

**Notice of Appeal of Appellant
T. Ryan Legg Irrevocable Trust, UBS Trust Company, N.A., Trustee**

Appellant, T. Ryan Legg Irrevocable Trust, UBS Trust Company, N.A., Trustee (“Appellant” or “Trust”) hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Ohio Board of Tax Appeals (“Board”), entered in Ohio Board of Tax Appeals case No. 2013-A-1469 on May 5, 2015 (“Order”). A copy of the Order is attached as Exhibit A. Jurisdiction is proper pursuant to S. Ct. Prac. R. 10.01 and R.C. 5717.04.

Assignments of Error

The Trust appeals the following findings of the Board because they are in error:

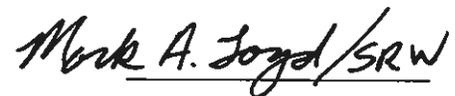
- I. The Board erred when it found that the income from Appellant’s 2006 sale of 65 shares of corporate stock in Total Quality Logistics, Inc. (“TQL”) was a qualifying trust amount under R.C. 5747.01(BB)(2). *See* Order, p. 4. The Board erroneously determined that the book value of TQL’s assets were “available” to Appellant so that the gain was a qualifying trust amount. *Id.* However, the book value was not available to Appellant so it was not a qualifying trust amount.

- II. The Board erred when it found that the income from Appellant’s sale of TQL stock was business income and thus taxable as income. *See* Order, p. 4. The Board erroneously determined that the income was business income and taxable under R.C. 5747.01(B) because the income came from a “liquidation of a business.” *Id.* at 5. However, TQL was not liquidated, and the income was nonbusiness income under R.C. 5747.01(C) and was thus not taxable to Ohio.

- III. The Board erred when it found that the Trust was an Ohio resident. *See* Order, p. 5. The Board determined that T. Ryan Legg, the grantor of the Trust, was an Ohio resident when the Trust was formed so that the Trust's domicile was Ohio. However, under R.C. 5747.01(I)(3), a trust is domiciled in a particular state for tax purposes when a beneficiary is a resident of that state during the taxable year at issue, and the Trust had no beneficiaries in 2006 so that the Trust was not an Ohio resident trust, and therefore the income was not taxable to Ohio.
- IV. The Board erred by failing to address the Trust's argument that if the gain from the TQL stock is indeed a qualifying trust amount, it is overstated. Because a qualifying trust amount is multiplied by a fraction of the qualifying investee's physical assets' book value in Ohio versus the value everywhere as of the last day of the calendar year immediately prior to the date the gain was realized, any qualifying trust amount that results from the Trust's sale of TQL stock must be apportioned at less than 100% to Ohio because TQL had property in West Virginia as well as Ohio. Therefore, the gain from the sale of TQL stock is overstated and erroneous.
- V. The Board by failing to address the Trust's alternative apportionment argument. The Commissioner's position results in an unfair allocation of the Trust's taxable income in Ohio and thus arbitrarily failed to apply alternative apportionment to accurately reflect that no portion of the Trust's Ohio income was taxable pursuant to R.C. 5747.21(C).

- VI. The Commissioner's Final Determination is unconstitutional. The Board did not reach Appellant's constitutional claims. *See Order*, p. 5. Notwithstanding the Board's failure to reach these claims, the Board accepted evidence on these points, and they remain preserved on appeal, and. *See MCI Telecomm. Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 198.
- VII. The Commissioner's position violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I § 2 of the Ohio Constitution because it treats differently persons, nonresident trust shareholders, who are alike in all relevant aspects.
- VIII. The Commissioner's position violates the Due Process Clause of the Fifth Amendment of the United States Constitution because there is no nexus between the Trust and Ohio, given that Appellant is a nonresident trust domiciled in Delaware.

Respectfully submitted,

Handwritten signature of Mark A. Loyd in black ink, written in a cursive style. The signature includes the initials "SRW" at the end.

Mark A. Loyd

Counsel for Appellant

T. Ryan Legg Irrevocable Trust,
UBS Trust Company, N.A., Trustee

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by certified mail to counsel for Appellee, Barton A. Hubbard and David E. Ebersole, 30 East Broad Street, 25th Floor, Columbus OH 43215 on June 3, 2015.

Mark A. Loyd /SRW

Mark A. Loyd

Counsel for Appellant

T. Ryan Legg Irrevocable Trust,
UBS Trust Company, N.A., Trustee

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Exhibit

A

OHIO BOARD OF TAX APPEALS

T. RYAN LEGG IRRECOVABLE TRUST, (et.
al.),

CASE NO(S). 2013-1469

Appellant(s),

(TRUST INCOME TAX)

vs.

DECISION AND ORDER

JOSEPH W. TESTA, TAX COMMISSIONER OF
OHIO, (et. al.),

Appellee(s).

APPEARANCES:

For the Appellant(s)

- T. RYAN LEGG IRRECOVABLE TRUST
Represented by:
MARK LOYD
BINGHAM GREENBAUM DOLL LLP
3500 NATIONAL CITY TOWER
101 SOUTH FIFTH STREET
LOUISVILLE, KY 40202

For the Appellee(s)

- JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO
Represented by:
DAVID D. EBERSOLE
ASSISTANT ATTORNEY GENERAL
OHIO ATTORNEY GENERAL
30 EAST BROAD STREET, 25TH FLOOR
COLUMBUS, OH 43215

Entered Tuesday, May 5, 2015

Mr. Williamson, Ms. Clements, and Mr. Harbarger concur.

This matter is considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above-named appellant T. Ryan Legg Irrevocable Trust ("trust"), from a final determination of the Tax Commissioner. Therein, the Tax Commissioner ("commissioner") adjusted only the penalty associated with the trust income tax assessment against appellant relating to tax year 2006. The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript ("S.T.") certified to this board by the Tax Commissioner, the record of this board's hearing ("H.R."), and the briefs filed by counsel. We note that exhibits 16 and W, upon which this board reserved ruling as to their admission into evidence at the time of hearing, shall be received into evidence.

At the outset, this board must address a motion to dismiss filed by the commissioner; specifically, the commissioner contends that it has not been demonstrated that the trustee of the trust "authorized this appeal, as well as the Legg Trust's filing of a petition for reassessment." Motion at 2. The commissioner contends that "in order for a trust to prosecute or defend a legal action, the trustee must provide the necessary authorization. The trustee is the sole party who may bring or

defend an action on behalf of a trust. Without the requisite authorization of the trustee, the prosecution or defense of a legal action is invalid. *Schofield v. Cleveland Trust Co.* 149 Ohio St. 133, 144 (1948) ***." (Emphasis sic.) Motion at 1. The record establishes that in 2006, U.S. Trust Company was the trustee of the subject trust. H.R. at 98. "U.S. Trust Company was a wholly owned subsidiary of Charles Schwab and was sold by Charles Schwab at some point *** and *** Charles Schwab Bank essentially replaced U.S. Trust Company as the trustee." H.R. at 123-124. Thereafter, in 2009, the trustee was changed again from Charles Schwab to UBS Trust. H.R. at 124. The record further reflects that in August 2008, Kevin R. Ghassomian and Mark A. Loyd of Greenebaum Doll & McDonald PLLC were declared the trust's representatives by the Charles Schwab Bank, Trustee, through its senior trust officer, Shawn P. Wilson; notice of such declaration was provided to the commissioner with the trust's objections to the commissioner's audit changes to its 2006 income tax return, prior to the assessment and filing of the petition for reassessment. S.T. at 88-89. Thereafter, in May 2009, the trust was formally assessed for income tax deficiencies in 2006 and a petition for reassessment was filed in July 2009 by the stated representatives, purportedly on behalf of the Charles Schwab Bank, as trustee for the trust. S.T. at 7-45. While the record indicates that as of June 5, 2009, UBS Trust Company, N.A. had been appointed the successor trustee to the Charles Schwab Bank, contrary to the trustee listed on the petition for reassessment, the record, as a whole, also indicates that UBS, Mr. Legg as grantor/beneficiary of the trust, and counsel themselves, at all times, considered Greenebaum Doll & McDonald (and its successor Bingham Greenebaum Doll LLP) to be the authorized representative of the subject trust. As such, we consider the misstated name of the trustee on the petition for reassessment to be a typographical error and find that the petition for reassessment, notice of appeal, and all pleadings filed by the trust, both before and after, were properly filed by the trust's authorized representative. See Ex. 23; H.R. at 228. Accordingly, the motion to dismiss is hereby denied.

In reviewing appellant's appeal, we recognize the presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Kern v. Tracy* (1995), 72 Ohio St.3d 347; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213. Where no competent and probative evidence is presented to this board by the appellant to show that the Tax Commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Kern*, supra; *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Alcan*, supra.

The facts leading to the instant appeal are best summarized by the commissioner in his final determination, as follows:

"In November 2005, T. Ryan Legg *** transferred 65 shares of Total Quality Logistics, Inc., *** an Ohio S Corporation, to the petitioner [the subject trust]. The Trust sold the shares in February 2006, which created the gain at issue. The Trust was assessed when the Department determined that the gain at issue was a 'qualifying trust amount' under R.C. 5747.01(BB)(2), and thus subject to Ohio taxation. The petitioner

contends that the gain from the Trust's sale of stock in an Ohio S Corporation is not a qualifying trust amount, but instead is nonbusiness income allocable to the Trust's state of domicile." S.T. at 1.

Specifically, Mr. Legg and his friend, Ken Oaks, had formed and operated a trucking business, Total Quality Logistics, Inc. ("TQL"), an Ohio Subchapter S corporation. Mr. Legg and Mr. Oaks each owned 50%, i.e., 100 shares each, of the business. The owners decided to part ways, and around August or September 2005, Mr. Legg stopped participating in the business and going to the office. H.R. at 96. Mr. Legg tendered his resignation in November of 2005 and thereafter created the subject trust and funded it by transferring 65 of his shares of TQL stock into it. H.R. at 57, 60-61. In December 2005, Mr. Legg entered into a purchase agreement with Mr. Oaks for the sale of the 65 shares of TQL stock. Ex. F; H.R. at 75-76. The sale closed on February 3, 2006, and the trust sold the 65 shares of TQL stock to Mr. Oaks for \$18,525,000. Ex. F; H.R. at 115.

R.C. 5747.02(A) provides in pertinent part:

"For the purpose of providing revenue for the support of schools and local government functions, to provide relief to property taxpayers, to provide revenue for the general revenue fund, and to meet the expenses of administering the tax levied by this chapter, there is hereby levied on every individual, trust, and estate residing in or earning or receiving income in this state, *** and on every individual, trust, and estate otherwise having nexus with or in this state under the Constitution of the United States, an annual tax *** *measured in the case of trusts by modified Ohio taxable income* under division (D) of this section." (Emphasis added.)

"Modified Ohio taxable income" is considered "the sum of the amounts described in division (BB)(4)(a) to (c)" of R.C. 5747.01, i.e., R.C. 5747.01(BB)(4)(a)(i) and (ii), amounts attributable to the trust's modified business income, R.C. 5747.01(BB)(1) and the trust's qualifying investment income, R.C. 5747.012; R.C. 5747.01(BB)(4)(b), amounts attributable to the "qualifying trust amount," R.C. 5747.01(BB)(2); and R.C. 5747.01(BB)(4)(c)(i) and (ii), amounts attributable to "modified nonbusiness income," R.C. 5747.01(3). R.C. 5747.01(BB) goes on to provide that "[i]f the allocation and apportionment of a trust's income under divisions (BB)(4)(a) and (c) of this section do not fairly represent the modified Ohio taxable income of the trust in this state, the alternative methods described in division (C) of section 5747.21 of the Revised Code may be applied in the manner and to the same extent provided in that section."

Thus, to the extent specified, we must review the trust's objections to the commissioner's calculations used to determine the amount of modified Ohio taxable income. Appellant first contends that the requirements in R.C. 5747.01(BB)(2)(a) and (b) for a "qualifying trust amount" have not been met, but we disagree. R.C. 5747.01(BB)(2) provides:

"(2) 'Qualifying trust amount' of a trust means capital gains and losses from the sale, exchange, or other disposition of equity or ownership interests in, or debt obligations of, a qualifying investee to the extent included in the trust's Ohio taxable income, but only if the following requirements are satisfied:

"(a) The book value of the qualifying investee's physical assets in this

state and everywhere, as of the last day of the qualifying investee's fiscal or calendar year ending immediately prior to the date on which the trust recognizes the gain or loss, is available to the trust.

"(b) The requirements of section 5747.011 *** of the Revised Code are satisfied for the trust's taxable year in which the trust recognizes the gain or loss.

"Any gain or loss that is not a qualifying trust amount is modified business income, qualifying investment income, or modified nonbusiness income, as the case may be."

We find that regardless of the tenuous relationship between Mr. Legg and Mr. Oaks, the record establishes that the book value of the TQL assets was available to the trust, whether it was actually requested or not, as it was utilized by the trust's tax preparer; it was therefore "available," i.e., "a person [was] able to learn of" it. R.C. 5747.01(BB)(6). H.R. at 118, 133, 226, 241. See, also, *Alcan*, supra. Further, the commissioner represents that it is undisputed that the second requirement for a "qualifying trust amount" has been met, as the trust was a 32.5% interest holder in TQL, and therefore met the statutory 5% requirement set forth in R.C. 5747.01(BB)(2)(b). Commissioner brief at 13. The trust cites to this board's decision in *Random House, Inc. v. Tracy* (May 14, 1993), BTA No. 1991-A-1329, unreported, as support for its position that the book value was not "available" to the trust, as that term was defined therein. We find the *Random House* case inapposite herein, as it concerned a specific franchise tax statutory provision, namely, R.C. 5733.051(G), and the determination of whether the location of the payor's activities relating to patent and copyright royalties and technical assistance fees was available for purposes of allocating/apportioning such amounts to this state. As previously indicated, R.C. Chapter 5747 contains a definition of "available," and we need not look any further to conclude that the commissioner correctly determined that the information in question was "available."

Appellant next contends that the gain experienced by the trust from the sale of the stock constituted *nonbusiness* income, and, as such, was not taxable. Specifically, the trust argues that its "gain on the sale of TQL stock is nonbusiness income because the Trust did nothing more than hold and sell the TQL stock. *** These actions do not constitute a trade or business under the tax code. By definition, therefore, the TQL stock sale gain was nonbusiness income." Trust Brief at 11.

R.C. 5747.01(B) and (C) provide:

"(B) 'Business income' means income, including gain or loss, arising from transactions, activities, and sources in the regular course of a trade or business and includes income, gain, or loss from real property, tangible property, 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 operation. 'Business income' includes income, including gain or loss, from a partial or complete liquidation of a business ***."

"(C) 'Nonbusiness income' means all income other than business income and may include, but is not limited to, compensation,

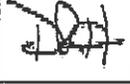
***capital gains ***."

Based upon the clear language of the foregoing statutory provisions, we conclude that any income arising out of a liquidation of a business, i.e., Mr. Legg's sale of his ownership interest in TQL, via his stock, constitutes "business income" in Ohio, as a gain from the partial liquidation of his interests in TQL.

Next, appellant contends that the subject trust is a non-resident trust, domiciled in Delaware, and therefore, pursuant to the version of the statute in effect at the time of the stock sale, was not liable for tax. While the trust provides that it "shall be construed and administered pursuant to the law of the State of Delaware," R.C. 5747.01(I)(3) provides that a "trust resides in this state for the trust's current taxable year to the extent *** that the trust consists directly or indirectly, in whole or in part, of assets, net of any related liabilities, that were transferred *** to the trust by *** (ii) [a] person who was domiciled in this state for the purposes of this chapter when the person *** transferred assets to an irrevocable trust, but only if at least one of the trust's qualifying beneficiaries is domiciled in this state for the purposes of this chapter during all or some portion of the trust's current taxable year[.]" The trust agreement was entered into on November 18, 2005 and the sale of the shares of stock out of the trust closed on February 3, 2006; Mr. Legg testified that he lived in Cincinnati from 2001 to mid-2006. Ex. 1; H.R. at 67-68, 71. Clearly, Mr. Legg's testimony established that he was domiciled in Ohio for at least a portion of the current tax year under consideration, i.e., 2006, and, domiciled in Ohio at both the time of transferring the stock into the trust and the time the stock was sold. Finally, the trust agreement clearly lists Mr. Legg as a beneficiary of such trust. Therefore, we find the subject trust should be taxed as a resident trust, pursuant to R.C. 5747.01(BB)(4)(c)(i).

With regard to appellant's constitutional claims, we make no finding in relation thereto. Although the Ohio Supreme Court has authorized this board to accept evidence on constitutional points, it has clearly stated that we have no jurisdiction to decide constitutional claims. *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229; *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 198.

Accordingly, we find the appellant has failed to meet its burden of demonstrating the error in the commissioner's findings. See *Kern*, supra; *Kroger*, supra; *Alcan*, supra. As such, this board finds that the Tax Commissioner's conclusions in this matter were reasonable and lawful. It is the decision and order of the Board of Tax Appeals that the final determination of the Tax Commissioner must be and hereby is affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Ms. Clements		
Mr. Harbarger		

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



Kathleen M. Crowley, Board Secretary