

IN THE SUPREME COURT OF OHIO

T. Ryan Legg Irrevocable Trust, UBS Trust Company, N.A., Trustee	:	Case No. 2015-0917
Appellant,	:	On Appeal from the Ohio Board of Tax Appeals
v.	:	
Joseph W. Testa, Tax Commissioner of Ohio	:	BTA Case No. 2013-A-1469
Appellee.	:	

RESPONSE AND REPLY BRIEF OF APPELLANT T. RYAN LEGG IRREVOCABLE
TRUST, UBS TRUST COMPANY, N.A., TRUSTEE

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SUMMARY

The Appellant/Cross-Appellee, T. Ryan Legg Irrevocable Trust (“Trust”) submits this Brief in response and reply to that of the Appellee/Cross-Appellant, Joseph W. Testa, Tax Commissioner of the State of Ohio (“Commissioner”).

The Trust was formed under Delaware law and has, since its inception, had Delaware trustees, starting with U.S. Trust Company of Delaware, N.A. (“US Trust”). The grantor, Thomas Ryan Legg (“Ryan” or “Mr. Legg”), was a West Virginia native who moved to Kentucky and then to Ohio for a few years, during which he helped start a business, Total Quality Logistics, Inc. (“TQL”). Mr. Legg transferred 65 of his 100 shares in TQL to the Trust in November 2005. The Trust had no qualifying beneficiaries in Ohio in 2006, and the Trust sold its TQL shares in February 2006. Mr. Legg left Ohio later in 2006, moving to North Carolina, where he still resides. The Trust has remained in Delaware throughout its existence, switching trustees to Charles Schwab Bank (“Schwab”), to UBS Trust Company, N.A. (“UBS Trust”), and to Reliance Trust Company of Delaware (“Reliance”), each residing in Delaware.

Herein, the Trust refutes the Commissioner’s arguments and maintains that the Trust’s capital gain was not a qualifying trust amount or modified business income; rather, the capital gain was nonbusiness income allocable outside of Ohio so that it should not be subject to Ohio income tax. Construction of Ohio’s statutes in this way is required by due process and by the clear precedent of this Court and that of the United States Supreme Court because to do otherwise would result in the prohibited extraction of an extraterritorial tax.

Moreover, this Court should follow the Board of Tax Appeals’ (“Board”) reading of the evidence in the record and reject the Commissioner’s attempt to dismiss the Trust’s appeal based

on the Commissioner's bare speculation that the Trust's counsel (Bingham Greenebaum Doll LLP, Mark Loyd, Kevin Ghassomian, and Bailey Roesse, collectively, the "BGD Firm") did not represent the trustee, UBS Trust. If this Court sides with the Commissioner on this point, however, then this Court must void the Commissioner's Assessment and Final Determination because the Commissioner issued both to US Trust, not UBS Trust, in violation of the Trust's due process rights.

COUNTERSTATEMENT OF FACTS

The Commissioner's Merit Brief mischaracterizes several key facts as they relate to the formation of the Trust and its administration, including the availability to the Trust of the book value and location of the physical assets of TQL. Furthermore, the Commissioner's depiction of the procedural history is filled with naked speculation that the BGD Firm lacked authority to file the Petition of Appeal, which flies in the face of the clear evidence in the record that the BGD Firm has acted properly throughout this appeal. The Trust corrects the following facts.

I. The Trust's CPA could not and did not share TQL's books and records with the Trust.

The Commissioner's brief asserts that "Mr. Michel, the Trust's tax preparer, actually had access to the TQL books and records when he prepared the Trust's 2006 Ohio income tax return * * *. Indeed, upon audit, he actually used the very books and records at issue * * *. Commissioner's Br. p. 7.¹ But, Mr. Michel did *not* have access to "TQL books and records" as

¹ Citations will appear in this brief as follows: the Hearing Transcript will be cited as "Hr'g Tr." and include both the page number and the name of the individual testifying. References to Exhibits introduced at the hearing will be cited as either "Appellant's Ex. ___" or "Appellee's Ex. ___" and will include a parenthetical identifying the Exhibit. The Statutory Transcript, certified to the Board by the Commissioner pursuant to R.C. 5717.02, will be cited as "S.T." and the page number. References to Appellant's Supplement will be cited as "Appellant's Supp. p. ___" and will include a parenthetical identifying the document.

“the Trust’s tax preparer.” Rather, Mr. Michel had access to TQL’s financial information *only* as TQL’s CPA. Hr’g Tr., Michel, pp. 226; T. Supp. p. 205. Mr. Michel used the information to prepare TQL’s, not the Trust’s, tax returns. Hr’g Tr., Michel, p. 225; T. Supp. p. 204.

Mr. Michel was also “unaware of any information supplied directly to the trustee by personnel at TQL.” *Id.* Mr. Michel’s testimony is entirely consistent with the Affidavit of US Trust, the Trustee at the time the Trust sold the TQL stock, which averred, “TQL did not provide the Trust with the book value and location of TQL’s physical assets in Ohio and elsewhere for the 2005 calendar year.” Appellant’s Opening Post-Hearing Brief to the Board at Tab 3; Appellant’s Supp. pp. 1-2 at ¶ 8.² Moreover, contrary to the Commissioner’s insinuations, Mr. Michel was “unaware of any process or procedure” to regularly provide or report TQL financial information to the Trust or the Trustee. Hr’g Tr., Michel, p. 225; T. Supp. p. 204.

As to the Ohio Forms IT 2023, Income Allocation and Apportionment, for 2004, 2005 and 2006 [S.T. pp. 90-95], Mr. Michel also testified that, “I did prepare these documents at the request of the Ohio Department of Taxation pursuant to the examination of the [T]rust.” Hr’g Tr., Michel, p. 227; T. Supp. p. 205. So, not only were these prepared during the Commissioner’s audit of the Trust, but they were only prepared at the Commissioner’s request made on June 30, 2008 to which Mr. Michel responded. S.T. 131 (“Please complete Form IT-2023 * * *.”). Mr.

References to the Commissioner’s Supplement will be cited as T. Supp. p. __. References to the Commissioner’s Brief will be cited as Commissioner’s Br. p. __. References to the Appellant’s brief will be cited as Appellant’s Br. p. __.

² The Commissioner did not respond to Appellant’s Opening Post-Hearing Brief and object to the introduction of the US Trust Affidavit. Accordingly, the Commissioner waived any objection to its introduction into the administrative record. *State v. Lee*, 2012 Ohio App. LEXIS 2500, *11-12 (Ohio App. Jun. 22, 2012).

Michel did not provide the information to the Trust or to the Trustee, he provided it directly *to the Commissioner* at his request. Hr’g Tr. at 227; T. Supp. p. 205; S.T. p. 131.

Any information Mr. Michel gleaned for the end of calendar year 2005 was obtained in his capacity as CPA for TQL, *not* the Trust. Mr. Michel was not a party to the Trust; rather, Mr. Michel provided tax services to the Trust as a CPA with an accounting firm. Hr’g Tr., Michel, pp. 218-19, 224. Mr. Michel’s name appears nowhere in the Trust Agreement. *See generally* Appellant’s Ex. 1 (Trust Agreement); T. Supp. pp. 409-433. Mr. Michel also provided accounting and tax services to TQL, but *Mr. Michel was not at liberty to communicate any of the information he obtained as TQL’s CPA to the Trust*. Hr’g Tr., Michel, p. 218.

II. The creation of the Trust and the Trust’s sale of TQL stock.

The Trust was created as part of Ryan’s estate planning, and witnesses Mr. Ghassomian, Esq. and Mr. Michel, CPA, confirmed this. (Hr’g Tr., Ghassomian, pp. 163, 213 (“Q. Do you know why Mr. Legg transferred those shares into a trust rather than just transferring them directly to Mr. Oaks? * * * The Witness: it was part of his estate planning.”; Hr’g Tr., Michel, p. 247; T. Supp. p. 210. (“Q. Do you know why he first transferred it to a trust and then to Mr. Oaks and not just directly from – he didn’t just directly transfer the shares from himself to Mr. Oaks? A. Yes, this was part of Mr. Legg’s estate tax planning process. This was an element thereof.”)). The Trust was formed to plan for Ryan and his family’s future. After the creation of the Trust, Ryan transferred 65 shares of TQL stock to the Trust and the Trust later sold them per the terms of the Trust Agreement and Purchase Agreement. *See* Appellant’s Ex. 1 (Trust

Agreement); T. Supp. pp. 409-433; Appellee's Ex. F (Purchase Agreement); T. Supp. pp. 297-408.³

III. Counterstatement of procedural posture.

The Commissioner's Cross-Appeal is based on his claim that the BGD Firm did not have authority from the relevant trustees to litigate this tax controversy. As the Board correctly found in its Order, the Board record reflects that the BGD Firm had proper authorization from the various trustees to represent the Trust ("the record, * * * 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."). Order, p. 2. The relevant facts are as follows:

- November 18, 2005 – US Trust began serving as Trustee of Trust formed by **BGD Firm** [Appellant's Ex. 1 (Trust Agreement); T. Supp. pp. 409-433].
- February 3, 2006 – TQL Stock was sold by Trust, represented by **BGD Firm**.
- October 7, 2007 – 2006 Trust Return filed, identifying US Trust as trustee [S.T. 101-128].
- January 28, 2008 – Schwab replaced US Trust as Trustee, after US Trust, a former subsidiary of Schwab, split off from its parent company [Hr'g Tr., Dovich, pp. 123-24; T. Supp. p. 179; Appellant's Supp. pp. 3-4 (Trustee Succession Documents)].
- May 19, 2008 – The Department initiated a review of the Trust [S.T. 132].
- July 29, 2008 – The Department directed audit changes to Grant Thornton (CPA) [S.T. 46-50].

³ The gain at issue did not "flow through" the Trust, as the Commissioner contends. Commissioner's Br. p. 6. This is a legal conclusion, not a factual statement.

- August 29, 2008 – Trust filed Protest with the Department, represented by **BGD Firm**, with Declaration of Representative and all corresponding documents identifying Schwab as Trustee [S.T. 59-89].
- May 26, 2009 – The Department issued Notice of Assessment to “T Ryan Legg Irrev Trust” at *US Trust’s address* [S.T. 44-45].
- June 5, 2009 – Trust’s Advisory Committee removed Schwab as Trustee and appointed UBS Trust as successor trustee [Hr’g Tr., Dovich, p. 124; T. Supp. p. 179; Appellant’s Supp. pp. 3-4 (Trustee Succession Documents)].
- July 20, 2009 – Trust filed Petition for Reassessment, represented by **BGD Firm** [S.T. 6-58].
- June 21, 2010 – The Department issued Notice of Hearing to BGD Firm [S.T. 5].
- March 29, 2013 – The Department issued Final Determination to “T. Ryan Legg Irrevocable Trust” at *US Trust’s address*, mailed to **BGD Firm** [S.T. 1-4].
- May 28, 2013 – Trust filed Notice of Appeal, represented by **BGD Firm**.
- October 25, 2013 – Discovery began in the summer of 2013 and was to end in the fall of 2013. Under the broadest interpretation of the Board’s rules, discovery was to be completed by no later than October 25, 2013. *Cf.* Ohio Administrative Code 5717-1-11 (effective February 1, 2009) to 5717-1-06 (effective October 9, 2013).⁴
- March 4, 2014 – Over 4 months after the close of discovery, the Commissioner issued his untimely First Set of Requests for Admissions, Interrogatories, and Production of

⁴ The Trust timely served requests for interrogatories, admissions and production of documents on July 26, 2013; however, the Commissioner disregarded the Board’s rules and submitted responses to the admissions a month after the close of discovery and responses to the remaining requests four months after the close of discovery.

Documents to the Trust, which were incredibly voluminous, in many cases asking for over 10 years' worth of documents.

- April 21, 2014 – Without waiving any objections to timeliness or otherwise, the Trust voluntarily responded to the Commissioner's discovery requests on this agreed upon date.
- April 21, 2014 – The Commissioner issued notices of depositions to the Trust's own counsel, as well as subpoenas to appear for the hearing set for May 21, 2014.
- April 25, 2014 – The Trust and Commissioner's respective counsel held a phone conference. The Trust's counsel tried in good faith to discuss the subpoena issue, affirmatively stating that the Trust's counsel represented the Trust and was authorized to litigate the Appeal; then Trust's counsel offered to provide a letter or an affidavit attesting to their representation. The Trust's counsel also offered to move the hearing so that the parties could resolve this and other issues to streamline the hearing. The Commissioner did not agree.
- May 19, 2014 – Less than 48 hours prior to the hearing, the Commissioner filed a 178-page Motion to Dismiss questioning the authorization of the BGD Firm to litigate the Board Appeal and explicitly outlining the voluminous evidence he demanded from the Trust regarding the "authorization" issue. *See* Commissioner's Motion to Dismiss, pp. 27-28.
- May 20, 2014 – The Trust submitted a letter to the Commissioner from UBS Trust that fully addressed the questions raised in his Motion to Dismiss regarding the "authorization" issue.
- May 21, 2014 – Board Hearing on Trust's Appeal, represented by **BGD Firm**.

- June 2, 2014 – UBS Trust submitted an Affidavit to the Board via **BGD Firm** counsel affirming the May 20, 2014 letter in support of the Trust’s Response to the Motion to Dismiss.
- May 5, 2015 – The Board issued its Decision and Order, finding that the BGD Firm had the appropriate authorization to litigate the appeal [Order, p. 2].
- June 3, 2015 – Notice of Appeal made to the Supreme Court of Ohio by the Trust, represented by **BGD Firm**.
- August 31, 2015 – UBS Trust sold to Reliance Financial Corporation, at which time UBS Trust was merged into Reliance. Reliance serves as the current Trustee represented by **BGD Firm**.

As the above timeline makes clear, the Trust – through the BGD Firm – has consistently, timely and properly, disputed the tax at issue at every procedural level. And, in addition to creating the Trust for the Legg Family in November 2005, the BGD Firm has continuously represented the Trust (through its various successor trustees) since that time.

ARGUMENT

I. The Trust’s sale of corporate stock in TQL is not taxable to Ohio as a qualifying trust amount because the book value and location of TQL’s assets were not “available” within the meaning of R.C. 5747.01(BB)(2)(a) to the Trust.

The capital gain from the Trust’s sale of TQL stock was not a qualifying trust amount under R.C. 5747.01(BB)(2)(a) because the “book value of the qualifying investee’s physical assets in [Ohio] 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” was *not* “available” to the Trust. The Commissioner, however, argues that the book value and location of TQL’s physical assets were in fact “available” to the Trust because: [A] such information is

available to “any shareholder” under R.C. 1701.37, citing *Alcan Aluminum v. Limbach*, 42 Ohio St.3d 121 (1989) [Commissioner’s Br. pp. 13-18]; [B] Mr. Michel “used the records upon audit” [Commissioner’s Br. pp. 18-21]; and [C] because the Trust had “contractual rights” to view the books and records under the Trust Agreement and Purchase Agreement [Commissioner’s Br. pp. 18-21]. As discussed below, all three arguments fail.

First, “available” means more than “ascertainable” and *Alcan* requires such information to be *normally* available to a shareholder “such as Alcan.” Second, Mr. Michel’s use of TQL’s book value and asset location information which he obtained as TQL’s CPA and which he supplied directly to the Commissioner at the Commissioner’s request over two years after the sale does not equate to TQL’s records being normally available to the Trust and certainly did not make them “available” within the statutory time frame. Third, the Trust Agreement to which TQL is not a party and the Purchase Agreement provide no rights to the Trust to access TQL’s book value and asset location information; in fact, the Purchase Agreement forbids the Trust from accessing TQL’s records.⁵

- A. *Alcan* supports the Trust’s position that TQL’s book value and asset location information was not “available” to the Trust because the Trust was not “just like” Alcan and TQL would not and did not normally supply such information to the Trust.**

The Commissioner’s claim that “available” means only that “a person is able to learn of the information” misapplies and misstates this Court’s holding in *Alcan* to the instant circumstances. To apprehend the *Alcan* holding as to the meaning of “available”, it is first important to understand the circumstances therein:

⁵ Also, should this Court *not* find for the Trust, the tax assessed as a qualifying trust amount should be corrected because it was mathematically overstated.

[Alcan] is a * * * Corporation with its principal place of business located in Cleveland, Ohio. [Alcan] is an aluminum fabricator, producing various kinds of aluminum building products.

On December 2, 1968, [Alcan] purchased 50% of the stock of F.A. Kohler Company (Kohler), a distributor of aluminum building products. [Alcan] sold the Kohler stock on February 20, 1980.

Alcan Aluminum Corp. v. Limbach, No. 85-C-197 (BTA 1987), *rev'd, Alcan, supra*. So, Alcan was a business, specifically, a fabricator of aluminum building products, that for over 20 years owned 50% of Kohler, a distributor of such products.

This Court determined the meaning of “available” in the context of the facts in *Alcan*:

Therefore, the contextual meaning of “available” is that the shareholder must be able to ascertain or learn of the location of the physical assets of the payor * * * .

Furthermore, a fifty-percent shareholder *such as Alcan* would be expected to be able to learn of the location of the physical assets at least until the date of sale. Under R.C. 1701.37(C), any shareholder has the right to examine the corporation's books and records of account * * * .

* * * Information regarding the location of Kohler's physical assets would *normally* be available to Alcan * * * .

Alcan, 42 Ohio St.3d at 123-24 (emphasis supplied). Thus, the shareholder must be one “such as Alcan” and such information must “normally be available” to that shareholder, especially given that the information is not simply generic financial information but is specifically the location of the physical assets of the payor and the book value thereof. *Id.* “Available” does not simply mean “ascertainable” such that “*any* shareholder” can ascertain the relevant information, as the Commissioner contends. Commissioner’s Br. p. 14. Nor does the *Alcan* opinion support such a reading. More is required; otherwise, this Court’s opinion in *Alcan* would not be given its full force and effect.

Here, the Trust is *not* a shareholder “just like” Alcan. Rather, Alcan owned 50% of Kohler for over 20 years, and the two businesses were a manufacturer and a distributor,

respectively, of the same products. In contrast, the Trust owned for a short time only 35% of TQL, was not engaged in any business, and was not engaged in a vertically integrated business with TQL. So, plainly, the Trust was *not* “a fifty-percent shareholder such as Alcan [which] would be expected to be able to learn of the location of the physical assets * * *.” *Alcan*, 42 Ohio St.3d at 123.

Moreover, TQL’s book value and asset location information would not *normally* be available to the Trust, as Kohler’s was to Alcan. *Id.* Obviously, Alcan and Kohler were both in the aluminum products business as a manufacturer and distributor, respectively, and had a close business relationship, but the Trust and TQL had no similar relationship. Further, Mr. Michel, the Trust’s CPA and also TQL’s CPA, testified that he was “unaware of any process or procedure” by which TQL regularly provided such information to the Trust. Hr’g Tr., Michel, p. 225; T. Supp. p. 204. So, unlike in *Alcan*, the Board’s record here supports the fact that TQL would not and did not normally supply the Trust with book value and asset location information like Kohler would have been expected to normally supply to Alcan.

As this Court construed the meaning of “available” in *Alcan* by reference to, for example, dictionaries and context [*Alcan*, 42 Ohio St.3d at 123], so must this Court here as “available” in R.C. 5747.01(BB)(2)(a) is not defined and thus ambiguous here as well, contrary to the Commissioner’s assertions on page 15 of his brief. Therefore, this Court must look to the underlying legislative intent as laid out in the Trust’s first brief, *i.e.*, presumed to *not* be a qualifying trust amount. Appellant’s Br. pp. 20-22.

Further, any ambiguities in R.C. 5747.01(BB)(2)(a) are thus subject to the long-standing rule that “[s]trict construction of taxing statutes is required, and any doubt must be resolved in favor of the citizen upon whom or the property upon which the burden is sought to be imposed.”

Gulf Oil Corp. v. Kosydar, 44 Ohio St. 208, 218 (1975) (citing multiple prior cases). Notably, *Gulf Oil* construed a definition of an amount to be taxed which was then subject to an apportionment formula, just like the task now before this Court. *UBS Financial Servs. v. Levin*, 119 Ohio St.3d 286, 2008-Ohio-3821, the sole case the Commissioner cites (as support that the *Gulf Oil* rule does not apply here) was an outlier, cited to no prior cases, and was never cited to again by this Court. In contrast, this Court recently cited *Gulf Oil* in support of its holding in *Saturday v. Cleveland Bd. of Rev.*, 142 Ohio St.3d 528, 534, 2015-Ohio-1625. Notably, as Cleveland did in *Saturday*, the Commissioner here seeks to tax extraterritorial value, *i.e.*, *more than* Ohio's "fair share," the Commissioner's arguments to the contrary notwithstanding. *See Allied-Signal, Inc. v. Div. of Taxation*, 504 U.S. 768 (1992). In fact, Ohio should *not* tax the gain as it is *not* a qualifying trust amount, *not* modified business income, and *not* modified nonbusiness income allocable to Ohio. *See id.*

The Commissioner next argues that the Trust's reliance on *Random House, Inc. v. Tracy*, No. 91-A-1329 (BTA 1993) is misplaced. Commissioner's Br. p. 17. The Commissioner also claims that *Random House* merely creates additional support for the notion that "available" means simply "ascertainable." *Id. Alcan*, however, confirms that more than bare ownership of stock for the relevant book value and asset location information must be "available", rather it must be available "in the course of business," *i.e.*, "normally" available as *Alcan* requires. *See Random House, supra; see also Allied-Signal, Inc. v. Div. of Taxation*, 504 U.S. 768 (1992) (holding that a unitary relationship must be present for a state to tax one out-of-state entity's sale of stock in another in-state entity) (discussed in detail *infra*).

The Commissioner also argues that *Random House* is distinguishable from the case here because any shareholder always has the relevant information available to them under R.C.

1701.37(C). Commissioner's Br. p. 17. The Commissioner's position is not supported by the text of *Alcan*, is unreasonable, and for all practical purposes amends R.C. 5747.01(BB)(2)(a) to eliminate the limitation of its application. If *any* shareholder *always* has access to the book value and location of the physical assets of a company in which it owned and sold stock (as the Commissioner claims), why would the General Assembly need to stipulate that a capital gain could only be a qualifying trust amount if such information was "available" prior to a particular date? For R.C. 5747.01(BB)(2)(a) to be logically and constitutionally construed, there must be instances where such specific information is not available to a shareholder. *Gulf Oil Corp.*, 44 Ohio St.2d at 218 ("It is the duty of the courts, if the language of a statute fairly permits or unless restrained by the clear language thereof, to so construe a statute as to avoid unreasonable or absurd consequences."). *See also Allied-Signal, supra* (discussed *infra*). This Court identified such instances in *Alcan*, *i.e.*, when such information is not available to a shareholder such as *Alcan* and when such information is not normally available; an example of that is in *Random House* where that taxpayer presented evidence that the royalty payors did not provide such information in the course of business. Another example is here, where the Trust presented evidence that such information was not normally provided to the Trust, which does not operate a business [*City Bank Farmers Trust Co. v. Helvering*, 313 U.S. 121, 126 n. 3 (1941)], so that the instant capital gain is not a qualifying trust amount taxable to Ohio.

B. The Trust could not normally and did not actually access TQL’s books and records.

1. Mr. Michel did not and could not share with the Trust the book value and asset location information that he received from TQL as TQL’s CPA.

The Board’s finding that the books and records of TQL were “utilized by the trust’s tax preparer” (John Michel) and were thus available to the Trust (Order, p. 4), is unreasonable, unlawful, and must be overturned because it ignores the crucial facts that Mr. Michel could not and did not share any information he received as TQL’s CPA with the Trust. *Gallenstein v. Testa*, 138 Ohio St.3d 240, 243, 2014-Ohio-98; R.C. 5717.04 (regarding authority of appellate court to reverse a Board decision if it is unreasonable or unlawful). Expanding on this erroneous finding, the Commissioner claims that the “BTA relied on a strong evidentiary record in holding that the Trust held a legal right to TQL’s books and records,” however, such a finding appears nowhere in the Board’s Order. *See* Commissioner’s Br. p. 18; *see generally* Order.

In fact, the Commissioner takes great liberties with both the Order and the Board record. For example, the Commissioner’s claims that Mr. Michel “actually had access to TQL’s books and records when he prepared the Trust’s tax return for 2006” (Commissioner’s Br. p. 18) are *not true or supported by the evidence*. Mr. Michel was in fact legally forbidden to share confidential information he obtained as CPA of TQL with another client, the Trust, and he did not share it. *See Wagenheim v. Alexander Grant & Company*, 19 Ohio App.3d 7, 10-11 (1983) (describing obligation of a CPA to keep client information confidential). Taken to its logical extreme, the Commissioner’s argument is that any information Mr. Michel has obtained from his many clients over the course of his 30-year plus career would be considered “available” to the Trust. The notion is absurd.

Moreover, Mr. Michel is not the Trust. Pursuant to R.C. 5808.1, trusts are administered by their trustee, and thus for information to be “available” to a trust, it must be available to the trustee, not the trust’s CPA. As noted above, Mr. Michel was not permitted to share any information he received from TQL about TQL with the Trustee, and in fact he testified that he did not do so. Hr’g Tr., Michel, p. 226; T. Supp. p. 205 (“Q. As a CPA for Total Quality Logistics, did you have access to the book value and location of TQL’s physical assets in your capacity as Total Quality’s Logistics’ CPA? A. Yes * * *. Q. Did you pass that information along to either Ryan Legg or to U.S. Trust? A. No.”). Mr. Michel was not the Trustee of the Trust. *See* Appellant’s Ex. 1 (Trust Agreement); T. Supp. p. 409 (appointing US Trust as trustee). Mr. Michel had no role whatsoever in administering the Trust. Therefore, Mr. Michel’s access to the books and records of TQL as TQL’s CPA cannot be imputed to the Trust, and that information was thus not “available” to the Trust through Mr. Michel.

2. The information Mr. Michel subsequently gathered and provided directly to the Department during the audit in response to the Department’s request was not “available” to the Trust and fell outside of the statutorily-required deadline in R.C. 5747.01(BB)(2)(a).

The Commissioner’s claim that “Mr. Michel used TQL’s books and records to provide the Commissioner with Ohio Form IT-2023 for the Trust’s 2006 Ohio tax return” which the Department requested during audit (Commissioner’s Br. p. 18) completely ignores the deadline required by R.C. 5747.01(BB)(2)(a), that is, that the information must be available “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.” The Trust sold the TQL stock in February 2006. Appellee’s Ex. F (Purchase Agreement); T. Supp. pp. 297-408. Therefore, under R.C. 5747.01(BB)(2)(a), the information would have had to have been available to the Trust by

December 31, 2005. The Department audited the Trust in July of 2008. S.T. 129-130. The information that Mr. Michel provided to the Department at its request during audit was accessed two and a half years after the statutorily-required date of December 31, 2005. Regardless of whether this information was provided “on behalf of the Trust” as the Commissioner claims (Commissioner’s Br. p. 19), it was not “available” to the Trust prior to the statutory deadline required to make it a qualifying trust amount.⁶

3. The Affidavit of US Trust was part of the record before the Board.

The Commissioner next claims that “the Trust * * * impermissibly attempted to add documents to the evidentiary record on appeal to this Court,” when it submitted the US Trust Affidavit (Appellant’s Supp. p. 1-2) as part of the briefing after the Board hearing. *Id.* The Commissioner misconstrues the law. An appellate court is only restricted in considering documents attached to an appellate brief which was not filed with the trial court. *See Belardo v. Belardo*, 187 Ohio App.3d 9, 16, 2010-Ohio-1758 (“An exhibit attached to an appellate brief *and not filed with the trial court* is not part of the record.” (emphasis added)). In *Belardo*, the appellant had attempted to attach a document to his appellate brief but the “docket [did] not reflect that such a document was ever filed with the [trial] court.” *Id.* In fact, the Commissioner added a document, the affidavit of David Ebersole, to the record in the same way:

Q: Dave, are you familiar with the Motion to Dismiss that was filed in this case?

⁶ The statutory text of R.C. 5747.01(BB)(2)(a) at issue here as to when information is “available” is different from that in R.C. 5747.01(BB)(6). In the former, the books and records are required to be available to the taxpayer by the calendar year end immediately preceding the date of sale of the stock; in the latter, “available” is defined to mean “such that a person is able to learn of the information by the due date plus extensions, if any, for filing the return for the taxable year in which the trust recognizes the gain or loss.” So, one statute requires that information be available by the end of the year prior to the stock sale, while the other requires it to be available by the date the taxpayer’s return is due. Plainly stated, the timing matters, as a matter of statutory law.

A: Yes, I filed it.

Q: And as one of the exhibits to that Motion and Memorandum in Support is an affidavit from you?

A. Yes.

Q: Ok.

MR. HUBBARD: Because the affidavit has already been filed with the Board, we could make it a separate exhibit or if the Court – or not.

THE EXAMINER: It's already in the record.

MR. HUBBARD: It's in the record of this case.

Hr'g Tr., Ebersole, pp. 38-39,158. Here, like Mr. Ebersole's affidavit that he attached to the Commissioner's Motion to Dismiss, the US Trust Affidavit was part of the Board record – it was attached to the Trust's Opening Merit Brief, timely filed with the Board on July 3, 2014, and would have been considered in the Board's ruling. It is properly part of the record.⁷

The Commissioner further complains that the Affidavit's sworn statements are false and that it was not subject to cross-examination. Commissioner's Br. pp. 19-20. The Commissioner, however, elected not to depose a representative of US Trust after the hearing despite the Trust's offer to keep the Board record open so that the Commissioner could do so.⁸ Consequently, an affidavit was provided instead. And, the Commissioner does not identify one shred of proof that the Affidavit's sworn statements are false:

⁷ The Commissioner's proffered case law is factually distinguishable and has no bearing on the facts and circumstances of this case. *RNG Properties, Ltd. v. Summit Cty. Bd. of Revision*, 140 Ohio St.3d 455, 460, 2014-Ohio-4036 (2014), merely holds that documents *not presented* to the Board cannot be added to the supplement and considered by the appellate court. In this case, the Trust filed the Affidavit with the Board, it is clearly part of the record.

⁸ Counsel for the Commissioner's decision not to depose US Trust occurred off the record after the conclusion of the hearing.

- The Affidavit is based on personal knowledge – the affiant has “the authority to make the statements herein on U.S. Trust’s behalf and I have personal knowledge of this matter.” Appellant’s Supp. pp. 1-2 (Affidavit of US Trust), ¶ 1.
- The Affidavit is limited to the time period in which US Trust served as Trustee, November 18, 2005 through December 28, 2007, and does not encompass events that took place in 2008 (the year the Board found that Mr. Michel – not the Trust – accessed TQL’s books and records during an audit). *Id.* ¶ 2.
- The Affidavit confirms that TQL did not provide US Trust with its books and records during the time that US Trust was Trustee. *Id.* ¶ 8. This is consistent with the testimony of all four of the Trust’s witnesses – each confirmed that they were unaware of the Trust being provided with the books and records. Hr’g Tr., Ryan, pp. 61-62; T. Supp. pp. 163-64; Hr’g Tr., Dovich, p. 123; T. Supp. p. 179; Hr’g Tr., Ghassomian, p. 209; T. Supp. p. 200; Hr’g Tr., Michel, pp. 225-26; T. Supp. pp. 204-205.

The Affidavit is a legal document made from personal knowledge and was sworn under oath; the Board accepted it as competent evidence, and this Court should defer to that finding.

Finally, the Commissioner claims that if true, the Affidavit is problematic because “[i]f, in fact, U.S. Trust Co. did not receive the information, it was because they failed to ask for the information, not because the location of TQL’s physical assets were ‘unavailable.’” Commissioner’s Br. p. 20. However, the Commissioner’s rationale is not in accord with *Alcan* or *Random House*, which provide that the books and records must be provided in the normal course of business. The Trust was not a 50% shareholder of TQL and did not have a close business relationship with TQL such that it would be expected to be able to learn the location of the

company's physical assets.

4. Mr. Legg did not and could not provide the book value and asset location of TQL to the Trust.

Lastly, the Commissioner's claim that "Mr. Legg could have even told his advisors of the physical location of TQL's physical assets in Ohio and everywhere because he had personal knowledge" (Commissioner's Br. p. 20) directly conflicts with Mr. Legg's testimony at the hearing. Mr. Legg testified that he stopped participating in TQL's affairs as early as August 2005 and stopped receiving books and records around that time. Hr'g Tr., Ryan, pp. 60-61, 95-96; T. Supp. pp. 163, 172. Mr. Legg also did not have access to the books and records as a 50% shareholder of TQL (Commissioner's Br. p. 20), because the shares of TQL stock were transferred to the Trust in November of 2005. *See* Appellant's Ex. 1 (Trust Agreement); T. Supp. pp. 409-433. R.C. 5747.01(BB)(2)(a) requires that the *taxpayer* be able to learn of the information, and the taxpayer here is the Trust. Mr. Legg is not the Trust, so any knowledge he had prior to transferring the stock to the Trust is irrelevant to this inquiry.

C. The Trust was contractually forbidden from obtaining the books and records under the Purchase Agreement.

Although the Commissioner is correct that the Trust Agreement provides the Trust with the right to access the books and records of a business in which it was invested, it cannot do so unless it has concomitant rights from the particular business investment to access those books and records. Commissioner's Br. p. 21; Appellant's Ex. 1 (Trust Agreement), ¶ 4.1(a)(2); T. Supp. p. 426. TQL (the Trust's business investment) is not a party to the Trust Agreement; thus, the Trust Agreement does not provide any authorization from TQL to the Trust to access TQL's records.

Moreover, contrary to the Commissioner's assertions, the Purchase Agreement for the

sale of the TQL stock expressly forbade the Trust from accessing TQL's books and records. Appellant's Ex. F (Purchase Agreement), § 2.1; T. Supp. p. 298.⁹ The Purchase Agreement has one very narrow exception, which allowed the Trust to gain access if a "monetization event" occurred (*i.e.*, if TQL, not a shareholder, sold off a substantial portion of its stock). *Id.*; Hr'g Tr., Michel, pp. 248-249; T. Supp. p. 210. The Trust's CPA, Mr. Michel, affirmatively stated that a monetization event never occurred and, therefore, the Trust had no right to inspect TQL's books and records under Section 2.5 of the Purchase Agreement as this Section was not "operative under the facts at hand." *Id.*, p. 250; T. Supp. p. 211. Even if the Trust's sale of the stock is considered a monetization event giving rise to inspection rights [though it did not], that sale did not take place until February 2006, more than a month after the date of December 31, 2005 that is statutorily required under R.C. 5747.01(BB)(2)(a) to make the sale a qualifying trust amount. *See* Appellee's Ex. F (Purchase Agreement); T. Supp. p. 408.

Because the Purchase Agreement did not allow the Trust to access TQL's book value and location of the physical assets by December 31, 2005, this information was not available to the Trust, and thus, the capital gain is not a qualifying trust amount.¹⁰

⁹ R.C. 1701.37(C) is inapplicable as the Purchase Agreement clearly limits that right in Section 2.1. In fact, even if the Trustee had statutory rights to inspect the book value and asset location of TQL, it could not have done so without breaching the Purchase Agreement.

¹⁰ Assuming *arguendo* that the gain was a qualifying trust amount, as the Commissioner contends, R.C. 5747.01(BB)(4)(b) requires the Commissioner to apportion such amount using a fraction of the book value of the physical assets of TQL, the qualifying investee, as of December 31, 2005 in Ohio to TQL's total assets. Instead, the Commissioner claims he used a "0.918, or roughly 92% apportionment ratio based upon the three-year average of TQL's property, payroll and sales factors" because the Trust could not provide such information to the Commissioner or to the Board. The Trust did not have this information because TQL did not and would not provide the Trust with it. Thus, as discussed *supra*, such amount cannot be a qualifying trust amount.

II. The income from the Trust's sale of TQL stock did not result from the liquidation of a business and is not business income; it is nonbusiness income that cannot be apportionable to Ohio pursuant to R.C. 5747.01(C).

A. The Board erred in determining that the capital gain assessed to the Trust was *both* a qualifying trust amount *and* modified business income – in fact, it is neither.

1. Under the plain language of R.C. 5747.01(BB)(2), it is a statutory impossibility for income to be both a qualifying trust amount and modified business income.

Contrary to the Commissioner's assertions, the Board erred when it determined the Trust's capital gain to be both a qualifying trust amount and modified business income because this is a legal impossibility under Ohio's statutory scheme.¹¹ Order, pp. 4-5. The Commissioner attempts to rewrite the Order by arguing that the Board did not determine the capital gain to be both, but rather, "simply provided *alternative* bases for its central holding that Ohio law requires the taxation of the Trust's gain." Commissioner's Br. p. 26 (emphasis added). The Board's Order reads otherwise.

Indeed, noticeably absent from the Order is any language such as "in the alternative" or "instead of a qualifying trust amount, the capital gain could be considered modified business income." The Board's Order holds on its face that the capital gain is *both* a qualifying trust

Nonetheless, the Commissioner thus concedes that under its position, the Trust's tax should be computed using an apportionment fraction of no more than 0.918. Accordingly, even if this Court holds for the Commissioner, this Court should direct that the tax should not be \$1,275,547 as computed in the Assessment and Final Determination; rather, it should be \$1,170,734.29 computed as follows – \$18,614,242, the capital gain arising from the TQL stock sale [Commissioner's Br. p. 6] multiplied by 0.918 [Commissioner's Br. p. 24], so, \$17,087,874 in Ohio Taxable Income at the 2006 tax rates in R.C. 5747.02(A)(3) (*i.e.*, \$10,537.35 plus 6.87% of excess over \$200,000) is Ohio tax of \$1,170,734.29. The Final Determination as it currently stands contains a math error.

¹¹ The gain is neither, of course, as explained by the Trust in Sections I and II. It is nonbusiness income allocated outside of Ohio as explained in Section III.

amount *and* modified business income. Order, pp. 4-5. However, this holding is a statutory impossibility under the plain language of R.C. 5747.01(BB)(2), which defines “qualifying trust amount” as “[a]ny 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.” (Emphasis added.) See *Portage Cty Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 116 (2006), 2006-Ohio-954, ¶ 52 (“Following a primary rule of statutory construction, we must apply a statute as it is written when its meaning is unambiguous and definite * * *. An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language, and a court cannot simply ignore or add words.”) (internal citations omitted). Thus, the Trust’s income is either a qualifying trust amount *or* one of the other categories listed in R.C. 5747.01(BB)(2), but it cannot be both, so this finding must be reversed.¹²

2. The Trust’s capital gain from the sale of TQL stock did not arise from the liquidation of a business and thus, is not modified business income under R.C. 5747.01(BB)(1).

The Commissioner’s arguments in support of the Board’s erroneous finding that the Trust’s capital gain from the sale of TQL stock was modified business income likewise fail. Order, p. 5. First, the Commissioner is incorrect that the Trust’s sale of stock arose out of a “partial or complete liquidation” of TQL under R.C. 5747.01(B). Commissioner’s Br. p. 26. The plain meaning of “liquidation” of a business is “the winding up of a corporation, partnership, or other business enterprise upon dissolution* * *.” *Ballentine’s Law Dictionary*, 3rd Ed. (2010). The Commissioner does not cite any authority to the contrary for his incorrect interpretation that a “liquidation” of a corporation occurs any time a shareholder sells stock in that corporation. Under the rules of statutory construction, “any item left undefined by statute is to be accorded its

¹² Instead, the Trust asserts that the gain is nonbusiness income allocable outside of Ohio.

common, everyday meaning.” *State ex rel. Celebrezze v. Board of Cnty. Com’rs of Allen Cnty*, 32 Ohio St.3d 24, 27 (1987) (internal quotations and citations omitted). Here, under the plain meaning of “liquidation,” TQL was not dissolved and is in fact still in existence today. *See* Appellant’s Ex. 3 (TQL Corporate Documents).

Second, the Commissioner’s claim that *Kemppel v. Zaino*, 91 Ohio St.3d 420 (1994) was superseded by statute misses the point.¹³ Commissioner’s Br. p. 27. *Kemppel* and post-*Kemppel* legislation dealt specifically with a corporation selling off its assets – not a shareholder selling stock as is the case here. *See Kemppel*, Ohio St.3d at 420-23. Importantly, none of the post-*Kemppel* legislative changes hold that a shareholder’s sale of stock is a liquidation of a business.

Third, the Commissioner’s attempts to rely upon the General Assembly’s “express[] provi[sion] that the sale of stock is business income” in R.C. 5747.21 and R.C. 5747.212, do not pass muster. Commissioner’s Br. p. 27. Both R.C. 5747.21 and R.C. 5747.212 “appl[y] solely for the purpose of computing the credit allowed under division (A) of section 5747.05 of the Revised Code and computing income taxable in this state under Division (D) of section 5747.08 of the Revised Code.” R.C. 5747.212(A); R.C. 5747.21(A). Neither R.C. 5747.05 nor R.C. 5747.08 are in issue as to this point.

In addition, R.C. 5747.212 does not provide *anywhere* in its text that the sale of stock is *business* income, which is the relevant determination here. And, R.C. 5747.21 merely provides that “business income” is to be apportioned, but it does not specify in particular that the sale of stock by a shareholder is business income. Indeed, it cannot be apportioned. *See Allied-Signal*, 504 U.S. at 777 (“[A] state may not tax value earned outside its borders * * *.”). The fact that an apportionment formula exists for sales of stock by a shareholder does not mean that such income

¹³ In fact, the Trust acknowledged this in its opening brief. Appellant’s Br. p. 28.

is business income under R.C. 5747.01(B), as the Commissioner would mislead this Court to believe.

Because TQL was not partially or completely liquidated, the Board's finding that the capital gain was modified business income is unlawful and must be reversed.

B. The Board erred in failing to determine that the capital gain is modified nonbusiness income not allocable to and not taxable by Ohio.

1. R.C. 5747.01(BB)(4)(c)(ii) cannot be retroactively applied to the sale transaction here.

The Trust agrees with the Commissioner that the capital gain is modified nonbusiness income; however, the modified nonbusiness income is not allocable to Ohio and subject to tax because R.C. 5747.01(BB)(4)(c)(ii) was not in effect for the instant transaction that took place prior to March 30, 2006 and its retroactive application to the completed sale transaction would be unconstitutional.¹⁴

The General Assembly enacted R.C. 5747.01(BB)(4)(c)(ii) as an amendment on March 30, 2006. Am. Sub. H.B. 530, 126th G.A. (2002), Appx. 199-201. The transaction at issue here took place on February 3, 2006, nearly two months prior to the amendment. *See Appellee's Ex. F (Purchase Agreement); T. Supp. p. 408.* Specifically, the General Assembly added the underlined text:

With respect to a trust or portion of a trust that is *not a resident* as ascertained in accordance with division (I)(3)(d) of this section, the amount of its modified

¹⁴ The Commissioner argues that the Trust has abandoned its argument that R.C. 5747.01(BB)(4)(c)(ii) is unconstitutionally retroactive. Commissioner's Br. p. 29. However, the Board made no finding that the capital gain was taxable under R.C. 5747.01(BB)(4)(c)(ii). *See generally* Order. As such, it would have been impossible for the Trust to specify an error related to this argument. S.Ct.Prac.R. Rule 10.01(A)(2) ("The notice of appeal shall set forth the claimed errors"). Instead, it was proper for the Trust to wait until the Commissioner raised an argument that the capital gain is taxable under R.C. 5747.01(BB)(4)(c)(ii) and respond accordingly, which it now does.

nonbusiness income satisfying the descriptions in divisions (B)(2) to (5) of section 5747.20¹⁵ of the Revised Code, except as otherwise provided in division (BB)(4)(c)(ii) of this section. With respect to a trust or portion of a trust that is not a resident as ascertained in accordance with division (I)(3)(d) of this section, the trust's portion of modified nonbusiness income recognized from the sale, exchange, or other disposition of a debt interest in or equity interest in a section 5747.212 entity, as defined in section 5747.212 of the Revised Code, without regard to division (A) of that section, shall not be allocated to this state in accordance with section 5747.20 of the Revised Code but shall be apportioned to this state in accordance with division (B) of section 5747.212 of the Revised Code without regard to division (A) of that section.

R.C. 5747.01(BB)(4)(c)(ii) (underlined text added by 2006 Ohio Laws, H. 530, §§ 101.01 & 821.06(A), effective Mar. 30, 2006).

The General Assembly did not evidence any intent to retroactively change the rules for or to otherwise tax a transaction that had already occurred prior to the effective date of the change. The effective date provisions of the 126th General Assembly (which enacted it), indicate in Section 821.06 that the amendments passed in 2006 went “into immediate effect when this act [became] law.” *See* H.B. 530. Indeed, even if there had been some intent to retroactively change the law (and there was not), the Ohio Constitution prohibits this: “The general assembly shall have no power to pass retroactive laws * * *.” Ohio Const., Art. 2, § 28. This Court has reemphasized this mandate, expressly holding that the General Assembly may not “change[]

¹⁵ Although the Commissioner claims that the statutes upon which the Trust relies for its argument that the capital gain is nonbusiness income, R.C. 5747.01(C) and R.C. 5747.20(B)(2)(c), only apply to individuals and estates, Commissioner’s Br. p. 29, Ohio statutory law provides otherwise. R.C. 5747.01(C) defines “nonbusiness income” and is not limited in its scope of application to trusts. In fact, the Commissioner uses R.C. 5747.01(B), which defines “business income” and is the counterpart to R.C. 5747.01(C), in its own brief for its argument that the Trust’s capital gain is business income. Commissioner’s Br. p. 26. To argue now that those definitions are not applied to trusts defies reason. Similarly, R.C. 5747.20 “applies solely for the purposes of * * * computing income taxable in this state under division (D) of section 5747.08 of the Revised Code.” R.C. 5747.08 applies to trusts, in fact containing specific instructions for return filings. R.C. 5747.08(C) (“Returns or notices required of an estate or a trust shall be made and filed by the fiduciary of the estate or trust.”).

existing rules of [tax] law to its benefit, and appl[y] those rules to events and transactions already completed under a different set of rules.” *Lakengren, Inc. v. Kosydar*, 44 Ohio St.2d 199, 204 (1975). Because the “protection applies to tax statutes as to others, and prohibits the state from imposing new or higher taxes upon past transactions,” the Commissioner’s position runs afoul of the Ohio Constitution, the Ohio General Assembly’s intent, and this Court’s precedent. *Id.* “[A] transaction which was completed in the past, such as a sale...is wholly in the past...” *Id.* The tax rules that applied to such a transaction cannot be changed. Therefore, the Commissioner simply may not retroactively apply new tax laws to the Trust for a sale that took place before that law was passed.

Although Ohio courts have held that a law is not retroactive solely because it relies upon antecedent facts, *United Eng. & Foundry Co. v. Bowers*, 171 Ohio St. 279, 282 (1960), the Commissioner argues that the Court may retroactively apply the new text in R.C. 5747.01(BB)(4)(c)(ii) where “antecedent facts” change the tax liability. Commissioner’s Br. p. 30. More specifically, the Commissioner claims that Ohio law permits antecedent facts to be applied to a tax law, as it is in the corporate franchise tax context, where a prior year’s net worth is used to determine the current tax year liability for a taxpayer. *Id.* (citing to R.C. 5733.01; R.C. 5733.05; R.C. 5733.06; *Bank One Dayton, N.A. v. Limbach*, 50 Ohio St.2d 163, 167 (1990); *East Ohio Gas Co. v. Limbach*, 26 Ohio St.3d 63, 67 (1986)). But antecedent facts are not antecedent events, which are at play here, and the Commissioner confuses the two.

Each and every case cited by the Commissioner deals with antecedent facts (*e.g.*, inventory from a past year) to determine present tax liability – not one of the cases deals with an antecedent transaction or event, the relevant issue here. In *J.M. Smucker, LLC v. Levin*, this Court held that in determining tax liability, the tax commissioner could take into account holding

inventory for a prior year to value inventory for the current tax year. 113 Ohio St.3d 337, 2007-Ohio-3192. The amount of inventory is a fact, not an event or transaction. In *United Eng. & Foundry Co. v. Bowers*, the tax commissioner was relying upon values of personal property from a prior tax year. 171 Ohio St. 279, 282 (1960). Values of personal property are facts, not an event or transaction. *Bank One Dayton, N.A. v. Limbach*, 50 Ohio St.3d 163, 167 (1990) and *East Ohio Gas Co. v. Limbach*, 26 Ohio St. 3d 63, 67 (1986) each deal with the corporate franchise tax, which requires using income earned during the previous year to calculate the tax owed. An amount of income from a previous year is a fact, not an event or transaction. *Schoenrade v. Tracy*, 74 Ohio St. 3d 200, 203 (1995) allowed the tax commissioner to use facts obtained in prior year's tax returns in relation to a statute of limitations issue; again, as in the other cases cited by the Commissioner, *Schoenrade* uses antecedent facts to determine a tax, not an event or transaction.

All of these cases deal with facts (numbers, values, income) and are fundamentally different from this case, where the law applies to an *event*, and one that took place before that law was passed. Ohio, in fact, expressly forbids such retroactive taxation, holding that the General Assembly may not “change[] existing rules of law to its benefit, and appl[y] those rules to *events and transactions* already completed under a different set of rules.” *Lakengren*, 44 Ohio St.2d at 204 (emphasis added).¹⁶ Under the holding in *Lakengren*, for example, Ohio could not create a new sales tax and retroactively apply it to a purchase completed in the prior year, *i.e.*, a completed transaction. Those kinds of retroactive taxes are those covered by the Ohio

¹⁶ For these same reasons, the Commissioner's argument that “the Ohio tax return at issue was not even filed until October 4, 2007, over 18 months after the transaction and the law change” (Commissioner's Br. p. 31) fails. The time period in which a taxpayer files his or her return has no bearing on the constitutionality of the laws at issue.

Constitution and are prohibited because, for example, they create uncertainty in the marketplace. Taxpayers would not be able to make decisions about when to buy or sell property if they could not be certain about when, how, and how much they would be taxed upon it. The same holds true for the amended statute here. The Trust sold the stock in February 2006, not March 2006. The sale of TQL stock is not an antecedent *fact*; it is an antecedent *transaction*. R.C. 5747.01(BB)(4)(c)(ii) cannot be retroactively applied in this case, and the capital gain is not taxable to Ohio.

2. The Trust is not a resident of Ohio, and therefore its income is not allocable to Ohio.

The gain is also not allocable to Ohio as nonbusiness income, as the Commissioner contends. Commissioner's Br. p. 25. Because the Trust had no qualifying beneficiaries domiciled in Ohio during the relevant tax year, the Trust, a Delaware trust, is not a resident trust and, therefore, the Trust's gain is not allocable to Ohio.

For a trust to be considered a resident of Ohio, its assets must have been transferred to it by "[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 * * **." R.C. 5747.01(I)(3)&(a)(ii) (emphasis supplied). Even if Mr. Legg was a domiciliary of Ohio during 2005 when he transferred the stock to the Trust,¹⁷ the second part of R.C. 5747.01(I)(3)&(a)(ii) must still be satisfied for the Trust to be considered a

¹⁷ The Commissioner focuses on Mr. Legg's domicile in 2006, but the TQL stock was transferred to the Trust in 2005. *See* Appellant's Ex. 1 (Trust Agreement); T. Supp. p. 433). The applicable year for an inquiry under the first part of R.C. 5747.01(I)(3) is the year in which the assets were transferred ("A person who was domiciled in this state for the purposes of this chapter *when the person directly or indirectly transferred the assets* to an irrevocable trust* * *") (emphasis added).

resident. That section is not satisfied for 2006, the tax year of the sale, however, because the Trust had no qualifying beneficiaries in 2006; Mr. Legg was not a qualifying beneficiary in 2006, let alone an Ohio domiciliary. *See* Appellant's Ex. 1 (Trust Agreement), ¶ 2.1(a); T. Supp. p. 409.

A "qualifying potential beneficiary" has the same meaning as a "potential current beneficiary" as that term is defined in section 1361(e)(2) of the Internal Revenue Code * * *." R.C. 5747.01(I)(c). Pursuant to section 1361(e)(2) of the Internal Revenue Code of 1986, as amended ("Code"), a "potential current beneficiary" is "with respect to any period, any person *who at any time during such period*, is entitled to, or at the discretion of any person *may receive*, a distribution from the principal or income of the trust" (emphasis added). Here, in 2006, the Trust had no potential current beneficiaries under the Code domiciled in Ohio (as Mr. Legg was not one, nor was his wife, nor his family), and thus, no qualifying beneficiaries as defined by R.C. 5747.01(I)(3) were domiciled in Ohio.

The Trust did not have any qualifying beneficiaries in 2006 because the Agreement specifies that the Trust was to make no distributions during the "Initial Period" spanning November 2005 through January 2, 2007. Appellant's Ex. 1 (Trust Agreement), ¶ 2.1(a); T. Supp. p. 409 ("During the period beginning with the date of this Trust Agreement and ending on January 3, 2007 (the 'Initial Period'), the trustee shall accumulate the net income of the Family Trust and add it to the principal."). Consequently, it was impossible for Mr. Legg to receive any distributions from the Trust in 2006, and as such, he was not a beneficiary. Hr'g Tr., Ryan, p. 63; T. Supp. p. 164; Appellant's Supp. p. 2, ¶ 9 (Affidavit of US Trust) ("The Trust, with the exception of paying duly incurred Trust expenses, made no distributions during the 'Initial Period,' i.e., from November 14, 2005 through January 3, 2007, consistent with Section 2.1(a)(1)

of the Trust Agreement which provided that no one was entitled to or could receive any distribution from the Trust during the Initial Period.”). Since the Agreement did not allow for distributions in 2006 to Ohio residents or otherwise, the Trust had no potential current beneficiary in Ohio and the Trust cannot be deemed an Ohio resident trust for the tax year 2006 under R.C. 5747.01(I)(3). Instead, the Trust was a nonresident trust under R.C. 5747.01(J). The capital gain is thus not allocable 100% to Ohio under R.C. 5747.01(BB)(4)(c)(i).

III. The Due Process Clause forbids Ohio’s taxation of the Trust because the Trust, i.e., the taxpayer (not TQL), had no nexus with Ohio.

As explained in the Trust’s brief (Appellant’s Br. pp. 34-37), the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the existence of nexus, *i.e.*, “some definite link, some minimum connection, between a state and a person, property or transaction it seeks to tax.” *Allied-Signal, Inc. v. Div. of Taxation*, 504 U.S. 768, 777 (1992) (internal quotations omitted). The Trust does not have this requisite nexus with Ohio, and the Commissioner’s brief does nothing to refute this fact.

The Commissioner improperly relies on *Agley v. Tracy*, 87 Ohio St.3d 265 (1999), to claim that “[t]his Court has already held that Ohio may constitutionally tax income generated against a backdrop of the ‘benefits, protections, and opportunities’ that Ohio provides.” Commissioner’s Br. p. 34. But the holding in *Agley* is not applicable to this case. *Agley* dealt with the taxation of nonresidents’ distributive share of income from S-corporations that conducted business in Ohio. *See Agley*, 87 Ohio St.3d at 266. In *Agley*, the income at issue “flowed through” from the S-corporations to the shareholders based on the way an S-corporation is taxed. *Id.* The income at issue in *Agley* was generated by the S-corporations, and the nonresidents were taxed on their distributive share of that income. *Id.* Likewise, the taxpayer in

Int'l Harvester Co. v. Wisconsin Dep't of Taxation, another case relied upon by the Commissioner, also deals with a state's taxation of distributive shares of income. 322 U.S. 435 (1944). These cases are in sharp contrast to the situation here, where a nonresident, the Trust, sold stock in an S-corporation, TQL. See generally Appellee's Ex. F (Purchase Agreement); T. Supp. p. 408. The income was generated by the Trust's one-time sale of stock, *i.e.*, a single transaction, not by TQL's business activities in Ohio or those of the Trust (of which there were none). The shareholders in *Agley* had nexus with Ohio because they received income directly from business activities conducted in Ohio as a result of the "benefits, protections, and opportunities" provided by the state. See *Agley*, 87 Ohio St.3d at 267 ("[I]t is evident that the S corporations have utilized the protections and benefits of Ohio by carrying on business here. This income was passed through to the [shareholders] as personal income. Thus, the [shareholders], through their S corporations, have availed themselves of Ohio's benefits, protections, and opportunities by earning income in Ohio through their respective S corporations."). *Agley* does not provide that income from a nonresident taxpayer's one-time sale of stock in an S-corporation doing business in Ohio gives rise to nexus between Ohio and the nonresident taxpayer, and thus does not apply to the instant case, where the Trust, a nonresident taxpayer, sold stock in TQL, an S-corporation.

The Commissioner contends that the Trust and Ohio are "inextricably intertwined" such that the Trust has nexus with Ohio. Commissioner's Br. p. 35. The Commissioner argues that "the Trust's gain is generated from the value that TQL created through its extensive activity in Ohio." *Id.* In actuality, the Trust itself recognized the capital gain from its sale of TQL stock. This is not a situation like that in *Agley*, where the income was in reality the income of the S-corporation itself that merely flowed through to the shareholders. *Agley*, 87 Ohio St.3d at 267.

The Commissioner's argument that TQL has "millions of dollars in property, payroll, and sales in Ohio" (Commissioner's Br. p. 35) is irrelevant here; the appropriate inquiry under Due Process clause analysis is whether *the taxpayer, i.e., the Trust*, has nexus with Ohio, not whether an entity in which it holds stock has nexus with the state. *See Allied Signal*, 504 U.S. at 777 ("The principle that a State may not tax value earned outside its borders rests on the fundamental requirement of both the Due Process and Commerce Clauses that there be "some definite link, some minimum connection, *between a state and the person * * * it seeks to tax.*") (internal quotations and citations omitted).

The Commissioner's argument that Mr. Legg was an Ohio resident in 2006 thus giving rise to nexus with Ohio is similarly unavailing. Commissioner's Br. p. 35. It is a trust's residency that determines the extent to which a trust is taxable in Ohio, not the residency of the grantor. *See R.C. 5747.02(A)*. The taxpayer itself must have nexus with the state; contacts of another party are irrelevant. *See Agle*, 87 Ohio St.3d at 265 ("In other words, a state must have minimum contacts *with the entity in order to tax it.*") (emphasis added). Any contact between Mr. Legg and Ohio does not give rise to Ohio nexus for the Trust.

This Court recently determined that an out-of-state taxpayer could not be taxed within the state when it had no contacts with Ohio. *Saturday v. Cleveland Bd. of Rev.*, 142 Ohio St.3d 528, 2015-Ohio-3886 (2015). In *Saturday*, Cleveland sought to tax a professional football player for compensation he earned when his team played a game in Cleveland. The player was actually injured, and remained home in Indianapolis during the game, thus never entering Cleveland at all. The Court held that "[q]uite simply, Saturday's absence from Cleveland and his performance of duties elsewhere on the same day raise a strong suggestion that the imposition of Cleveland tax would constitute extraterritorial taxation." *Id.* ¶ 21. Like the taxpayer in *Saturday*, who was

not in Cleveland, the Trust was not in Ohio, and like Saturday's out-of-state wages, Ohio cannot tax the Trust's out-of-state capital gain.

As explained at length in the Trust's opening brief, this case bears a striking resemblance to *Allied-Signal*, where the United States Supreme Court struck down New Jersey's attempt to tax an out-of-state entity that sold stock in a New Jersey corporation. 504 U.S. 768 (1992). This Court should follow the precedents of *Allied-Signal* and *Saturday* that uphold long-standing prohibitions on extraterritorial taxes and reverse the Commissioner's Final Determination as unconstitutional.

IV. The Equal Protection Clauses of the United States and Ohio Constitution forbid taxation of the Trust because such action would treat taxpayers who are alike in all relevant respects differently under the law.

As the Commissioner admits in his brief, the Equal Protection Clauses of the United States and Ohio Constitutions "keep[] governmental decisionmakers from treating differently persons who are in all relevant respects alike." Commissioner's Br. p. 36; *Park Corp. v. Brook Park*, 102 Ohio St.3d 166, 2004-Ohio-2237, ¶ 19 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)). Contrary to the Commissioner's argument on page 37 of his brief, however, nonresident trusts who own corporate stock belong to the same class, and thus must not be treated differently under the Equal Protection Clauses based on whether they own stock in an S-corporation or a C-corporation. In *Boothe v. Fin. Corp. v. Lindley*, 6 Ohio St.3d 247, 249 (1983), which the Commissioner cannot and does not distinguish from the instant circumstances, this Court struck down a tax law that treated members of the same class, lessors who owned equipment for lease, differently based on whether they were manufacturers or non-manufacturers.

The fact that the taxable status of a corporation is subject to an election has no bearing here. Commissioner's Br. p. 37. The Commissioner attempts to justify disparate treatment of the

taxpayer shareholders, using the differences between the corporations which they own but not identifying any difference in the taxpayer shareholders themselves, all of whom are in the same class of nonresident trusts. Moreover, the gain at issue did not flow up from TQL; rather, the gain resulted from the Trust's sale of TQL corporate stock; the difference in federal taxation of income of S- and C-corporations owned by nonresident trusts is wholly unrelated to the gain and therefore does not justify disparate treatment of nonresident trusts. Therefore, there is an equal protection violation, and this Court must strike down the application of R.C. 5747.01(BB)(4)(c) to the Trust.

The Commissioner finally argues that the disparate treatment of the Trust is justified under a rational basis inquiry because Ohio has an interest in "raising and stabilizing tax revenue." Commissioner's Br. p. 38. But this does not change the fact that although "[s]tates have great discretion in laying taxes * * * taxing power is subject to the Equal Protection Clause." *Boothe*, 6 Ohio St.3d at 249. Ohio must still adhere to Equal Protection Clause mandates if it wants to tax the Trust. Raising revenue may be a legitimate interest of the state, but this stated rationale does not account for the difference in treatment. Thus, there is no rational basis for Ohio to tax a nonresident trust who owns S-corporation stock differently than those who own C-corporation stock.

- V. At all relevant times, the BGD Firm had authority from the appropriate trustee to litigate this appeal, and UBS has also ratified all actions of the BGD Firm.**
- A. This court should affirm the Board's ruling 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, the BGD Firm.**

This Court is tasked with reviewing the Board's Order "to determine whether it is reasonable and lawful." *Gallenstein v. Testa*, 138 Ohio St.3d 240, 243 (2014). In conducting this

review, great deference is given to the Board's factual determinations and this Court must affirm them "if the record contains reliable and probative support for the[Board's] determinations." *Id.* The Court should not reverse the Board's decision unless it "is based on an incorrect legal conclusion." *Id.*

Here, the record contains reliable and probative support for the Board's determination that the BGD Firm had authority to file and handle the Board Appeal as confirmed by UBS Trust in its May 20, 2015 Letter (Exhibit 23) submitted into evidence by the Trust during the hearing:

[T]he record, as a whole, * * * 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 * * * 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. 228.

Order, p. 2. The Commissioner offered no proof to the contrary during or after the hearing and his attempt here to overturn the Board's well-reasoned and lawful finding merely presents the same speculation, nothing more, as set forth below.

Moreover, the Board did not find that the incorrect trustee listed on the Petition for Reassessment *was* a "typographical error" as the Commissioner contends¹⁸; rather, the Board

¹⁸ The Commissioner's proffered law, *Cousino Constr. Co. v. Wilkins*, 108 Ohio St.3d 90, 2006-Ohio-162, is factually distinguishable. Commissioner's Br. p. 39. There, *Cousino* failed to include R.C. 5739.02(B)(13) in its notice of appeal and therefore did not preserve the issue. *Id.* ¶ 4. Although the Board concluded that *Cousino's* citation to R.C. 5739.02(B)(1) was a typographical error and that it instead intended to cite to R.C. 5739.02(B)(13), this Court disagreed. *Id.* ¶ 40. Because "[t]he text surrounding the three references to R.C. 5739.02(B)(1) in the notice d[id] not support" the substance of R.C. 5739.02(B)(13) and the taxpayer "fail[ed] to mention R.C. 5739.02(B)(13) in its two posthearing briefs filed with the BTA," the Court dismissed that portion of the appeal. *Id.* Here, the Board record contains reliable and probative support that the Trust has consistently been the petitioner in the tax controversy and subsequent appeals, maintained consistent arguments throughout the proceedings, and the BGD Firm has consistently represented the Trust (via the successive

merely determined that it would consider it as such, *i.e.*, a harmless error, which is not grounds for dismissal. Commissioner's Br. p. 9; Order, p. 2. Accordingly, this Court should affirm the Board's decision.

B. The Commissioner does not have standing to challenge the BGD Firm's "authority" to file the Petition for Reassessment and the Board Appeal on behalf of the Trust.

Notwithstanding any "typographical error[s]," this Court may deny the Commissioner's appeal for the simple reason that the Commissioner does not have standing to challenge the authority of the BGD Firm to represent the Trust. As this Board has previously held: "[a]n opposing party has no standing to question the authority of an attorney to initiate legal action on behalf of his or her client." *Donauschwaben's German-American Cultural Ctr., Inc. v. Cuyahoga Cty. Bd. of Revision*, Case Nos. 97-M-1309, 97-M-1340, pp. 5-6 (Ohio BTA Aug. 11, 2000) (citing *Bd. of Edn. v. Ohio Edn. Assoc.*, 235 N.E.2d 538, 540 (Ohio St. 1967) ("The court knows of no rule of law or any cases which hold that the opposite party could question the authority of an attorney to bring suit on behalf of his client; and in the opinion of the court, that branch of the motion is without merit")). For example, in *Board of Education*, the Ohio court found no merit to defendant's argument that the action was "filed * * * without a legal meeting of the Board of Education * * * authorizing suit to be filed." *Bd. of Edn.*, 235 N.E.2d at 540. Indeed, only a Board of Education member could challenge its authority to file the action – not an opposing party. *Id.*

trustees) during those matters. And, the Board agreed. Order, p. 2. This is not a case where the Trust or the BGD Firm has ever waived from challenging the tax assessment or failed to cite a particular statutory basis for doing so. Thus, *Cousino* has no bearing on this matter and should be disregarded.

Likewise, the Commissioner does not have standing to and thus cannot challenge the authority of the trustees (whether it be the current trustee or prior trustees) to act on behalf of the Trust. R.C. § 5801, *et seq.* Assuming *arguendo* that the law permitted such a challenge, as discussed in Section V.D, *infra*, the Commissioner has not identified one shred of credible, unrefuted, and admissible evidence that the UBS Trustee failed to authorize or ratify the Petition or the Board Appeal. Commissioner’s Br. pp. 4, 40, 44, 45.

C. The Trust is the proper party to the proceedings and has always acted through its Trustee.

1. The Board has the authority to allow amendments to filings to substitute the real party in interest.

Despite the fact that the Commissioner cited to Ohio Civ. R. 17(A) as support for its motion to dismiss, he now claims that the Trust cannot likewise use Rule 17 to cure procedural defects, if any. However, the Commissioner’s argument that the “BTA does not have equitable jurisdiction,” and therefore Ohio Civ. R. 17 is not binding on the Board is simply wrong. Commissioner’s Br. p. 46. The Commissioner cannot have it both ways – Rule 17 either applies or it does not, and it is impermissible for the Commissioner to attempt to use Rule 17 as both a sword and a shield.

In fact, the Board has held that “[w]hile there is no statutory provision that permits an applicant to amend an application for rule review [to substitute the real party in interest] once the application is filed, there is also no prohibition against doing so either.” *Ohio Apt. Ass’n v. Tax Commissioner*, No. 2006-A-861, p. 5 (Ohio BTA Feb. 1, 2008). And, where the amendment is “simply a ‘clarification’” the “principles of administrative efficiency and economy” may dictate allowance of the amendment. *Id.* Indeed, this Court recently held that “the substitution of [the] proper party is typically permitted when there has been a misnomer in the pleadings and the

substitution caused no prejudice.” *James Navratil Development Co. v. Medina Cty. Bd. of Rev.*, 139 Ohio St.3d 183, 183, 2014-Ohio-1931. Thus, regardless of whether the Board cites to Ohio Civ. R. 17 or some other rule of law, the Board has the authority to decide whether to allow parties to amend their filings to substitute the proper parties.

2. Rule 17(A) permits ratification by UBS Trust.

Relying on *Ohio Central Railroad System v. Mason Law Firm Co.*, 182 Ohio App.3d 814, 2009-Ohio-3238, the Commissioner further argues that substitution of the real party in interest under Rule 17(a) by ratification is inapplicable “[w]hen determination of the correct party to bring the action was not difficult and when no excusable mistake was made.” Commissioner’s Br. p. 41. The Commissioner is mixing apples with oranges – the Trust’s ratification argument has nothing to do with substituting a party under Rule 17(a) because the Trust is the proper party to the proceedings and has always been named as such. *See* R.C. 5747.13 and R.C. 5717.02.

In addition, *Ohio Central Railroad* is readily distinguishable. There, the insured (the railroad) – but importantly, not the insurer – sued Mason Law Firm for malpractice claims, seeking recovery of legal fees it paid to the firm (in the form of the insured’s deductible), as well as those paid by the insurer to the firm. *Id.* at 817, 820. On summary judgment, the court dismissed the insured’s claims for damages above the deductible, ultimately finding that the insurer was the real party in interest for those damages and the insurer could not save the claims by ratification under Rule 17(a). *Id.* at 826, 828. The court opined that ratification under Rule 17(A) is only available “as an alternative to dismissal for failure to name the real party in interest,” meaning because the insured had a right to sue in its own name to recover the deductible, the court had no authority to outright dismiss the case for failure to name the real

party in interest and therefore no authority to allow ratification by the insurer. *Id.* at 826. Ratification was also improper based upon the insured's failure to demonstrate that it made "an honest mistake" in omitting the real party in interest from the complaint and that "it was difficult to ascertain the identity of the proper party." *Id.* at 828.

In contrast, here, there was no mistake – the named petitioner has always been the Trust, who is the real party in interest because the party assessed must be the one to bring the appeal. *See* R.C. 5747.13 and R.C. 5717.02. The trustee administering the Trust may have changed over the years, but the named petitioner has not and the Trust has always acted through its trustee.¹⁹ In addition, Rule 17(A) would permit ratification by the UBS Trustee of the Board Appeal because the Trust *alone* has the right to appeal the tax assessment and, as such, dismissal would be inappropriate.

D. The Trustee's Letter and Affidavit are probative, authenticated, and admissible evidence.

Contrary to the Commissioner's arguments, the Letter from the Trustee submitted during the hearing (Appellant's Exhibit 23) and the Trustee's Affidavit attached to the Trust's Response to the Commissioner's Motion to Dismiss – both of which discuss the BGD Firm's authorization to litigate this Appeal – are probative, authenticated, and admissible evidence as recognized by the Board. *Cf.* Commissioner's Br. pp. 43-45 and Order, p. 2. In reviewing the Board's decision as to the admission of evidence, this Court "may not reverse the [decision] absent an abuse of discretion," meaning the "decision was unreasonable, arbitrary or unconscionable and not merely

¹⁹ *Schofield v. Cleveland Trust Co.*, 149 Ohio St. 133, 144 (1948), cited by the Commissioner, is inapposite. Commissioner's Br. pp. 39-40. There, the Court held that the statute of limitations for wrongful diversion of a trust's funds did not begin to run until the incident was discovered by the trustee, who was the proper person to file an action to recoup the funds. *Schofield*, 149 Ohio St. at 144.

an error of law or judgment.” *Toledo v. Jenkins*, 2015 WL 1510849, *4 (Ohio Ct. App. Mar. 31, 2015) (citing *State v. Easter*, 75 Ohio App.3d 22, 26 (1991) and *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983)).

Here, the Board’s reliance upon the Letter was reasonable and not arbitrary or unconscionable. The Trustee’s Letter, dated May 20, 2014 (the “Letter”), is in response to the Commissioner’s last minute Motion to Dismiss (filed less than 48 hours prior to the hearing) regarding the BGD Firm’s authorization to file the Petition for Reassessment, Notice of Appeal, and to otherwise litigate the Board Appeal. The letter states:

Prior to UBSTC’s [UBS] appointment as Trustee of the Trust, UBSTC was made aware of the dispute following the audit of the Trust’s 2006 Ohio income tax return the “Tax Controversy”). Charles Schwab Bank had authorized Greenebaum Doll & McDonald PLLC (n/k/a BGD) to challenge the Ohio tax assessment and otherwise handle the Tax Controversy. UBSTC raised no objection to the continued litigation of the Tax Controversy. UBSTC ratified actions taken by BGD counsel for the Trust in connection with the Tax Controversy since UBSTC’s appointment as successor Trustee. UBSTC has also formally engaged BGD to pursue the Tax Controversy, including the Appeal.

Appellant’s Exhibit 23. The Letter is signed by two Senior Trust Officers and Directors of UBS, Seane Baylor and Richard Kemp. *Id.* The Affidavit is also signed by Seane Baylor and is substantially similar to the Letter. The Commissioner’s argument fails for at least seven reasons.

First, the Commissioner waived its right to question the probative value of the Letter by failing to maintain its objection to the Letter as an Exhibit at the end of the hearing. *State v. Lee*, 2012 Ohio App. LEXIS 2500, *11-12, 2012-Ohio-2856 (“when a party fails to renew an objection at the time exhibits are admitted into evidence, that party waives the ability to raise the admission on appeal absent plan error”). At the close of the hearing, the Hearing Officer confirmed that the sole objection of the Commissioner’s counsel was to Exhibit 16:

THE EXAMINER [denotes the Hearing Officer]: * * * Any other objections, Mr. Ebersole?

MR. EBERSOLE [Commissioner's counsel]: No.

THE EXAMINER: Okay. Then I'll receive the remaining Exhibits 1 through 15 and 17 through 23 with no objection * * * .

Thereupon, Appellant's Exhibits 1 through 15 and 17 through 23 were received into evidence.

Hr'g Tr., p. 271; T. Supp. p. 216. Thus, the Commissioner waived its right to challenge the admission of Exhibit 23.

Second, as to the Commissioner's argument that the Letter and Affidavit are not based upon personal knowledge (Commissioner's Br. pp. 43), in absence of a specific statement, "it is well settled that personal knowledge may be inferred from the contents of an affidavit." *Bank of America, N.A. v. Merlo*, 2013 Ohio App. LEXIS 5476, *13; 2013-Ohio-5266. Moreover, "it is not necessary that the [corporate] witness * * * have firsthand knowledge of the transaction" at issue. *Id.* at *14. Rather, Ohio "only require[s] that the [corporate] witness be sufficiently familiar with the operation of the business and with the circumstances of the record's preparation and maintenance that he can reasonably testify, on the basis of this knowledge, that the record is what it purports to be and that it was made in the ordinary course of business." *Id.* Here, it is clear from the contents of the Letter and the Affidavit that both Ms. Baylor and Mr. Kemp were personally aware of the facts and circumstances contained therein, and were further authorized by UBS Trust to make these statements as its corporate designees.

Third, the Letter was properly authenticated. The Board is "not bound by strict rules of evidence applied in court," including the authentication requirements of Ohio Evid. R. 901. *Day Lay Egg Farm v. Union Cty. Bd. of Revisions*, 577 N.E.2d 84, 87 (Ohio App. 1989); *Equitable Life Assurance Soc'y v. Bd. of Ed'n*, 1993 Ohio App. LEXIS 4213, *6-7 (Ohio App. Aug. 30,

1993) (upholding the Board’s reliance on an unauthenticated document because it was “reasonable and lawful” and the opposing party did not “present [any] evidence that the [document wa]s not what it purport[ed] to be). Here, the Letter and Affidavit are “reasonable and lawful” because Ms. Baylor and Mr. Kemp were the UBS Senior Trust Officers that oversaw the Trust’s administration, and they submitted the Letter and Affidavit in response to the Commissioner’s last-minute dismissal motion challenging the BGD Firm’s authorization to litigate the Board Appeal. Moreover, the Commissioner did not and could not present any evidence that the Letter and Affidavit were not what they purported to be, and expressly admitted to having no knowledge that the Letter was false (the same can be said for the Affidavit because its contents are substantially similar to the Letter).²⁰ Hr’g Tr., Ebersole, pp. 41-47; T. Supp. pp. 158-60.

Fourth, as to the Commissioner’s argument that the Letter and Affidavit are not probative evidence (Commissioner’s Br. pp. 4, 43), the Ohio Supreme Court defines “probative evidence” as “[relevant] evidence that tends to prove the issue in question.” *Our Place, Inc. v. Ohio Liquor*

²⁰ Alternatively, if the Board instead requires authentication, a document is properly authenticated as long as the “proponent of a document produce[s] ‘evidence *sufficient to support a finding* that the matter in question’ is what the proponent claims it to be.” *Easter*, 598 N.E.2d at 847 (citing Ohio Evid. R. 901(A)) (emphasis in original). More importantly, “[t]his low threshold standard does not require *conclusive* proof of authenticity, but only sufficient foundational evidence for the trier of fact to conclude that the document is what its proponent claims it to be.” *Id.* at 847-48 (citing 1 Weissenberger, Ohio Evidence (1991) 4-5, Section 901.2 and Giannelli, Ohio Evidence Manual (1990), Section 901.01) (emphasis in original). For example, “personal knowledge of a document’s receipt,” as well as “firsthand knowledge of the execution, preparation, or custody of the writing” are each sufficient foundation to authenticate a document. *Id.* at 848. Here, the Trust meets this low threshold standard because the Letter was addressed to, sent to, and received by the BGD Firm in response to the Commissioner’s Motion to Dismiss. Appellant’s Exhibit 23. Ms. Baylor’s Affidavit, which attaches the Letter, is entirely consistent with the Letter and further authenticates the Letter as it can be inferred from the Affidavit that Ms. Baylor has personal knowledge and that she helped prepare, execute, and send the Letter to the BGD Firm in response to the Commissioner’s Motion to Dismiss. *Id.*

Control Comm., 589 N.E.2d 1303, 1305 (Ohio 1992); Ohio Evid. R. 401 (defining “relevant evidence” “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”). Here, both the Letter and Affidavit are relevant, probative evidence. Each clearly sets forth the facts that the Trust has been overseen by multiple trustees, and that the Trustee has authorized and ratified the BGD Firm’s representation throughout the tax controversy, including the Board Appeal.

Fifth, the Commissioner’s “mere speculation” as to the Letter’s authenticity is insufficient to create a genuine issue as to its admissibility. *Easter*, 598 N.E.2d at 847. Commissioner’s Br. pp. 42, 44, 45. Neither Mr. Hubbard nor Mr. Ebersole (the Commissioner’s counsel) have even a scintilla of personal knowledge with respect to: whether the BGD Firm actually put words in the Trustee’s mouth [indeed, it did not]; have any evidence based upon personal knowledge that the Trustee did not authorize or ratify the Petition for Reassessment or Notice of Appeal [indeed, it did]; and, as Mr. Ebersole admitted on the witness stand, no personal knowledge that the Letter (Appellant’s Exhibit 23) is false [indeed, it is a true letter]. Hr’g Tr., Ebersole, pp. 41-47; T. Supp. pp. 158-60.²¹

Sixth, the Commissioner attempts to thwart the Board’s consideration of the Letter and Affidavit by claiming that the Commissioner did not have an opportunity to cross-examine the Trustee regarding the contents of the Letter or Affidavit because the Trustee did not attend the hearing. Commissioner’s Br. p. 44. The Commissioner, however, “is not permitted to take

²¹ Nor does the Commissioner cite to any evidentiary support when it accuses the BGD Firm of lying: “Mr. Loyd made the idea that TQL’s books and records were not ‘available’ from whole cloth and there is no reason to think, let alone evidence showing, that the trustee authorized such arguments.” Commissioner’s Br. p. 40. Such accusation are unfounded.

advantage of an error that he himself invited or induced * * * .” *Lester v. Leuck*, 142 Ohio St. 91, 92 (1943). Here, had the Commissioner followed the Board’s rules and issued discovery before the October 25, 2013 deadline, the Commissioner would have had more than ample time to gather relevant information and issue subpoenas well before the hearing date. Instead, the Commissioner created an emergency by waiting until the last minute to issue discovery requests. In fact, the Board Appeal had nothing to do with UBS Trust as all relevant substantive events took place in 2005 and 2006, before UBS Trust was the trustee. The law does not allow the Commissioner to gain an unfair advantage using the Commissioner’s self-created last-minute emergency. *Id.*

Seventh (and finally), the Commissioner claims by failing to cross-examine its counsel, Mr. Ebersole, regarding his Affidavit, and by failing to put Mr. Loyd and Ms. Roese on the witness stand, the Trust essentially confirmed Mr. Ebersole’s truthfulness, *i.e.*, it is “uncontroverted.” Commissioner’s Br. pp. 8, 40, 40 n. 8, 43. Instead, there are a number of issues with Mr. Ebersole’s testimony. Mr. Ebersole’s statement is textbook hearsay and inadmissible. Mr. Ebersole is relying upon an out-of-court statement which he believes was made to him by the BGD Firm to prove that the BGD Firm does not represent the Trust. Ohio. Evid. R. 801, *et seq.* While the “hearsay rule is relaxed in administrative proceedings,” this Court “should not act upon evidence which is not admissible, competent, or probative of the facts which it is to determine.” *Day Lay Egg Farm*, 577 N.E.2d at 88. Such statements are inadmissible and should not be considered by the Court when deciding this Appeal.

Furthermore, this Court must realize the implicit bias in Mr. Ebersole’s testimony. Mr. Ebersole appeared at the hearing in two capacities: as an advocate for the Commissioner and as a fact witness to testify on the very issues that would benefit his client. In other words, counsel for

the Commissioner testified on his client's behalf. In his Affidavit, Mr. Ebersole was provided with an opportunity to craft statements to benefit his client, and that alone should be enough for this Court to disregard his testimony. Indeed, on the witness stand, Mr. Ebersole admitted that he had never spoken to the UBS Trustee (or any prior trustee) and had no personal knowledge that the May 20, 2014 Letter from the UBS Trustee, which expressly stated that the BGD Firm had authority to file and litigate this Appeal, was false. *Id.* Mr. Ebersole's Affidavit was simply his own self-serving, hearsay statements – not evidence. Thus, there was no need for the Trust's own counsel – Mr. Loyd and Ms. Roese – to testify to the contrary, and the harassing subpoenas the Commissioner issued to them were properly quashed by the Board. Hr'g Tr., p. 26; T. Supp. p. 155.

The Commissioner's unfounded and unsubstantiated accusations regarding the BGD Firm's authorization to file and litigate the Board Appeal are insufficient to overturn the Board's well-reasoned finding that the BGD Firm had authority to file and handle the Board Appeal. Indeed, "the agency doctrine allows for a principal to retroactively authorize an actor's prior conduct." *Jacobsen v. HSBC Bank United States, N.A.*, 2012 U.S. Dist. LEXIS 170475, *16 (D. Nev. Nov. 30, 2012) (citing *Restatement (Third) of Agency* § 4.03). By way of example, in *Jacobsen*, the court found that even if the so-called agent had acted without the knowledge of the principal, the principal may "later ratif[y] the act after discovering what has occurred." *Id.* (emphasis added). There, the court, for argument's sake, assumed that if the supposed agent "Housekey" was a "rogue title company" that "file[d] a notice of default without the knowledge of the beneficiary [the principal,] * * * the filing becomes proper if the beneficiary later ratifies the act." *Id.* In fact, the court also pointed out that the agent's "later substitut[ion] as trustee 'is practically insurmountable evidence of ratification.'" *Id.* Similarly, in *Donauschwaben*, this

Board determined that even if the company's officers did not have "actual or apparent authority to file a valuation complaint, '[t]he filing of continuous valuation complaints would serve as a ratification of the actions taken in filing the earlier complaint.'" Case Nos. 97-M-1309, 97-M-1340, p. 7.

This case is no different and the cases cited by the Commissioner are inapposite. Here, the BGD Firm was authorized to litigate the Board Appeal, including filing the Petition for Reassessment and the Notice of Appeal, and the UBS Trustee may further ratify the actions of the BGD Firm. The BGD Firm continuously contested the Ohio tax assessment on behalf of the Trust (e.g., Protest, Petition, Appeal) and represented the Trust during the May 21, 2014 Hearing. As such, the continuous disputes of the Ohio tax assessment "serve as a ratification of the actions taken in" the early filings and the UBS Trustee's (and now the current Trustee, Reliance Trust) continued use of the BGD Firm to litigate this appeal is "practically insurmountable evidence of ratification." *Id.*; *Jacobson*, 2012 U.S. Dist. LEXIS 170475 at *16. The Commissioner's arguments therefore have no merit and this Court should affirm the Board's Order.²²

E. Ohio's failure to serve the trust at the correct address denied the Trust its procedural due process rights; the Department therefore lacks authority to collect the tax from the Trust.

The Commissioner argues the BGD Firm was not "authorized" to file the Petition for Reassessment (filed July 20, 2009) and/or the Notice of Appeal (filed May 28, 2013) because the

²² This Court should also bear in mind that the Trust's ratification argument is merely an alternative one provided to remove all doubt that UBS Trust has authorized this appeal. Because the Commissioner is challenging the authorization given by the Trustee to the BGD Firm to file and litigate the Board Appeal, the Trust further argued that the UBS Trustee may ratify the actions of the BGD Firm and the UBS Trustee has done so to ensure the preservation of its rights.

Trust changed trustees from Schwab to the current Trustee during this time frame, and the Commissioner speculates that the BGD Firm had not obtained authorization from the current Trustee prior to the filings, nor did the current Trustee ratify them. Commissioner's Br., pp. 5, 7, 10, 42. However, the Commissioner's theory actually favors the Trust.

Indeed, if the Commissioner's theory is true, then Ohio never properly served the Trust with its Notice of Assessment (dated May 26, 2009) or its Final Determination (dated March 29, 2013) both of which require service [R.C. 5703.37]. See R.C. 5703.60(A)(3), 5717.02(B), 5751.09(A). The statute of limitations for assessments has therefore expired; so, the Commissioner cannot cure the notice defect. The Ohio Tax Code requires that "[e]very order or notice, service of which is required, shall be served *upon the person or corporation affected thereby* either by personal delivery of a certified copy or by mailing a certified copy by registered mail to the person affected thereby * * *." *Ballard v. Kosydar*, 1975 Ohio App. LEXIS 7516, *3 (Ohio App. May 19, 1975) (quoting R.C. 5703.37). The "primary purpose" of this statutory requirement "is to give notice to the person assessed so that he will have an opportunity to contest the assessment." *Id.* at *4.

The Commissioner's service to US Trust is "both a failure to afford due process rights" and "a lack of authority" to collect the tax from the Trust if USB was not represented by the BGD Firm. *Knickerbocker Props. v. Del. Cty. Bd. of Revision*, 893 N.E.2d 457, 458 (Ohio 2008). For example in *Knickerbocker*, the Ohio Supreme Court reversed the Board of Revision's tax assessment because the Board's failure to notify the taxpayer at the correct address violated the taxpayer's due process rights. *Id.* Here, the outcome is no different.

The Commissioner served the Notice of Assessment on the wrong trustee – US Trust instead of Schwab (Schwab served as successor trustee from January 28, 2008 to June 5, 2009).

Using the Commissioner's logic, since Schwab could not authorize the filing of the Petition for Reassessment because it was filed after Schwab was removed as trustee, then US Trust likewise was not "authorized" to accept service of the Notice of Assessment on behalf of the Trust. *Cf.* Appellant's Exhibit 14 to 19. Under *Knickerbocker*, the failure to notify the taxpayer at the correct address of the final determination violated the taxpayer's due process rights.

The same holds true for the Final Determination, which was served on the BGD Firm – not the Trust [Appellant's Ex. 2 (Final Determination) (showing envelope addressed to Mark Loyd of the BGD Firm)]. The Commissioner claims that it can use the BGD Firm to notify the Trust of the Final Determination, but that the BGD Firm cannot contest the Final Determination on behalf of the Trust by filing a Notice of Appeal. The Commissioner cannot have it both ways. If the BGD Firm was not "authorized" to file the appeal, then it was likewise not "authorized" to accept service on behalf of the Trust.²³

Accordingly, if the Commissioner's position, *i.e.*, that the BGD Firm never represented the Trust, is correct [which it is not], then having failed to properly and timely notice the tax assessment, Ohio has lost its right to assess the tax.

CONCLUSION

For the foregoing reasons, the Trust respectfully requests that this Court reverse the Board's findings and hold [1] that the Trust's gain from its sale of TQL stock is not a qualifying trust amount, [2] that the gain is nonbusiness income, [3] that the Trust is a nonresident trust, and

²³ To use the vernacular, "what is good for the goose is good for the gander." "[I]n tax law what is today sauce for the goose turns out to be sauce for the gander * * *." *Delta Metalforming Co. v. Commissioner*, 632 F.2d 442 (5th Cir. 1980). It is imperative that the government adhere to the golden rule when dealing with its citizens: "Men must turn square corners when they deal with the Government, it is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens." *Title Ins. Co. of Minn. v. State Bd. Of Equalization*, 842 P.2d 121, 130 (Cal. 1992) (quotations omitted).

[4] that the Commissioner's Final Determination is unconstitutional, and affirm the Board's findings that the Trust, through its authorized representative (the BGD Firm), properly filed the Petition for Reassessment, Notice of Appeal, and all pleadings with the Board. In the alternative, the Trust respectfully requests that this Court hold that the tax be mathematically corrected as set forth herein.

Respectfully submitted,

/s Mark A. Loyd

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Certificate of Service

I hereby certify that a copy of the foregoing Merit Brief of Appellant T. Ryan Legg Irrevocable Trust, UBS Trust Company, N.A., Trustee was served upon the following by certified mail on December 10, 2015.

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