(^{66}\) Accordingly, the gist of domicile is settlement in a particular political jurisdiction with an intent to permanently remain.\(^{67}\) There is an intent to return when absent. While individuals normally have only a single domicile, they may have several residences.\(^{68}\) Witness the taxpayers of our example. They might have residences in both Ohio and Florida. However, they may have a domicile in only one of those two states.\(^{69}\) Their task is to make Florida that state. As the Harvard Law Review put it: "when the party has in fact two residences which he in some respects regards and treats as home, counsel can only advise that he select the locality in which he desires to be domiciled, and transfer to it as unambiguously as possible the substantial bulk of his domestic, social, and civic activities."\(^{70}\)

\section*{Intention}

The \textit{Firebaugh} and \textit{Calanni} cases are, in essence, nexus cases. They hold, in

\footnotesize{\(^{64}\) "Where one does an act apparently in violation of a criminal statute, but, in fact, under circumstances that tend to show a want of guilty intention, the excusing circumstances may be given in evidence on the trial, to show his good faith in the transaction, where that is a material element, or that he was ignorant of the facts that would make his acts criminal." Farrell v. State, 32 Ohio St. 456 (1877). The case of Cleveland v. Technisort, 20 Ohio App. 3rd 139, 485 N.E.2d 294 (1985) holds that a tax fraud conviction without proof of willfulness denies due process. However, this defense sounds in Ohio law. The United Supreme Court has ruled that a state's denial of a mistake of fact defense as to domicile in a criminal prosecution does not deny federal due process. Williams, 325 U.S. at 238.\(^{65}\) \textsc{Ohio Rev. Code Ann. §5747.19} (Anderson 1986) reads as follows: "No person shall knowingly fail to file any return or report required to be filed by this chapter, or file or knowingly cause to be filed any incomplete, false, or fraudulent return, report or statement, or aid or abet another in the filing of any false or fraudulent return, report, or statement." [emphasis added].\(^{66}\) Whitmore v. Commissioner, 25 T.C. 293, 297 (1955).\(^{67}\) Gilbert v. David, 235 U.S. 561, 569 (1915).\(^{68}\) Grant, 39 Ohio St. at 515.\(^{69}\) Id.\(^{70}\) \textit{Factors, supra} note 38, at 1240.}
substance, that during an extended absence, even persons with a domicile in a jurisdiction may receive so little benefit from that jurisdiction that it becomes unconstitutional to tax them. Be that as it may, it is important to understand that these two cases in no way upset the general rule that a taxpayer’s domicile endures until another supersedes it. That is, once individuals acquire a domicile in a given state, mere absence fails to divest it. To make the change, taxpayers must do more.

A long-continued residence in one place has been regarded, in some decisions, as strongly indicative, or even a controlling circumstance, in determining the question of domicile. However, residence alone will not establish domicile or effect a change of domicile, in the absence of the requisite intent. People may wander from place to place on business or pleasure. Still, they acquire no fresh domicile until they abandon the old. Mere “sentimental attachment” for a place or even referring to it as “home” are insufficient in the absence of outward manifestations of an intent to stay on permanently. Instead, the individual must engage in activities there that are “spontaneously homelike.” As J. Patrick McAndrew, Administrator of the Ohio Income Tax Audit Division, put it: “It really doesn’t matter what you do in [in another state], if all of your social, political and business ties are still in Ohio. Audit examiners will be looking at the taxpayer’s true intentions and acts in gauging whether someone is still an Ohio resident.”

Accordingly, temporary sojourns in other locales for assignment by an employer, for study, for research, for health recuperation or for recreation do not suffice. Even the acceptance of an indefinite term of extraterritorial employment, such as in the military or in federal government service, does not alone avail anything so far as raw domicile status is concerned. However, even when the settlement in a given locus is less than voluntary, persons free of legal restraint (e.g. not a prisoner) may consciously adopt that locale as their domicile. Therefore, to change domicile, the taxpayer must engage in activities there that are “spontaneously homelike.”

Village of Indian Hills v. Atkins, 57 Ohio Law Abs. 210, 90 N.E.2d 161 (1949), rev’d on other grounds, 153 Ohio St. 562, 93 N.E.2d 22 (1950); Sturgeon v. Korte, 34 Ohio St. 525 (1878). Perhaps the most comprehensive judicial review of the change of domicile issue in Ohio is to be found in the divorce decision of now-retired Meigs County Common Pleas Judge John C. Bacon in Spires v. Spires, 7 Ohio Misc. 197, 214 N.E.2d 691 (1966).

Factors, supra note 38, at 1240. See District of Columbia v. Murphy, 314 U.S. 441, 454 (1941); it is, nonetheless, possible to change one’s domicile to a foreign country, even without a citizenship change. In Re Paich Estate, 90 Ohio Law Abs. 470, 186 N.E.2d 755 (Ohio Ct. App. 1962).

Traditionally, a wife’s domicile generally follows that of her husband unless she affirmatively establishes a separate domicile. However, this rule is perhaps dated in today’s climate of equality between the sexes. It is especially suspect if the state attempts to assert it over the wife’s objection and claim of domicile elsewhere. A child’s domicile generally follows that of his father, or of his mother after the father’s death, until the child reaches the age of self-support and actually establishes his or her own separate domicile. The domicile of a child of divorced parents ordinarily follows that of the custodial parent.
domiciles individuals must abandon their existing one with no intention to return. Consistently, they must secure a residence in another state with the intention to make that residence their permanent home.  

Thus, determining a person's domicile focuses in part, at least, on what he genuinely intends it to be. The 1878 Ohio Supreme Court case of Sturgeon v. Korte best details the role of intent in the domicile conceptual scheme. It recites:

[Domicile] is of three sorts: domicile by birth, domicile of choice, and that which results from the operation of law. Domicile of birth remains until another is chosen, or where a person is incapable of choosing, until one results by operation of law. To acquire a new residence or domicile, where one is under no disability to choose, two things must concur — the fact of removal and an intention to remain. The old domicile is not lost or gone until the new is acquired, facto et animo. It is not, however, necessary that the purpose to acquire a new residence should exist at the time of removal. It may be formed afterward. A residence may be acquired by one who has removed to a place for temporary purposes only, by a change of purpose, and an election of the new habitation or place of abode as his place of future domicile or home. . . . In such case the old residence would be gone, and . . . the new residence was determined . . . and fixed . . . . It is not, however, necessary that he should intend to remain there for all time. If he lives in a place, with the intention of remaining for an indefinite period of time, as a place of fixed present domicile, and not as a place of temporary establishment, or for mere transient objects, it is to all intents, and for all purposes, his residence.

At the same time, beyond these dimensions, we recall that the animus to relinquish one domicile for another signifies the conscious volition to renounce the privileges and immunities that the laws and constitution of former domiciles extend to their citizens. Therefore, a domicile change is a momentous event. Its proof calls for very satisfactory evidence. In the first instance, the burden is on the state to prove that individuals have taken up a domicile there. Conversely, as the Surella case points out, the burden rests on individuals to tip the evidentiary scales in their favor with proof that they have abandoned an established domicile. Thus, we reemphasize that the burden to prove non-domicile by a preponderance of the evidence rests on the taxpayer, even in a criminal prosecution for state or local tax evasion.

79 Sturgeon, 34 Ohio St. at 534-535 (citing STORY, CONFLICT OF LAWS 39, 41, 46 (1883)).
80 McKnight v. Dudley, 148 F. 204, 205 (6th Cir. 1906); See also 84 C.J.S. Taxation 641-46.
Due to this state of affairs, it is impossible to state any positive rule for exactly what constitutes a domicile change. No single circumstance is determinative of the issue. Mostly, we must enlist a facts and circumstances test to search for indicia of an intent to fix a domicile.\(^3\) Of course, since intent is often the key, what a person says may weigh heavily. Yet, it bears repeating that merely mouthing the words avails nothing. The law places little or no stock in self-serving declarations.\(^4\) A person may, of course, always testify in any tribunal about what he considers his domicile to be. However, if the taxpayer wishes to admit evidence of statements that he made regarding his domicile in the past, he may count on the state or municipality to argue in a contested proceeding that such declarations of domicile are inadmissible hearsay.

There are three sorts of proceedings in which the admissibility of such declarations of domicile may become an issue — administrative appeals, refund actions and criminal prosecutions for nonpayment. Considering administrative proceedings, assume that the Tax Commissioner finds an Ohio domicile and assesses a state income tax liability founded on that finding.\(^5\) If the taxpayer files a Section 5747.13 administrative appeal of the Tax Commissioner's income tax assessment, evidence of past supportive declarations of domicile are probably admissible in the resulting administrative hearing before the Commissioner.\(^6\) Ohio law generally relaxes the hearsay rule in administrative hearings.\(^7\) Still, the

\(^3\) "The question is, and must always remain, one of fact, often attended with much difficulty; but to be determined by the preponderance of evidence favoring one place as against another." \textit{Sturgeon}, 34 Ohio St. at 535.

\(^4\) State \textit{ex rel.} Kaplan \textit{v.} Kuhn, 8 Ohio N.P. at 201: "One's testimony with regard to his intention is, of course, to be given full and fair consideration, but subject to the infirmity of any self-serving declaration, and may frequently lack persuasiveness or even be contradicted or negatived by other declarations or inconsistent acts." \textit{See also} District of Columbia \textit{v.} Murphy, 314 U.S. at 456.

\(^5\) The Tax Commissioner's administrative tax assessments have the force of a judgment at law upon which the Tax Commissioner may directly levy execution. \textit{Ohio Rev. Code Ann.} §5747.13 (Anderson 1986 & Supp. 1987). The Commissioner may attain service on nonresident taxpayers for such purposes by serving process on the Ohio Secretary of State and by sending a copy by certified mail to their last known address. \textit{Ohio Rev. Code Ann.} §5747.16 (Anderson 1986).

\(^6\) \textit{Ohio Rev. Code Ann.} §5747.13(D) (Anderson 1986 & Supp. 1989) provides: "Unless the person to whom the notice of assessment is directed files, within thirty days after service of the notice of assessment, either personally or by certified mail, a petition for reassessment in writing, by the person assessed, or by his authorized agent having knowledge of the facts, setting forth with particularity the items of the assessment objected to, together with the reasons for the objections, and makes payment of the portion of the assessment required by division (E) of this section, the assessment shall become conclusive, and the amount of the assessment shall be due and payable from the employer or taxpayer so assessed to the tax commissioner with remittance made payable to the treasurer of state. When a petition for reassessment is filed, the commissioner shall assign a time and place for the hearing of the assessment and shall notify the petitioner by certified mail, but the commissioner may continue the hearing from time to time if necessary." If our Florida taxpayers failed to file an Ohio income tax return, \textit{Ohio Rev. Code Ann.} §5747.13(E)(1) (Anderson 1986 & Supp. 1989) makes them pay the entire assessed tax, plus penalty and interest in order to be entitled to an administrative hearing. However, the filing of a "Individual Information Notice," in the back of the Ohio income tax packet, which reports the residence charge, should satisfy the filing requirement and avoid the necessity for having to advance the assessment, if the Ohio Tax Commissioner challenges the validity of the residence change.

\(^7\) \textit{Haley v. Ohio State Dental Board}, 7 Ohio App. 3d 1,6, 453 N.E.2d 1262, 1268 (1982); Rule 101(A), of the Ohio Rules of Evidence states that the Ohio Rules of Evidence apply to "proceedings in the courts of
Commissioner indicates that scarce weight is given in such proceedings to self-serving declarations of domicile. Instead, the Commissioner may accord them weight only when they run contrary to self-interest.

The ballgame is somewhat different if the taxpayer remits the tax under written protest and sues for a refund. It is likewise different if the state or a municipality instigates a criminal prosecution under Sections 5797.19 and 5747.99 or a corresponding municipal ordinance. In these two proceedings, the stakes are higher and the rules are tighter. The Ohio Rules of Evidence clearly apply in both of these proceedings. Evidence Rule 802 makes hearsay declarations generally inadmissible. To warrant admissibility, the taxpayer must find an applicable hearsay rule exception. Fortunately, there is a promising exception in the Ohio Rules of Evidence. Rule 803(2) affords an exception for "A statement of the declarant's... motive..." Accordingly, taxpayers would do well to make statements far and wide, on or about the day of their move, that their motive for moving is to change their domicile.

Still, tribunals often harp on how they ascribe only "slight weight" to what taxpayers utter about their domicile. Therefore, our taxpayers must bolster their declarations of a Florida domicile in more telling ways. Here is a checklist of the steps to take. They should announce their move in the local newspaper. They should acquire nonresident status with their professional organizations and licensing boards. They should resign from all local clubs and civic organizations or, when possible, transfer their memberships to Florida. In other instances, they might make the point even better by establishing "inactive" or "nonresident" memberships with such organizations. Particularly, they should switch their church or synagogue membership. They should file a Declaration of Domicile with the Clerk of Courts at the local county court house of their new Florida home. They should amend their Ohio trusts and wills to have them state a Florida residence. They should apply for Florida homestead status. They should use their Florida address for all purposes when called upon to give an address — e.g. applications, hotel registries, letters to the editor, and so on. They should recite a Florida residence in legal documents, such as this state and before court-appointed referees of this state." Ohio Rev. Code Ann. §119.09 (Anderson 1990), which creates the procedure for administrative hearings, is mysteriously silent as to what evidence rules govern them.

Ohio R. Evid. 801(D); See, Ohio Tax Commissioner Opinion, Serial No. 287042-0282.
Ohio R. Evid. 101.
as deeds and leases. They should acquire Florida license plates and a Florida driver's license. They should switch their telephone listing to Florida. They should notify their automobile liability carrier that their car will henceforth be garaged in Florida. They should register to vote in Florida and withdraw their Ohio registration. They should take part in the civic affairs of their new domicile. They should establish banking and other business relationships in Florida and minimize them in Ohio. They should take on a Florida family doctor, dentist and optometrist. An active Florida checking account that bears a Florida address is especially important. An active Ohio checking account is unwise. They should file an intangible tax return in Florida before its June 30 deadline. They should file final Ohio and municipal income tax returns for the year in which they move. These returns should bear the address of their new Florida residence. They should use their Florida address on their Federal income tax return for both the previous and the following year. In the year after they move, they should file an Ohio Department of Taxation “Individual Information Notice” and fill in the section that reads:

I MOVED OUT OF THE STATE IN 19x1 AND HAD NO TAXABLE INCOME IN OHIO DURING 19x2

MOVED TO: __________________________ DATE MOVED: ________

Actual Residence

As mentioned, to the courts, “actions speak louder than words.” The very fact of actual residence in a given state is cogent evidence of domicile in that state. Therefore, our retirees should either purchase or obtain a long term lease on their Florida home. They should move their most intimate personal effects to that Florida home. As time passes, the cogency of this evidence strengthens. Still, mere

94 Redrow v. Redrow, 94 Ohio App. at 40, 114 N.E.2d at 294.
96 Florida v. Texas, 306 U.S. at 426; Desmare v. United States, 93 U.S. at 607, 611.
97 Desmare, 93 U.S. at 610.
98 Whitmore v. Commissioner, 25 T.C., at 297-98. This address use is especially important, since the Internal Revenue Service shares tax information with domicile states. If the taxpayers place an Ohio address on their federal 1040, the I.R.S. is going to include their names on the computer tape that goes to Ohio for comparison with its filings. The concurrent failure to file an Ohio income tax return thereby virtually guarantees such a taxpayer an ungentle note from the Ohio Tax Commissioner.
101 The Calanni case, seemed to turn on the fact that the taxpayer had been outside the state for 27 years. The court found this absence proof of a want of Ohio tax jurisdiction, even though the taxpayer had failed to establish a domicile anywhere else. 1988 Ohio Tax LEXIS 574, at 7.
residence does not qualify alone. The law requires no specific time in a particular place to fix domicile. With the requisite intent, "any residence, however short, will be sufficient, even if it is but for a day or an hour." In this regard, the courts focus on changes in life patterns as indicia of a genuine intent to effect a domicile change.

Therefore, to bring about these life pattern changes, our taxpayers should sell their house in Ohio. If they cannot sell it, they should at least list it for sale with a realtor. Alternatively, they might weigh gifting or selling it to their children. They should file a change of address form at the post office. If they draw Social Security, they should notify Social Security of their address change. They should notify all their credit card companies of their move. They should notify their bank to list their Florida home as their address. They should instruct their bank to send their bank statements to that address. As the ultimate commitment to permanence, the taxpayers might even make funeral arrangements and buy cemetery plots in Florida.

On the other hand, the taxpayers ought not mention to others that tax considerations influence their move or that such considerations motivate any of the actions that they undertake to support their domicile change. Pronouncements of "I know that this is silly, but my lawyer tells me that I have to do it to get out of paying state income tax" certainly "wave red flags" to tax officials — especially municipal tax officials, who are apt to get wind of such statements. Further, the courts repeatedly register their dim view of "floating intentions" with respect to domicile in general and domicile changes for tax reasons in particular. Such statements constitute evidence of the absence of an intent to permanently abandon a domicile. It should go without saying that the best tax strategy of all is nearly always invisibility.

Let us now assume that our taxpayers have successfully cast their lot in Florida beyond all challenge. That change brings us to our second question. That question is the impact that this change will wield on the taxability of their various income sources that still originate in Ohio. Ohio tax law divides such income into two categories for income taxation purposes — non-business income and business income. Let us separately focus on each.

103 Village of Indian Hill v. Atkins, at 215, 90 N.E.2d at 165, citing 28 C.J.S. Domicile §10b (1941).
104 Factors, supra note 38, at 1236.
105 Taxpayers can realize as much as a one-time $125,000 gain on their residence without tax liability, if either spouse is fifty-five or older at the time of the sale and they file jointly. I.R.C. §121 (West 1988 & Supp. 1990).
107 However, while violative of the invisibility principle, if the taxpayers want to add even more to their safety margin, it would be possible for them to procure a Tax Commissioner Opinion, pursuant to Ohio Rev. Code Ann. §5703.53, (Anderson 1986 & Supp. 1989) on the validity of their domicile change. The taxpayers may have to request such an opinion before they move, because the Tax Commissioner renders them only prospectively.
The law is more lenient with Ohio source nonbusiness income than business income. Six Ohio income sources of Florida’s newest citizens fit into this category: 1) Interest from Ohio banks; 2) Dividends; 3) Retirement income from an Ohio source; 4) Capital gains on the sale of the stock of their Ohio corporation; 5) Rent; and 6) The income from an Ohio situs trust. They may clearly draw the first three without any Ohio income tax liability. The rules are more complex for the remaining three. Let us go over them all to see how they work.

Interest from Ohio Banks

Our new Floridians would have no reason to cash in their certificates of deposit with Ohio lending institutions. Indeed, they would have valid reasons to leave them in place. For instance, they would not want to suffer the penalties that come with early withdrawal from certificates of deposit. Further, they might well have an established working relationship with a local banker. So, if Ohio does not impose a tax burden on the interest from these funds, the taxpayers would be better off to leave them in Ohio. Therefore, Ohio also has good reason not to lean on departing residents to move these funds. If Ohio were to tax the interest that Ohio banks pay to out-of-state account holders, no out-of-stater would ever deposit any money in an Ohio bank. After all, “a land that taxes windows will be a windowless land.” Therefore, Section 5747.20(B)(5) specifically exempts interest paid to nonresidents from the Ohio income tax. So, these taxpayers are “home free” on this income item.

Still, there is one caveat to heed in this area. Ohio does tax interest that “accrues” while its owner is an Ohio resident. Therefore, interest accruals may occasion problems. Take this example. An Ohio resident has an interest-bearing account in Ohio that posts interest once a year in December. This individual cannot remove his residence at the end of November and expect to escape taxation on the interest that accrues on this account during the eleven months that he was an Ohio resident. That eleven months of interest will be fully subject to the Ohio tax.

Dividends from Ohio Corporations

Again, in the case of dividends, it would be counter productive for Ohio to tax the dividends that Ohio corporations pay to nonresidents. If Ohio were to put in place that policy, no one outside Ohio would invest any money in Ohio corporations. Therefore, Section 5747.20(B)(5) insulates these nonresidents from Ohio income taxation on the dividends that an Ohio corporation pays to them.

Again there is the need for caution. The law taxes dividends that have “accrued,” as well as those that the corporation has paid to the taxpayers during the

108 Grant v. Jones, 39 Ohio St. at 515.
taxable year. "Accrual" cannot include the corporation's accumulated earnings, because it would be slicing the proverbial shadow to identify how much of those earnings belong to individual shareholders. This problem would become acute where there are sizable stock transfers between dividend declarations. However, once a corporation declares a dividend, the duty to pay it becomes a legal corporate obligation. Indeed, Treasury Regulation 20.2033-1(b) provides that dividends accrue to the shareholders on the record date for federal estate tax purposes. Thus, suppose that the taxpayers, wearing their directors' hats, declare a dividend, but move to Florida before they collect it. In that case, there has undoubtedly been an accrual for Ohio income tax purposes. They would thereby have to pay Ohio tax on it, notwithstanding the fact that they were residents of Florida when they wrote themselves the check. What's more, it would be tempting fate to move to Florida one day and have the corporation declare a dividend the next — especially in the same taxable year. The better course would be to "let the dust settle" for a while after the domicile change. Thereafter, a series of modest dividends over a respectable interval would reflect a bit of fitting sensitivity to appearances.

Ohio Retirement Income

Ohio taxes retirement income generally. However, it supplies a modest tax credit for retirement income. This credit tops out at a $200 credit on $8,000 of retirement income. There are credits for lump sum distributions from pension, retirement and profit sharing plans. There is a meager $50 senior citizen credit for people sixty-five or older. The aim of these provisions is obviously to blunt part of the incentive for pensioners to locate outside Ohio’s taxing authority. However, Ohio’s use of a credit, rather than a deduction or income exclusion, provides the high tax bracket pensioner with far less relief. Correspondingly, they have far more motive to remove themselves beyond the reach of Ohio’s tax bite on their pensions.

All that the United States Constitution requires is that states tax retirement

110 See Estate of McNary v. Commissioner, 47 T.C. 467 (1967).
111 I.R.C. §61(a)(9) & (11) makes retirement benefits a part of a taxpayer's federal adjusted gross income. Ohio Rev. Code Ann. §5747.01(A) (Anderson 1986 & Supp. 1989) makes federal adjusted gross income the beginning figure for the calculation of Ohio adjusted gross income. Years ago, Ohio Rev. Code Ann. §5747.01(A) excluded retirement income from Ohio adjusted gross income. The present tax credit replaces that exclusion, with the effect that it is the same credit for a given amount of retirement income, regardless of the tax bracket of the retiree claiming it. Thus, the credit is of less use to the high-bracket retiree. Ohio Rev. Code Ann. §5747.01(A)(4) (Anderson 1986 & Supp. 1989) still generously allows taxpayers to deduct federally included survivors and disability benefits from their Ohio adjusted gross income. However, when people eligible for these benefits reach age 65, Ohio law thereafter taxes them as retirement benefits. See also Ohio Admin. Code §5703-7-08 (1990).
income generated within their borders in a nondiscriminatory manner.\textsuperscript{115} However, states have good cause to exclude pension payments to out-of-state recipients. Executives would be reluctant to locate businesses in a state that taxed their retirement income after their departure. As a practical matter, people often generate pension benefits in a multitude of states. To allocate the part attributable to any given state would be an accounting nightmare for the taxpayer, the employer and the state alike. The state would also have to tax the income from the wealth of retirement plans that it furnishes to its own state and local employees.\textsuperscript{116} For all these reasons, Section 5747.20(B)(5) exempts for nonresidents “Any item of income . . . which has been taken into account in the computation of adjusted gross income for the year . . . including without limitation . . . distributions, items of income taken into account under the provisions of sections 401 to 425 of the Internal Revenue Code . . . shall not be allocated to this state unless the taxpayer has a domicile in this state at the time that such income was accrued or paid.” In other words, Ohio law exempts income attributable to almost all federally tax-favored retirement plans. Therefore, in order to distill which plans generate income that may depart the state untaxed, it is necessary to find which “plans” federal tax law favors. By the same token, we need to get at which plans federal law deems to be “nonqualified.”

Ohio law mentions Sections 401 to 425 of the Internal Revenue Code as the source of exempted plans. These sections provide that employers may adopt a formal written retirement benefits plan for the welfare of their employees. Individuals may also set up individual retirement accounts (IRAs), even without the involvement of their employers. The employers and/or the participating employees then contribute money or other investment assets to these plans. The employers transfer these contributed funds beyond their control into the hands of a trustee (often a bank or insurance company). The trustee invests the funds and holds them until the occurrence of some event that the plan specifies. Typically, this event will be the employee’s retirement, death or termination of employment. Generally speaking, a plan is “qualified” for tax purposes when it satisfies the requirements of Section 401 of the Internal Revenue Code.\textsuperscript{117} When qualified, a retirement plan enjoys three tax advantages. First, the employer may deduct the contributions that it makes to the plan.\textsuperscript{118} Second, the employees may exclude contributions to the plan from their adjusted gross taxable income.\textsuperscript{119} Third, the earnings on these funds are tax free.\textsuperscript{120} The funds in qualified plans are taxable only when the plan ultimately

\textsuperscript{115} Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989). This case found unconstitutional a Michigan law that taxed all retirement benefits (including those from federal plans), except those of its own employees.

\textsuperscript{116} California and New Jersey do have legislation afoot to tax pensions generated in their states. However, legislation has been introduced in Congress to block this move. The Wall Street Journal, July 26, 1989, at 1, col. 1.

\textsuperscript{117} Ohio includes plans qualifying under I.R.C. §401 to 425, because there are plans with federal tax benefits that I.R.C. §401 does not mention, but which these later-mentioned sections pick up.


distributes them to their beneficiaries.\textsuperscript{121}

While there are endless variations, there are nine basic varieties of tax-favored plans that seem to qualify for exemption under Ohio law when out-of-state residents receive them.\textsuperscript{122} These are: 1) stock bonus plans;\textsuperscript{123} 2) cash or deferred arrangements (CODAs or "401(k)" plans);\textsuperscript{124} 3) defined benefit (pension) plans;\textsuperscript{125} 4) ESOPs;\textsuperscript{126} 5) the repealed PAYSOPs;\textsuperscript{127} 6) tax sheltered annuities (TSAs);\textsuperscript{128} 7) Keoghs ("HR-10") plans;\textsuperscript{129} 8) individual retirement accounts (IRAs);\textsuperscript{130} and 9) simplified employee pensions (SEPs).\textsuperscript{131}

Plan participants normally take their benefits in the form of periodic payments. However, in some instances, they may opt to take the entire account balance all at once in a "lump sum distribution." There are circumstances in which there are substantial federal tax benefits for taking a lump sum distribution. However, the general rule is that lump sum distributions are taxable in full in the year of withdrawal (plus any applicable early distribution penalty).\textsuperscript{132} For that reason, the settled rule of thumb is that electing lump sum distributions is unwise. Even so, there are always those who want to use their account balance to snap up their new Florida yacht or for some other worthwhile endeavor. If these Ohio residents complete a residence change in the year before they notify their trust administrator of their intent to take it, there would be no accrual of the payment. Thus, such a distribution would seem to be free of the Ohio income tax.

\textsuperscript{121} I.R.C. §72 and 402(a) (West 1988 & Supp. 1990).
\textsuperscript{122} It is often difficult to distinguish plan types because plans sometimes qualify under more than one I.R.C. Code section. However, people in the retirement plan field normally break plans into two groups. First, there are the "defined benefit plans" that pay a guaranteed payment amount upon retirement. They enjoy the advantages that the employee knows exactly how much he is going to receive on retirement and that they maximize the amount of deductible contributions that he may make to the retirement fund. However, defined benefit plans suffer the disadvantage that the United States Department of Labor regulates them through the Employee Retirement Security Act (ERISA). That regulation involves insurance premium payments and extensive reporting on pension fund activity. Second, the defined benefit plan keeps separate track of each employee's contributions and the earnings on those earnings. These plans are easier to administer. However, they allow only limited contributions. Further, they involve some investment risk as to the amount that they will pay on retirement. Of course, there are a host of hybrids of these two plan types.\textsuperscript{123} I.R.C. §401(a) (West 1988 & Supp. 1990). The fair market value of a corporation's stock that it pays as compensation to its employees is a deductible business expense. Devine v. Commissioner, 500 F.2d 1041 (2d Cir. 1974).
\textsuperscript{125} I.R.C. §§401(a), 415(c) (West 1988 & Supp. 1990).
\textsuperscript{127} The Tax Reform Act of 1986 repealed the I.R.C. §41 credit that the PAYSOP used to provide.\textsuperscript{128} I.R.C. §403(b) (West 1988 & Supp. 1990).
\textsuperscript{131} I.R.C. §408(b) (West 1988 & Supp. 1990).
\textsuperscript{132} I.R.C. §402(e). Ohio does afford a one-time [Ohio REV. CODE ANN. §5747.05(F) (Anderson 1986 & Supp. 1989)] election to achieve some favorable treatment for lump sum distributions from a "pension, retirement, or profit-sharing plan." Since this language does not restrict this credit to any particular sections of the federal law, it is presumably available to "qualified" and "nonqualified" plans alike. Ohio REV. CODE ANN. §5747.06(E) (Anderson 1986 & Supp. 1989) allows taxpayers under 65 a credit "equal to fifty dollars times
By contrast, Ohio law presumably taxes the income that a nonqualified plan pays to nonresidents. Generally, employers go to such plans for the benefit of their top executives to supplement their retirement benefits or to avoid the strictures that Section 415 of the Internal Revenue Code imposes on qualified plans. It takes advantage of one of the escape routes from the federal tax doctrine of “constructive receipt.” Under the constructive receipt doctrine, the tax law attributes to taxpayers income that was available to them, but which they decline.\textsuperscript{133} Under the escape route from this rule, the employees may agree with their employer, before they earn an anticipated salary, that their employer may defer paying it to them until some taxable year down the road — typically, the years after they retire. This salary must be unassignable to others.\textsuperscript{134}

These plans also sidestep the effects of Section 83 of the Internal Revenue Code. That provision taxes employee compensation in the first year in which it is “not subject to a substantial risk of forfeiture.” The parties create that risk by leaving unvested the accumulations (if any) of the employee’s benefits.\textsuperscript{135} However, these plans carry the hefty catch that the employers may not deduct their contributions until the employee takes them as taxable income.\textsuperscript{136} The Section 83 risk of forfeiture is in the possibility of nonpayment due to the employer’s insolvency or bankruptcy. While the employer may, in some circumstances, earmark the money for a particular employee’s retirement, the debt must be an ordinary debt of the employer. Thus, the employer’s creditors may lay claim to it. The most common nonqualified plans include: 1) rabbi trusts;\textsuperscript{137} 2) the Section 457 plans that Section 501(c)(3) tax exempt organizations, such as charities, governments, public educational organizations and

the expected remaining life of a taxpayer sixty-five years of age as shown by annuity tables issued under the provisions of the Internal Revenue Code and in effect for the calendar year which includes the last day of the taxable year.” \textit{Ohio Rev. Code Ann.} §5747.05(D) (Anderson 1986 & Supp. 1989) grants persons 65 or older a lump sum retirement credit of $50.00 times their life expectancy, computed in the same way. Persons making the lump sum treatment election under that Section lose their entire $50.00 a year Senior Citizens Credit for life. However, Ohio does not reduce taxation of lump sum distributions to account for the I.R.C. §72(t) 10% excise tax on them when their owner withdraws them before age 59 1/2. Further, subject to some limited grandfathering, Congress repealed the favorable treatment that it used to accord taxpayers in the form of five year averaging, ten year averaging and capital gain distributions treatment. Tax Reform Act of 1986, Pub. L. No. 99-514 §1122(h)(3), 100 Stat. 2085 (1986).

\textsuperscript{133} Treas. Reg. 1.451-2 (1989); As Mr. Justice Holmes put it: “The income that is subject to a man’s unfettered command and that he is free to enjoy at his option may be taxed to him as his income whether he sees fit to enjoy it or not.” Corliss v. Bowers, 281 U.S. 376, 378 (1930).

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certain churches adopt; top hat plans; excess benefit plans; supplemental executive retirement plans (SERPs).

Assume that the employer deposits the employee's funds into a nonqualified trust that later makes periodic payments to the employee. The exclusion from Ohio tax for interest to non-resident rules probably exclude the interest that the trust accrues and distributes to nonresident retirees after retirement. However, it probably does not exclude distributions of principal.

**Salary from an Ohio Corporation**

The corporate salary is clearly taxable, if the taxpayers are physically in Ohio when they earn it, no matter what their residence is. Therefore, it is an enormous drawback to the whole domicile removal scheme that any corporate salary that the taxpayers renounce will increase the corporate taxable income in like proportion. The corresponding corporate income increase will subject it to federal and state double taxation. That is, the corporation will have to pay a tax on its taxable income and the shareholders thereafter will have to pay tax on the after-tax dividends that the corporation pays to them. As salary, the corporation can deduct the salary that it pays its owners from its taxable income. Thus, there is only one tax on that salary. The corporation also can pay them a disproportionate portion of the corporate earnings as salary.

Hence, a top rate 34% (39% with surtax) federal corporate and a normal top rate 9.12% Ohio corporate franchise tax rate obviously dwarf the 6.9% top Ohio individual rate and the present or two income tax that localities normally assess.

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138 The omission of I.R.C. §457 plans in [Ohio Rev. Code Ann. §5747.20(B)(5)](https://www.ohiolaws.com/) (Anderson 1986 & Supp. 1989) is probably an oversight. There is only one substantial feature that distinguishes these plans from Qualified Plans generally. Since nonprofit organizations have no income from which salaries may be deducted, I.R.C. §457 allows these organizations to give discriminatory retirement benefits to their management personnel. Still, it is hard to believe that the General Assembly would intend to deny benefits to the retired employees of charities that it grants to everyone else. Therefore, there is much reason to believe that the General Assembly simply missed the need to include it among the excluded pension plans. The Ohio Tax Commissioner could correct this oversight administratively by promulgating administrative regulations which include I.R.C. §457 plans in eligibility for payment tax-free to nonresidents under authority of [Ohio Rev. Code Ann. §5747.18(B)](https://www.ohiolaws.com/) (Anderson 1986 & Supp. 1989). So far as can be determined, Ohio already correctly does exclude these benefits administratively.

139 A plan that the employer does not fund, but maintains to provide deferred compensation to a select group of management or highly compensated employees. See [Employee Retirement Security Act of 1974 (E.R.I.S.A.), §§201(2), 301 (a)(3), 401 (a)(1), 29 U.S.C. §1001 (1974). Department of Labor Advisory Opinion Letters 75-63 (July 22, 1975); 75-64 (August 1, 1975); 75-48 (December 23, 1975); and 76-100 (November 15, 1976).]

140 A plan that an employer maintains solely for the purpose of providing benefits in excess of the limits that I.R.C. §415 imposes on tax favored plans. E.R.I.S.A. §3(36).

141 A plan through which an employer provides any kind of non-qualified supplemental retirement income.


there are other shareholders, it would violate the fiduciary duty of the controlling shareholders to vote themselves a disproportionately large dividend. 145

Further, when the corporation withholds state income tax from the salaries that it pays them and sends them W-2's for their Ohio income, the corresponding tax report to the state obviously will alert the Ohio Tax Commissioner that something calls for inquiry. 146 The taxpayers will then have to file an Ohio income tax return as nonresidents that reports all their income and claims a credit for the portion of the tax that they claim to have earned outside Ohio. 147 Section 5747.05(A) bases this credit on the portion of a nonresident's income that is not allocable to Ohio. Section 5747.05(B) founds the rest on the portion of an individual's federal adjusted gross income that another state or the District of Columbia taxes. 148 Nonresidents may not avail themselves of both credits. Nor may they avail themselves of either credit until they have first subtracted out all other credits that Ohio law allows. 149 However, employers must withhold the income taxes of other states from the salaries of their nonresident employees. Employers who withhold such taxes must report those

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148 Presumably, this provision means that Ohio taxes its citizens on salary that they earn while overseas, even though they pay foreign tax on it. However, the taxpayers in this situation might argue that City of Columbus v. Firebaugh, 8 Ohio App.3d 366 457 N.E.2d 367 (1983) and Calanni v. Limbach, B.T.A. 86-A-1314 (1983) exempt them from Ohio taxation entirely. Even City of Cleveland v. Surella, 1989 Ohio Tax LEXIS 545 (1989) seems to accept this result. The Ohio Tax Commissioner might well use these cases as the basis to promulgate some horse sense justice in this area, by administratively forgiving income that Ohioans earn while overseas for extended periods.

salaries to that employee’s state of residence.\textsuperscript{150} Since Florida levies no income tax, this rule presumably does not apply to the salaries of Florida residents working in Florida for Ohio employers.

Still, Section 5747.20(B)(1) taxes “[a]ll items of compensation paid to an individual for personal services performed in this state who was a nonresident at the time of payment and all items of deduction directly allocated thereto shall be allocated to this state.” [emphasis added] Therefore, the taxpayers may argue that they have the right to perform compensated management services in Florida for their Ohio corporation without Ohio income tax liability. The W-2’s that their corporation would issue to them would then legitimately carry Florida addresses and would be free of Ohio withholding and reporting. Apparently a couple of telephone speaker boxes would be a good investment for their corporation. However, corporate officers hazarding this technique should not risk so much as an inspection tour to their Ohio business, if they want to maximize their chances for success.

If the taxpayers do not want to chance an Ohio salary, the impact that flows from surrendering such a salary may not be all bad. If they renounce all salary income, they may make themselves eligible for their Social Security benefits.\textsuperscript{151} If they refrain from returning to Ohio on a regular basis, the Internal Revenue Service might disallow the salary deduction anyway as unreasonable compensation and thereby treat it as a disguised dividend.\textsuperscript{152} So, if their children now make up the management, they can transfer their salaries to them. If those salaries are reasonable, they can thereby transfer income tax deductible wealth to those children outside the estate and gift taxation system. If grandchildren are drawn in, salary increases to them also avert the horrors of the generation-skipping tax, with its infamously ruinous rates.\textsuperscript{153} Businesswise, the salary increases may neatly encourage the younger generations to devote even more effort to the success of the corporation.

The taxpayers might also escape the effects of this rule by simply electing “S” status. In that way, the corporate profits would be taxable to them in proportion to their ownership of the corporate stock.\textsuperscript{154} Accordingly, the loss of their salary deduction would no longer matter. Further, if the corporation loses money, they may

\textsuperscript{151} Generally, the Social Security Act, 42 U.S.C. §301 et seq., [hereinafter “S.S.A.”] reduces the Social Security Benefits payable to a recipient before that recipient reaches age seventy. In 1990, this reduction is one dollar for every three dollars above $9,360.00 for recipients 65 or older. The reduction is one dollar for every two earned over $6,840.00 for recipients less than 65. After 1990, these maximums increase with the cost of living. \textit{S.S.A.} §203(f)(3).
\textsuperscript{152} Treas. Reg. §1.162-7(b) (1989); Rev. Rul. 79-8, 1979-1 C.B. 92; Joseph P. Kropf, Inc. v. U.S., 543 F. Supp. 581 (D. Colo. 1982); Nor-Cal Adjusters v. Commissioner, 503 F.2d 359 (9th Cir. 1974); Charles McCandless Tile Service v. U.S., 422 F.2d 1336 (Cl. Cl. 1970); Huchins Tool & Die, Inc. v. Commissioner, 289 F.2d 549 (7th Cir. 1961); Lydia E. Pinkman Medicine Co. v. Commissioner, 128 F.2d 986 (1st Cir. 1942), cert. denied, 317 U.S. 675 (1942).
directly offset that loss against their other income. There is also an Ohio tax advantage to electing "S" status. Ohio does not tax "S" corporations.\textsuperscript{155} While they must file a Form FT-1120S each year, that form is only an informational return. However, unlike dividend distributions to nonresident "C" shareholders, nonresident "S" shareholders must report and pay Ohio income tax on the distributive share of their interests in Ohio-based "S" corporations.\textsuperscript{156} Nonetheless, the highest Ohio personal income tax rate of 6.9\% is more than two percent less than the 9.12\% maximum corporate Ohio franchise tax rate.

Having said that, before electing "S" status, these taxpayers should search out the potential drawbacks that sometimes inhere in this election. For federal tax purposes, if the corporation has undistributed earnings and profits, the Internal Revenue Code imposes substantial limitations on its corporate fiscal activities thereafter. For instance, the corporation may not carry over any of its "C" net operating loss carryovers into an "S" taxable year. That restriction effectively losses these carryovers, unless the corporation returns to "C" status before the fifteen year carryover period expires.\textsuperscript{157} It's subsequent sale of capital assets may invoke "built-in gain" treatment under Section 1374 of the Internal Revenue Code. It must pay a corporate level tax on its LIFO reserve.\textsuperscript{158} It must keep its "passive investment income" below 25\% of its "gross receipts" or it must pay a tax on that passive investment income at the highest corporate rate.\textsuperscript{159} If the "S" corporation has both excess passive income and carries "C" earnings and profits for three years in a row, it forfeits its "S" election and cannot elect it again for five years; it must make all distributions to its shareholders in proportion to their shareholdings.\textsuperscript{160}

The corporation must divest itself of any control or ownership of its subsidiaries that exceeds 79\%.\textsuperscript{161} It may have no more than thirty-five shareholders.\textsuperscript{162} Only United States residents who are individuals (i.e. not most entities) may own it.\textsuperscript{163} It

\textsuperscript{157} I.R.C. \textsection 172(b)(1)(B) (West 1988 & Supp. 1990); I.R.C. 1371(b) (West 1988).
\textsuperscript{158} I.R.C. \textsection 1363(d) (West 1988 & Supp. 1990).
\textsuperscript{159} I.R.C. \textsection 1375(a) (West 1988 & Supp. 1990); The corporation generally must pay out all its "C" earnings and profits as dividends to eliminate them. I.R.C. \textsection 1368(e)(3) (West 1988 & Supp. 1990). However, knowing how much it must pay out in order to rid a corporation of its "C" earnings and profits can be tricky. For instance, the corporation must recapture all its accelerated depreciation from past years. I.R.C. \textsection 312(k) (West 1988 & Supp. 1990). Mercifully, the Secretary of Treasury may waive this tax if he finds that the corporation determined in good faith that it had no "C" earnings and profits. I.R.C. \textsection 1375(d) (West 1988 & Supp. 1990).
\textsuperscript{160} I.R.C. \textsection 1362(g) (West 1988 & Supp. 1990); The Secretary of Treasurer may waive this rule if he determines that the termination was "inadvertent." I.R.C. \textsection 1362(f) (West 1988 & Supp. 1990).
\textsuperscript{161} I.R.C. \textsection 1361(b)(2)(A) and \textsection 1504(b) (West 1988 & Supp. 1990).
\textsuperscript{162} I.R.C. \textsection 1361(b)(1)(A) (West 1988 & Supp. 1990); However, husband and wife count as one shareholder for purposes of the thirty-five shareholder limitation. I.R.C. \textsection 1361(c)(1) (West 1988 & Supp. 1990).
\textsuperscript{163} I.R.C. \textsection 1361(b)(1)(B) (West 1988 & Supp. 1990). This requirement might preclude an "S" election if the taxpayers have previously contributed the corporation's stock to an irrevocable trust that fails to meet the stringent I.R.C. \textsection 1361(c) grantor trust requirements or the equally stringent Qualified Subchapter S Trust (QSST) requirements of I.R.C. \textsection 1361(d)(3). The parties may also put the stock in a voting trust. I.R.C. \textsection 1361(c)(2)(A)(iv) (West 1988 & Supp. 1990).
may have only one class of stock.\textsuperscript{164} If the corporation has been exercising its right as a nonpersonal service "C" corporation to offset passive losses against its active income, the "S" election will end its right to do so.\textsuperscript{165} However, as previously active participants in the corporation, the shareholders will be able to offset any losses of the corporation itself against their other income for the next five years — assuming that they have enough basis in their corporate stock and are "at risk."\textsuperscript{166} If the corporation was a "personal service corporation," the shareholders may avail themselves of that offset for the rest of their lives. Conversely, on the more likely assumption that the personal service corporation is profitable, its shareholders will never be able to use their newly-passive share of its profits to offset any passive losses from other sources they may have.\textsuperscript{167}

\textit{Rent}

Closely-held corporations commonly rent business assets from their owners as a mechanism to funnel out corporate revenue to themselves as a business expense. This practice avoids the double taxation on that revenue. The practice is permissible, if the rents are reasonable.\textsuperscript{168} However, if the property that the corporation rents is situated in Ohio, the income from that rental is subject to the Ohio income tax, regardless of the residence of its owners.\textsuperscript{169} What may make this problem acute is that long-standing assets may well be appreciated down to little or no book value. Therefore, there is little or no depreciation deduction to shield this income from Ohio taxation.

If the owners plan to sell their stock and they have the requisite I.R.C. Section 351 eighty percent (or better), control, one strategy would be to contribute their Ohio rental properties to the corporation. There is no gain to them on such a contribution.\textsuperscript{170} Any basis that remains in the contributed asset will step up the basis of their stock in like amount.\textsuperscript{171} As we will see in our next topic on capital gains, the taxpayers, upon clinching their Florida tax residence, may then sell this stock free of Ohio tax. The value of those contributed rental properties would, of course, step up that sale price for the purpose of later Florida sale.

\textsuperscript{164}I.R.C. §1361(b)(1)(D) (West 1988 & Supp. 1990); This predicate effectively precludes preferred stock in "S" corporations. However, the corporation may have both voting and nonvoting stock. I.R.C. §1361(c)(4) (West 1988 & Supp. 1990).
\textsuperscript{167}Temp. Treas. Reg. §1.469-5T(a)(6) (1989). "Personal service is when the corporation provides services directly to the public and devotion of capital is not a material factor." Temp. Treas. Reg. §1.469-5T(d) (e.g. attorneys, accountants, consultants, etc.).
\textsuperscript{168} \textit{See} e.g. Alden B. Oaks, 44 T.C. 524 (1965); \textit{See generally} Oliver, Income Tax Aspects of Gifts and Leasebacks of Business Property in Trust, 51 CORNELL L.Q. 21 (1965).
\textsuperscript{170}I.R.C. §§351(a) & 368(c) (West 1988 & Supp. 1990).
Capital Gains

Suppose instead that the departing taxpayers decide that the better thing is to simply sell their stock in their Ohio corporation and reinvest the proceeds in Florida. They will sell their home, perhaps on a land contract. Their Florida condominium is much smaller, so they intend to auction off most of their household goods and appliances before they leave.

Section 5747.20(B)(2) governs this area. The very first thing that we need to repeat regarding this section is that the obvious best planning move for the migrating taxpayers is to change their residence before they sell their stock. However, to avert challenge, they should not enter into a contract to sell it before they leave—even informally. They should not sell it in the taxable year of their residence change. In fact, the more time that passes between the move and the sale, the better. On the other hand, if the taxpayers have capital assets that they intend to sell for a loss, the obvious time for the sale is before their move—at least to the extent of the $3,000.00 offset that federal tax law allows from their joint federal adjusted gross income. While there is a carryover of unused capital loss to future taxable years, these taxpayers will not be in Ohio during those taxable years to avail themselves of that benefit.

Any gain that they realize on the sale of their household goods will be subject to Ohio taxation. While they can avoid this tax by physically moving the goods to Florida before the sale, the moving outlay will probably exceed the tax. Anyway, unless they have valuable antiques or paintings, there is little chance for any gain on the sale of household goods to worry about. The loss on the furniture and appliances sold will often more than offset the gain on such gain items, making their sale free of all tax. The taxpayers who are most likely to run afoul of this law are farmers

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(B) All items of nonbusiness income or deduction taken into account in the computation of adjusted gross income for the taxable year by a nonresident shall be allocated to this state as follows:

(2) All gains or losses from the sale of real property, tangible personal property, or intangible property shall be allocated as follows:

(a) Capital gains or losses from the sale or other transfer of real property are allocable to this state if the property is located physically in this state.

(b) Capital gains or losses from the sale or other transfer of tangible personal property are allocable to this state if, at the time of such sale or other transfer, the property had its physical location in this state.

(c) Capital gains or losses from the sale or other transfer of intangible personal property are allocable to this state if the taxpayer had his domicile in this state at the time of such sale or other transfer.


and other small business owners who have depreciated their business assets down to a book value far below their fair market value. When portability allows, taxpayers who own assets that carry heavy built-in gains should take those assets to Florida and sell them there during the following taxable year.

Mobile tangible assets, such as aircraft, present a unique problem. Strictly speaking, such assets have their situs in the state in which their seller completes their sale. However, the Ohio Department of Taxation feels that it is unfair to assess an income tax on nonresidents making such sales, if they used the asset outside Ohio, but complete the sale in Ohio. The Ohio sales tax on the transaction may well exceed the foregone income tax. Therefore, the Department interprets Section 5747.20(B)(2)(c) to mean that the situs of mobile assets is the state in which they were used before their sale. Still, the interesting question is whether the converse is true. That is, does a nonresident owe Ohio an income tax on the sale of a mobile asset that he long used in Ohio, but sells outside Ohio? It is hard to see how.

Since taxpayers only report to Ohio the capital gains that they report on their federal return, Ohio will not tax them on any gains on the sale of their personal residence that federal law excludes because of their age. However, if they have previously claimed that exclusion or if they have not attained the requisite age, Ohio will tax them on the sale whether they changed their residence to Florida at the time of the sale or not.

The taxpayers might be tempted to sell some of their Ohio situs property on an installment contract and elect installment reporting under I.R.C. Section 453. They might believe that the payments that they receive in later years will be free of Ohio tax, if they have accomplished their residence change when they receive their later payments. However, Section 5747.20(B) provides that there is an Ohio income tax on all property that is physically located in Ohio at the time of its sale. Therefore, installment reporting will not avoid this tax. Strange to say, the converse is not true. If a taxpayer has installment sale income from sales he completed before becoming an Ohio resident, the resulting pro rata gain that the taxpayer receives after his move to Ohio is part of his federal adjustable gross income. That inclusion makes it taxable in Ohio.

Another area of which these selling shareholders should be wary is noncompetition agreements. Many buyers will only buy corporate assets, rather than corporate stock, so as to avoid the corporation’s liability for its past operations. In that instance, the shareholders often avoid some of the corporate level gain on the asset sale by diverting some of the sale price to a covenant not to compete. These funds flow directly to them. Thus, they are not subject to a corporate level tax.

Ohio has no counterparts of I.R.C. §269 tax-motivated acquisition limitations or I.R.C. §482 to reallocate income — nor should it. Such authority would grant the state the ability to challenge a taxpayer’s federal adjusted gross income. Different federal adjusted gross income and state Line 1 income would result in tax bedlam.
However, such consideration is not salary, because the recipient is, by definition, not an employee. It is not self-employment income, because the recipients are not engaged in a trade or business activity.\textsuperscript{176} Instead, the buyer pays them for nonactivity. So, what is it? The surprising answer seems to be capital gain.\textsuperscript{177} The owners are selling their good will — a capital asset with a useful life or more than one year — albeit, a capital asset in which they have no basis. For this reason, if the sellers enter into a noncompetition agreement before they change their residence, the full amount will be subject to the Ohio income tax, no matter when they receive the payments.

\textit{Trust Income}

Remember that our taxpayers have a self-declared trust. They are the trustees of these trusts for their lives. However, to avail themselves of its QTIP feature, an Ohio bank becomes the trustee or successor trustee. They have built up an association of confidence with that bank. They trust it to use the trust’s discretionary distribution powers to suitably attend to the needs of the survivor or of their children after they both have departed. Therefore, they do not want to change their trustee unless Ohio tax law forces them to it.

Ohio taxes the income of only those trusts whose beneficiaries are subject to Ohio taxation.\textsuperscript{178} Even when a trust has some Ohio beneficiaries, trust income is taxable only on the percentage share of the income that is attributable to those Ohio beneficiaries and which the trust does not distribute to them during the year. Presumably, the term “beneficiaries” refers only to current income beneficiaries and not remaindermen or contingent beneficiaries. Seemingly then, if the sole income beneficiaries are Florida residents, the trust is immune from Ohio taxation altogether. Such a trust can retain or distribute income at its pleasure, without Ohio income tax liability. However, the evident tax-free status of Ohio trusts with only nonresident beneficiaries gives rise to the interesting question of what happens if the trust generates business income that would be taxable to nonresident taxpayers —

\textsuperscript{176} I.R.C. §1402(c) (West 1988 & Supp. 1990); Treas. Reg. §1402(a)-6(a) (1989).
\textsuperscript{177} Fed. Tax Guide Ref. (CCH) §4862.263.
\textsuperscript{178} The operative law is in \textit{Ohio Rev. Code Ann.} §5747.23 (Anderson 1986) which reads as follows:

\begin{itemize}
  \item [(A)] With respect to a trust, one or more of the beneficiaries of which are liable for the tax imposed by section 5747.23 of the Revised Code, the business income and deductions included in the income of such trust shall be allocated to this state in the hands of such trust pursuant to section 5747.21 of the Revised Code. Such trust business income and deductions shall then be allocated to the beneficiaries in proportion to their right to share in the business income of such trust to the extent of the distribution made to the beneficiary.
  \item [(B)] With respect to a trust described in division (A) of this section, the nonbusiness income and deductions included in the income of such trust shall be allocated to the beneficiaries in proportion to their right to share in such income and deductions of the trust, and then the share of each beneficiary shall be allocated to this state in the hands of such beneficiary pursuant to section 5747.20 of the Revised Code.
\end{itemize}
e.g. an interest in an Ohio partnership or "S" corporation, capital gain from sale of Ohio situs property, and the like.

Read literally, Section 5757.23 appears to permit such trusts to generate Ohio situs income without Ohio income tax. There is no provision in Ohio law for character pass-through of trust income. Section 5757.23 does not set forth a grantor trust look-through rule akin to I.R.C. Section 671. To illustrate, let us say that nonresident taxpayers contribute their Ohio apartment complex to their trust. They direct the trust to sell it and then distribute the capital gain to them. There appears to be no Ohio income tax on such a transaction. This tactic is somewhat aggressive and is certainly not for the skittish. However, having said all that, no other reading of this statute readily suggests itself. Effectively, a trust without an Ohio beneficiary is not an Ohio taxpayer.

BUSINESS INCOME: DIRECTOR'S FEES

Acceptance of director's fees from an Ohio corporation is a riskier proposition. Director's fees are not salary — at least, for federal tax purposes. The federal tax law considers corporate directors to be self-employed. Accordingly, directors report their income on Schedule C of their federal tax return. Like salary, director's fees are deductible business expenses for the corporation that pays them. Directors may attend board meetings by telephone. Therefore, the taxpayers could elect themselves as chairman and co-chairman of the board, and participate in board meetings without ever setting foot in the state of Ohio. For that reason, corporations might bump up the fees of their newly nonresident directors by a reasonable amount to offset any salary reductions that their diminished role in the front line management of the enterprise might dictate. However, Ohio will likely consider such income to be what it labels "business income." Section 5747.01(B) defines "business income" to be:

[I]ncome arising from transactions, activities and sources in the regular course of a trade or business and includes income from tangible and intangible property, if the acquisition, rental, management and disposition of the property constitute integral parts of the regular course of a trade or business.

179 Rev. Rul. 72-86, 1972-1 C.B. 273; Rev. Rul. 68-595, 1968-2 C.B. 378; Director's fees also reduce Social Security eligibility in the year that the director performs the services rather than in the year in which he receives payment for those services. I.R.C. §1402(a) (West 1988 & Supp. 1990). There is an argument that director's fees are "compensation" for Ohio income tax purposes regardless of how federal tax law treats them. OHIO REV. CODE ANN. §5747.01(D) (Anderson 1986 & Supp. 1990) defines "compensation" to mean "any form of remuneration paid to an employee for personal services." (Emphasis added). OHIO REV. CODE ANN. Chapter 5747 does not define "employee," which presumably means that the federal definition that excludes directors would hold sway. However, there is no contesting that directors' fees represent remuneration for personal services.

Ohio Revised Code Section 5747.21 provides a three-part formula that allocates business income between Ohio and other states for entities that generate their profits through sales. However, Section 5747.21(C)(2) provides:

Business entities whose business does not consist of the making of sales of tangible personal property and to which the sales numerator and denominator cannot apply, but which business consists of such activities as receiving commissions, rents, interest, dividends and fees, the fraction shall be determined by allocating such business activities in and out of this state according to their situs. (emphasis added)

The safe bet is that the “business entity” of this section embraces a directorship. There is no definition of “situs” in Chapter 5703. However, logically, the situs of income is the location of where the activity that generates it takes place, rather than the location of the payor. For instance, assume that an Ohio corporation retains a Florida advertising firm to work up some television commercials for it and that firm thereafter makes all its contacts with Ohio by telephone and mail. In such a case, National Bella Hess tells us that there clearly would be no Ohio tax on this Florida firm, because there is inadequate nexus between the taxpayer and Ohio to justify the tax. Therefore, it seems probable that the director's fees that Ohio corporations pay are not subject to the Ohio income tax, if the directors of these corporations perform all their services outside Ohio. However, again, to be thoroughly safe, the directors should scrupulously avoid all corporate business during any visit they make to Ohio.

CONCLUSION

When we sit down to ponder American tax residence standards, we uncover a virtual maze of scattered, unfocused and even conflicting thinking in the legal authorities that touch upon the subject. In an effort to help mend the resulting uncertainty in this legal province, let us see if we can bring it all together in some sort of brief, but orderly, framework. Here it is in a nutshell.

Residence is where a person regularly sleeps. Domicile is a person’s home. The two may be the same or different. Either may constitutionally suffice for taxation. Residence is time-sensitive. If a person sleeps too many nights in a taxing jurisdiction, it will tax him. So, to change a residence, one begins sleeping

\[
\text{Value of property in Ohio} + \text{Ohio payroll} + \text{Sales in Ohio} \times 3
\]

\[\text{Adjusted gross business income} \times 3\]

Ohio law does not define “situs” for income tax purposes. Ohio Revised Code Ann. §5731.181(B) (Anderson 1986) defines “property having a situs in this state” for purposes of Ohio's generation-skipping tax. With the possible exception of income in respect of a decedent (see I.R.C. §691), the deceased do not earn income. Therefore, that definition does not mention salary as having an Ohio situs.

\[\text{National Bellas Hess v. Dept. of Revenue}, 386 U.S. 753 (1967).\]
elsewhere. If a person has a domicile in a taxing jurisdiction, it will tax him no matter where he sleeps. Domicile is not time-sensitive. To change domicile, one must sleep elsewhere, affirmatively intend to make the new sleeping place one’s new home, break most social and business ties and all civil ties with the old domicile and have no present intention ever to begin regularly sleeping again in that old domicile.

The burden of proof for a domicile change is on the party alleging it. In close cases, fact-finders decide the actuality of such changes by weighing a long list of indicia, such as the person’s declarations, where they vote, where they physically reside, where they register their vehicles and take out their driver’s license, and whatnot. It is immaterial whether the residence change or the intention to change domicile occurs first. However, neither alone qualifies. There is no domicile change until the two concur. By and large, acts outweigh words as proof of a domicile change. Long absence may disengage domicile as the nexus to tax.

These tax principles pertain to the exercise of a state’s taxing dominion at its outermost limits. However, as a practical matter, states also consider what they ought to tax as a matter of its own tax policy. In this context, there are two sharply clashing political judgments regarding the taxation of out-of-state domiciliary retirees. On the one hand, we must never forget that America rose from a tax revolt. Thus, strange to say, in our democracy and self-assessment system, the appearance of tax fairness is necessarily mightier than maximizing the tax yield. Concerns for appearances too often foreclose complete rationality in the law. The need for such appearances sometimes compels “penny wise, but dollar foolish” tax laws. After all, many taxpayers remain constantly on the alert for others who seem to be escaping their fair share of the tax load. Protesters and common taxpayers alike cite perceived unfairness in the tax system to justify cheating and even outright refusals to comply.

On the other hand, state legislators, even in their zeal for tax fairness, cannot lose complete sight of the fact that mankind is a tax-avoiding species. The human animal simply will not pay taxes, given much choice in the matter. Wisely, American tax law bows to this facet of human nature. It upholds the right of every taxpayer to avoid taxes to the full extent that the law condones. Further, American freedom guarantees every American the right to live wherever he or she chooses. Thus, while it is beyond argument that it is a matter of fundamental fairness that all citizens must shoulder their share of the support of civilized society according to their abilities to pay, lawmakers may not completely ignore the actuality that certain of their state’s tax laws repel taxable income. Accordingly, within the bounds of appearances, lawmakers must do what they can to stem the outward flow of taxable income and thus slow this erosion of the income tax base.

185 As Judge Learned Hand said: “Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury. There is not even a patriotic duty to increase one’s taxes.” Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934).
Thus, we find the old battle cry of “It’s the principle of the thing!” to be the most expensive utterance in the English language. Clearly, inducement invariably fares better than force. As unseemly as it might at first appear, there is a prescription of self-restraint in this realm that Ohio should seriously ponder. Ohio should consider extending its part-year tax credit to its “residents” over a certain age (say 60) for the portion of the year that they reside outside Ohio — say, for up to four months. Such measures would at least blunt the impetus for formal residence changes. They would lift much of the incentive for sham changes. Perhaps even more important, this credit would sanction for pensioners the bliss of golden summers among loved ones in Ohio and toasty-warm winters in the Florida sunshine, without tax penalty.

Such a policy is defensible. Ohio has already made one move in this direction by implementing a full marital deduction for the surviving spouse under Ohio’s estate tax. Realistically, Ohio provides its citizens who are basking in the Florida sun with less services than it provides to its other citizens who remain on hand. Realistically, many people wintering in Florida come to the unsalutary view that their home state and their life-long communities are enemies, rather than the objects of affection that they previously felt — especially on football Saturdays. Realistically, we may even suspect that many elderly Ohioans, with nominal Florida domiciles, react to this perceived injustice by spending their summers in Ohio without paying Ohio income taxes. If they use Florida addresses for their federal income tax returns and hold Florida drivers’ licenses and automobile tags, there is no effective way to police this activity. Barring recourse to Orwellian measures, summers in Ohio are not readily detectable. Even tax filings with the state by payors doubtlessly are often too little or come too late. Presumably, once the taxpayer accomplishes a successful domicile change, the burden of proving thirty-one days of presence in Ohio is on the state. Anyway, even if detected and provable, how many of these old folks is Ohio really going to extradite from Florida for prosecution? Thanks to the famous Florida homestead exemption, civil recoveries in Florida would be neither easy nor cheap. An unenforceable law is no law at all. Remember government’s experience with prohibition and CB radio licenses?

On the other hand, we well know that the overwhelming majority of senior citizens are scrupulously honest. These seniors would in no way begrudge Ohio its due, if Ohio would only cut them some slack for the time that they spend in Florida. Hence, the nonresidence malady might well respond better to this sugar-based medicine than to the vinegar-based variety that Ohio now prescribes. Tax-free winters would allow such retirees the luxury of continuing their social, religious, civic and emotional ties to Ohio. Better still, this concession would surely lead many of these gray-headed patriarchs to shower Ohio organizations with largess (both

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186 Presently, Ohio limits its part-year tax credit to those who change their domicile to or from Ohio during the taxable year. It does not exempt those who merely spend part of the year outside Ohio with the intention to return. **Ohio Rev. Code Ann. §§5747.01(J) & 5747.05(A)** (Anderson 1986 & Supp. 1989).
inter vivos and testamentary) and valuable personal services—to the immeasurable betterment of Ohio communities. They could still buy their next automobile from the home town dealer where they have bought their every automobile for the past thirty years. In this regard, let us not forget that the dealer pays Ohio income taxes. Moreover, these measures would in no way gut the present tax system. Instead, under this halfway system of enlightened self-interest, the retired wealthy would continue to pay at least some Ohio income tax, instead of seizing the readily available expedient of ducking it all.

Of course, the Ohio Department of Taxation cannot be faulted for doing what the law demands of it. Like everyone else, it must take the tax law as it finds it. For that reason, it is the legislative yielding to these realities that is in order. The credit for the part-year elderly would spare the enforcement costs entailed in the enforcement program that the Tax Department announced. Perhaps of greater significance, stricter enforcement will run off even more of the wealthy elderly. It will inhibit them in spending their money at Ohio businesses or from patronizing Ohio professionals. Worst of all, their fat decedent’s estates will not tarry for the eventual attention of the Ohio estate tax collector. Therefore, this part-year credit for the elderly makes sense. But, will it ever happen?