

In the  
**Supreme Court of Ohio**

T. RYAN LEGG IRREVOCABLE TRUST, :  
: Case No. 2015-0917  
Appellant/Cross-Appellee, :  
: Appeal from Ohio Board of Tax Appeals  
v. :  
: BTA Case No. 2013-A-1469  
JOSEPH W. TESTA, :  
TAX COMMISSIONER OF OHIO, :  
: Appellee/Cross-Appellant. :

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**REPLY BRIEF OF APPELLEE/CROSS-APPELLANT, JOSEPH W. TESTA,  
TAX COMMISSIONER OF OHIO**

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## **REPLY BRIEF OF APPELLEE/CROSS-APPELLANT TAX COMMISSIONER**

*The trustee of a trust has exclusive authority to authorize litigation on behalf of the trust. If at all, the trustee may ratify an attorney's unauthorized initiation of litigation on behalf of the trust in the Tax Commissioner's administrative proceedings and appeals therefrom to the Board of Tax Appeals, only if there is a justifiable excuse for the failure of the attorney to have obtained the requisite authority.*

In this reply brief, the appellee and cross-appellant Tax Commissioner buttresses Proposition of Law No. 5 of his merit brief with respect to the jurisdictional defect in this appeal. Namely, this appeal is properly dismissible because the trustee of the T. Ryan Legg Irrevocable Trust ("Legg Trust" or "Trust") did not authorize the filing of the Trust's notice of appeal to the BTA or petition for reassessment before the Commissioner.<sup>1</sup>

**I. This appeal is properly dismissible for want of jurisdiction because UBS Trust Co., as the trustee of the Legg Trust, did not authorize the filing of the petition for reassessment with the Commissioner or the BTA notice of appeal.**

Only the trustee of the Legg Trust may authorize the Legg Trust to prosecute a legal action. See, R.C. 5808.16(X) (granting trustees the requisite authority to "prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property \*\*\*[.]"); and *Schofield v. Cleveland Trust Co.*, 149 Ohio St. 133, 144 (1948). In its third brief, the Legg Trust does not set forth any contrary authority for this established legal principle.

Likewise, there is no dispute as to the identity of the trustee of the Legg Trust throughout the periods relevant to this jurisdictional issue. Specifically, UBS Trust Co. was the trustee of the Legg Trust when the petition for reassessment was filed and when the BTA notice of appeal was filed. Because UBS Trust, as the trustee of the Legg Trust, did not authorize the Trust's

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<sup>1</sup> This Court need not consider this subject-matter jurisdictional ground defect, if it affirms the BTA's decision on substantive grounds. See, *Hafiz v. Levin*, 120 Ohio St.3d 449, 2008-Ohio-6788, ¶ 15, fn. 1 (having determined that the taxpayer's challenge based on its reading of a tax statute was substantively erroneous, the Court declined to consider jurisdictional issues).

filings of the petition for reassessment and BTA notice of appeal, the Trust's appeal to this Court is properly dismissible for want of jurisdiction.

**A. The evidentiary record shows that UBS Trust did not authorize attorney Mark Loyd to file the petition for reassessment or notice of appeal to the BTA.**

The evidence in the record shows that T. Ryan Legg, who is the grantor of the Trust rather than the trustee, provided *invalid authority* for attorney Mark Loyd to make the filings. Specifically, David D. Ebersole's uncontroverted affidavit and his live, sworn BTA testimony buttressing the affidavit confirm that the Trust's grantor (Mr. Legg), rather than its trustee (UBS Trust), authorized the filing of the petition for reassessment and the BTA notice of appeal.

At the BTA hearing on the Commissioner's motion to dismiss, Mr. Ebersole testified that, through extended correspondence following the Trust's filing of its notice of appeal with the BTA, Mr. Loyd and his co-counsel, Bailey Roese, identified Mr. Legg, not UBS Trust, as authorizing the Trust's petition and BTA notice of appeal. Hr. Tr. 39-40; Ebersole Affidavit, at ¶¶ 7, 17. Mr. Legg also testified at the BTA that he has paid, and is paying, the legal fees for the Trust regarding its litigation of the Legg Trust's Ohio income tax assessment liability, rather than UBS Trust. Hr. Tr. 97-98.<sup>2</sup>

The BTA hearing on the Commissioner's motion to dismiss was a separate proceeding from the BTA evidentiary hearing on the merits of this appeal. The BTA's hearing on the motion concluded prior to the commencement of the BTA hearing on the merits. Hr. Tr. 48. At the request of the Commissioner, the BTA issued subpoenas to Mr. Loyd and Ms. Roese to appear and testify at the BTA hearing on the motion to dismiss.

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<sup>2</sup> For purposes of this brief, citations to the hearing transcript from the evidentiary hearing before the BTA will be referenced as "Hr. Tr. \_\_\_."

They refused, however, to testify on this critical jurisdictional issue on the basis of asserted privileges and other grounds, and the BTA sustained their motion to quash the subpoenas. Hr. Tr. 26-32. Mr. Loyd and Ms. Roese refused to testify despite the Commissioner's counsel's repeated invitations *in three separate instances* for them to affirmatively state whether they had been granted any such authorization on behalf of UBS Trust. Hr. Tr. 13, 26-27, 33-34. Instead, they chose to maintain their silence, presumably so as to avoid confirming the truth of Mr. Ebersole's BTA testimony and affidavit.

When Mr. Ebersole gave live, sworn testimony on his affidavit, Mr. Loyd and his law firm colleagues chose not to cross-examine him on the representations that he had made in the affidavit. Hr. Tr. 41-47. Nor did they raise any objection to either Mr. Ebersole's affidavit or his testimony at that hearing. Consequently, the Legg Trust waived any objection to the admissibility of Mr. Ebersole's dispositive evidence on the issue. *Crown Comm., Inc. v. Testa*, 136 Ohio St.3d 209, 2013-Ohio-3126, ¶ 18. The BTA admitted Mr. Ebersole's affidavit into the evidentiary record. Hr. Tr. 38-39. It is far too late for the Trust, by way of its briefing in its appeal to this Court, to suddenly challenge the admissibility of that compelling and probative evidence. There can be no question that the trustee did not authorize this litigation at the time the petition for reassessment and BTA notice of appeal were filed.

But even if the Legg Trust had not waived any challenge to the admissibility of Mr. Ebersole's hearing testimony and affidavit, the grounds on which the Legg Trust now attempts to challenge the probative value of Mr. Ebersole's BTA evidence are meritless. Mr. Ebersole's uncontroverted evidence is not "textbook hearsay," as Mr. Loyd now alleges through the Legg Trust's third brief -- or even hearsay at all. See the Trust's third brief at 44-45. To the contrary, Mr. Ebersole's BTA testimony and affidavit are based on the admissions of Mr. Loyd and Ms.

Roese, in their then-capacity as representatives of party-opponents. As such, these statements are expressly excepted from the definition of hearsay under Ohio Evid.R. 801(D)(2).

Further, even if Mr. Loyd's and Ms. Roese's statements to Mr. Ebersole were not excepted from the definition of hearsay, those statements would fall within the hearsay exception for "statements against interest" pursuant to Ohio Evid.R. 804(B)(3), which requires a showing that the declarant was "unavailable" to testify. That showing is easily met here. Pursuant to Evid.R. 804(A)(5), a declarant is unavailable to testify as a witness when the proponent of the declaration is unable to procure the declarant's testimony "by process or other reasonable means." Here, at the outset of the hearing on the motion to dismiss, the BTA attorney examiner sustained the Legg Trust's motion to quash the subpoenas issued to Mr. Loyd and Ms. Roese.

**B. The BTA's decision denying the Commissioner's motion due to "typographical errors" should be reversed because there is no basis for the BTA to find that the trustee authorized Mr. Loyd to file the petition and BTA notice of appeal.**

The BTA missed the mark altogether when it determined that Mr. Loyd's filings contained "typographical errors" and denied the Commissioner's motion to dismiss on that basis. *BTA Decision and Order*, at unnumbered page 4. Mr. Loyd presented a ratification defense before the BTA, not a "typo" defense. The letter and affidavit that Mr. Loyd now relies upon for his ratification defense (even though they are not in the evidentiary record) do not allege that the trustee granted authorization to file the petition and BTA notice of appeal at the time of filing.

Simply put, the BTA's denial of the motion to dismiss was clearly unreasonable and unlawful because Mr. Loyd never asserted to the BTA that he had authority at the time of filing. See, *Cousino Constr. v. Wilkins*, 108 Ohio St.3d 90, 2006-Ohio-162, ¶ 40.

For the first time in the Trust's third brief filed with this Court, Mr. Loyd argues that "there was no mistake." Trust third brief, at 39. Mr. Loyd further asserts that "the Trust has

always acted through its trustee.” *Id.* at 34, 37, 39. But again, there is no evidence to support those assertions. The uncontroverted evidence in the record, including Mr. Ebersole’s testimony and affidavit establish that Mr. Legg, not UBS Trust, authorized the filing of the petition for reassessment and BTA notice of appeal. See particularly, Ebersole Affidavit, at ¶¶ 7, 17.

Grasping at straws, Mr. Loyd argues that what the BTA really meant by “typographical error” was “harmless error.” But the BTA’s “typo” decision could not be “harmless error,” because there is no evidence that Mr. Loyd had authority to make the filings at the time of filing. Moreover, the Commissioner and the BTA have been burdened with potentially needless litigation. “Where a material portion of a Board of Tax Appeals decision is not supported by any probative evidence of record, the decision is unreasonable and unlawful.” *Stds. Testing Labs., Inc. v. Zaino*, 100 Ohio St.3d 240, ¶ 31 (2003). Since there is no evidence that the trustee of the Trust authorized these proceedings, this appeal is properly dismissible.

**II. Mr. Loyd’s attempt to “ratify” these proceedings fails for at least three reasons.**

In an attempt to perfect the Trust’s appeal after the statutory appeal windows have already closed, Mr. Loyd argues that the trustee “ratified” the filings, even though the trustee did not provide authority at the time of filing. That argument fails for a myriad of independent reasons: (1) the trustee did not actually ratify the filings; (2) the BTA and the Commissioner lack equitable jurisdiction; and (3) Mr. Loyd has no excuse for failing to obtain authority from the trustee prior to filing. Each reason is discussed below in turn.

**A. There is no evidence in the record that the trustee of the Legg Trust, UBS Trust, attempted to ratify the filing of the petition and BTA notice of appeal.**

There is no evidence in the record to show that the trustee actually attempted ratification. Through the Trust’s third brief, Mr. Loyd argues that an unsworn UBS Trust letter and an “affidavit” of UBS Trust Officer Seane Baylor somehow ratify the filings. The letter and

affidavit actually cut against Mr. Loyd's new contention that "[a]t all relevant times, the BGD Firm had authority from the appropriate trustee to litigate this appeal[.]" Trust third brief, at 34. The letter and affidavit omit any assertion that UBS Trust granted authorization of the filing of the Trust's petition for reassessment and BTA notice of appeal at the time of filing, or that Mr. Loyd sought it.

The letter and affidavit also cannot ratify this litigation, among other reasons, because neither document is in the evidentiary record. The unsworn letter, which is not notarized, simply was not introduced into evidence at the hearing on the motion. Hr. Tr. 48. The BTA attorney examiner even clarified at the hearing on the motion that "[the letter] has not technically been entered into the record this morning, I just want to clarify that." Hr. Tr. 38.

Mr. Loyd argues that the letter was introduced at the BTA hearing on the merits, but that hearing was separate from the hearing on the motion. See, Hr. Tr. 48 (concluding the hearing on the motion before moving on to the hearing on the merits). Indeed, during the hearing on the motion, counsel for the Commissioner strenuously objected to and moved to strike the UBS Trust letter because it is unauthenticated, un-notarized (*i.e.* not under oath), hearsay that is not from personal knowledge and not subject to cross-examination.<sup>3</sup> Hr. Tr. 13-14, 19.

It is apparent that the letter is not from personal knowledge because it alleges that a prior trustee of the Trust, Charles Schwab Bank, authorized Mr. Loyd's firm to represent the Trust.<sup>4</sup> But unless Mr. Baylor and Richard Kemp (the UBS Trust officers who allegedly co-signed the

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<sup>3</sup> The letter is also objectionable because it was not timely disclosed prior to BTA hearing in accordance with the Board's rules. Rather, the letter was provided to counsel for the Commissioner the evening before the Board's hearing. Hr. Tr. 11, 13-14, 17, 37.

<sup>4</sup> Since the letter is not from personal knowledge, counsel for the Commissioner pointed out at hearing that Mr. Loyd is very likely the author who "put the words in the mouth of the trustee." Hr. Tr. 30. Mr. Loyd maintained his silence and never denied, at hearing or through post-hearing briefing on the motion, that he wrote the letter and affidavit. The allegation was first denied on page 43 of his third brief filed with this Court.

letter) have some undisclosed role in this matter, they could not have had personal knowledge of Charles Schwab's prior authorization. And, the Commissioner could not inquire into their role because the letter was not subject to cross-examination. Thus, the letter has no probative value even if it were in the record. *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, ¶ 14.

Similarly, the BTA plainly lacks authority to consider the Mr. Baylor's "affidavit." The BTA lacks authority to consider documents provided after hearing. *Columbus Bd. of Ed. v. Franklin Cty. Bd. of Rev.*, 76 Ohio St.3d 133, 16-17 (1996) (documents that were "not part of the original record from the BOR and were submitted after the BTA hearing" had to be "disregarded by the BTA"); *Fogg-Akron Assoc., L.P. v. Summit Cty. Bd. of Rev.*, 124 Ohio St.3d 112, 2009-Ohio-6412, ¶ 14. Thus, the BTA may not, *and did not*, consider the Baylor "affidavit" because it was submitted post-BTA-hearing as an attachment to the Trust's written response to the motion.<sup>5</sup>

The Commissioner presently maintains his motion to strike the affidavit and his objections to the affidavit as unauthenticated hearsay that is not from personal knowledge and improperly submitted outside and after the Board's hearing process. See, Commissioner's reply in support of his BTA motion to dismiss, at 4-5, 13-14. Like the letter, moreover, the affidavit has no probative value even if this Court were to determine that it is in the Board's record. In sum, Mr. Loyd's ratification defense fails simply because there is no evidence, let alone probative and reliable evidence, that the trustee attempted to ratify these proceedings.

**B. Mr. Loyd's ratification defense fails as a matter of law because the BTA and the Commissioner do not have equitable jurisdiction to allow such ratification.**

The BTA and the Commissioner possess only the powers that the General Assembly expressly confers upon them by statute; they do not have equitable jurisdiction. *HealthSouth Corp. v. Levin*, 121 Ohio St.3d 282, 2009-Ohio-584, ¶ 24; *Gen. Motors Corp. v. Limbach*, 67

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<sup>5</sup> The BTA allowed briefing on the motion following the hearing on the motion. Hr. Tr. 32-48.

Ohio St.3d 90, 92 (1993). Since the BTA and the Commissioner lack equity jurisdiction, had Mr. Loyd presented evidence that the trustee attempted to ratify these proceedings, the attempt would have nonetheless failed because there is no statute authorizing such ratification.

Ohio statutes provide strict jurisdictional requirements for tax appeals. *Avon Lake City Sch. Dist. v. Limbach*, 35 Ohio St.3d 118, 119 (1988). R.C. 5747.13 provides a 60-day period for filing a petition for reassessment with the Commissioner and former R.C. 5717.02<sup>6</sup> provides a 60-day period for filing a BTA notice of appeal. Since the trustee of the Trust did not authorize Mr. Loyd to file a petition and BTA notice of appeal within the statutory appeal windows, the appeals were not timely perfected and the Commissioner and BTA lacked jurisdiction over the filings. This appeal is dismissible because this Court derivatively lacks jurisdiction as well.

There is no statute that provides a “ratification” exception the appeal windows in R.C. 5747.13 and former R.C. 5717.02 where appeals are not timely perfected with authority from the trustee of a trust. If parties could ratify or amend their appeals to satisfy statutory appeal deadlines, then there would be no deadline at all and this Court would effectively read the appeal deadlines out of R.C. 5747.13 and R.C. 5717.02. *American Restaurant and Lunch Co. v. Glander*, 147 Ohio St. 147 (1946). Thus, Mr. Loyd’s ratification defense fails as a matter of law.

Just last week this Court reaffirmed that the BTA, as a creature of statute, has powers limited to those conferred by statute. *Snodgrass v. Testa*, Slip Opinion 2015-Ohio-5364, ¶ 34; see also, *Southside Comm. Dev. Corp. v. Levin*, 119 Ohio St.3d 521, 2008-Ohio-4839, ¶ 13.

Mr. Loyd has not identified any valid authority for his contention that the Commissioner and the BTA have equitable jurisdiction that would allow ratification of pleadings. Civ.R. 17(A)

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<sup>6</sup> The General Assembly amended R.C. 5717.02 after the period for appealing the Commissioner’s final determination to the BTA in this case. The former version of R.C. 5717.02 applicable to this case is attached in the appendix hereto, at 1-2.

contains language that allows the real party in interest to ratify litigation in a court where there is an equitable basis for it, *i.e.* an excuse for failing to obtain authority from the real party in interest at the time of filing. But, Civ. R. 17(A) cannot provide authority to ratify here because the BTA and the Commissioner do not have equitable jurisdiction. *HealthSouth; Gen. Motors*. Moreover, there is no equitable basis for ratification here, as detailed in Section C, *supra*.

The cases Mr. Loyd relies upon to argue that the BTA has equitable jurisdiction actually do not so hold. *First*, the interim BTA decision that Mr. Loyd cites, *Ohio Apt. Assn. v. Wilkins*, Case No. 2006-A-861 (Feb. 1, 2008), is one where the BTA allowed a party applying for review of a Tax Commissioner rule under R.C. 5703.14(C) to be substituted as the real party in interest. The BTA expressly recognized that the substitution was not an attempt to “cure” a jurisdictional defect because R.C. 5703.14(C) expressly allowed a rule review challenge “at any time after the rule is filed[.]” *Id.* at 3-4, Appx. 64-65.<sup>7</sup> The *Ohio Apt. Assn.* interim BTA decision is a lawful exercise of the BTA’s powers and consistent with the principle that it has limited powers.

*Second*, Mr. Loyd’s reliance on *James Navratil Dev. Co. v. Medina Cty. Bd. of Rev.*, 139 Ohio St.3d 183, 2014-Ohio-1931 (“*JNDC*”) is similarly misplaced. *JNDC* does not hold that the BTA or Commissioner have equitable powers. The *JNDC* decision merely recognizes that R.C. 5715.19 does not require valuation complaints filed with county boards of revision to properly identify the owner of real property, where “there has been a misnomer in the pleadings and the substitution has caused no prejudice.” R.C. 5715.19 does not require that the complaint to list the owner’s name and that statutory basis is central to the Court’s holding. Further, *JNDC* held that there must be an equitable basis for substitution. *Id.* at ¶ 5. As discussed, Mr. Loyd lacks an equitable basis here for his attempt to ratify the filings, and the BTA lacks equity jurisdiction.

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<sup>7</sup> Citations to the appendix to this reply brief will be referenced as “Appx. \_\_\_.”

**C. Even if the trustee had attempted ratification and the BTA and Commissioner possessed equitable powers, Mr. Loyd’s attempt to ratify the petition and BTA notice of appeal would still fail because he has not provided an “excusable mistake” for failing to obtain authority from the trustee prior to filing.**

Civ. R. 17(A) provides that “[e]very action shall be prosecuted in the name of the real party in interest.” The Rule further provides that “[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest.”

As discussed in the Commissioner’s merit brief, ratification under Civ.R. 17(A) is appropriate only where there is an “excusable mistake” for failing to commence the action properly in the first place. See, Commissioner’s merit brief, at 40-42, quoting *Ohio Cen. Railroad Sys. v. Mason Law Firm*, 182 Ohio App.3d 814, 2009-Ohio-3238 (10th Dist. 2009); see also, *Bank of N.Y. v. Gindele*, 2010-Ohio-542 (1st Dist. 2010), unreported, ¶ 4. The Commissioner’s merit brief, at 44-46, further explains that ratification is improper where, as here, the interests of third parties (*e.g.* the BTA and the Commissioner) are adversely affected, and the ratifying party is unaware of the specific actions that it is ratifying.

But Mr. Loyd failed to respond to the Commissioner’s brief with an equitable basis for ratification. The Trust’s third brief does not provide (a) an “excusable mistake” for failing to obtain authority from the trustee at the time of filing, (b) a justification for burdening the Commissioner and BTA with potentially needless litigation, or (c) any assurance, let alone evidence, that the trustee has knowledge of the details of these proceedings. Each of these defects is independently fatal to Mr. Loyd’s case, yet he failed to respond to each one.

Rather than address these equitable concerns, Mr. Loyd places odd reliance on a federal district court decision from Nevada, specifically *Jacobsen v. HSBC Bank*, 2012 WL 6005756 (D.

Nev., Nov. 30, 2012). The *Jacobsen* decision is inapposite, as it does not even address ratifying a court pleading, but rather the ratification of a “notice of default” required under Nevada law to begin foreclosure proceedings.<sup>8</sup> In *Jacobsen*, moreover, the court did not undertake any analysis of whether an “excusable mistake had been made.” Thus, the *Jacobsen* decision, of course, is not controlling on this Court, and is easily squared with the Ohio precedent holding that a necessary but insufficient condition for ratifying litigation is an “excusable mistake.”

**III. The Commissioner has standing to move for dismissal and the Commissioner achieved service of process of his notice of assessment and final determination.**

After the hearing and briefing on the Commissioner’s motion to dismiss, Mr. Loyd filed his own “motion to dismiss,” as a disguised, out-of-rule surreply to the Commissioner’s motion. Ironically, had the BTA granted Mr. Loyd’s motion to dismiss, it would have defeated the Trust’s appeal. The BTA did not rule on Mr. Loyd’s motion to dismiss, or the Commissioner’s motion to strike the motion, and Mr. Loyd did not appeal the issues in the motion to this Court.

Still, Mr. Loyd “re-raised” the already untimely issues in his motion to dismiss through the Trust’s third brief. Specifically, Mr. Loyd asserts that: the Commissioner lacks “standing” to contest Mr. Loyd’s authority to represent the Trust, and that the Commissioner did not achieve proper service of his notice of assessment and final determination. Should this Court consider Mr. Loyd’s new arguments, they should be rejected in any event, as discussed below.

**A. The Commissioner has “standing” to move the BTA to dismiss the appeal.**

Mr. Loyd questions the Commissioner’s standing to move the BTA for dismissal on the basis of Mr. Loyd’s failure to obtain authority from the trustee to file the petition and the BTA notice of appeal. The Commissioner has standing for at least four independent reasons.

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<sup>8</sup> In foreclosure actions, ascertaining the “real party interest” may prove to be very difficult and “excusable.” Not so here, as established by bedrock case law holding that that the trustee of a trust must prosecute litigation in the trustee’s name. R.C. 5808.16 (X); *Schofield*.

*First*, the Commissioner is the designated official for the administration of tax matters, particularly those, as here, that result from his issuance of an assessment and his administrative review of the assessment pursuant to a petition for reassessment. The Commissioner very frequently successfully moves to dismiss appeals to the BTA on the basis of lack of subject matter jurisdiction, for a myriad of reasons. See, e.g. *French v. Limbach*, 59 Ohio St.3d 153 (1991); *Delaney v. Testa*, 128 Ohio St.3d 248, 2011-Ohio-550; *Nascar Holdings, Inc. v. Testa*, BTA Case No. 2015-263 (Jun. 15, 2015), unreported, appeal pending, S. Ct. No. 2015-1157 (granting the Commissioner’s motion to dismiss a BTA notice of appeal filed by a non-Ohio-registered attorney, as the unauthorized practice of law), Appx. 44-46.

The “standing” for the Commissioner to move to dismiss here follows directly from the Commissioner’s status as the Ohio taxing authority. The Commissioner has the power and duty to defend his tax assessments and other actions through motions to dismiss on jurisdictional grounds, as a matter of law. If the Commissioner would not have standing to assert such grounds, no one would, in derogation of the General Assembly’s express legislative will.

*Second*, the basis for the Commissioner’s motion to dismiss is predicated on Mr. Loyd’s lack of authority from the trustee, *i.e.* real party in interest, to file a petition for reassessment and BTA notice of appeal, in violation of several Ohio Rules of Professional Conduct. Specifically, Mr. Loyd violated Rules of Professional Conduct 1.4(a)-(b) and 1.2(a). Rules 1.4(a) and (b) provide that attorneys must, among other things, keep their clients reasonably informed of the status of litigation, reasonably consult with their clients, and obtain their clients’ informed consent in litigation. Rule 1.2(a) further provides that “a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.” Simply put, by his failure to

consult and obtain the consent and knowledge of the “real party in interest,” namely, UBS Trust, Mr. Loyd violated the foregoing Ohio Rules of Professional Conduct.

*Third*, Mr. Loyd’s unauthorized legal actions are highly prejudicial to the Commissioner. See, Commissioner’s merit brief, at 45-46. The Commissioner was prejudiced because the trustee was not identified until just days prior to BTA hearing, and did not appear at the hearing. Further, the Commissioner, the BTA, and this Court are now burdened with litigation regarding a straightforward “availability of books and records” issue. Had Mr. Loyd properly sought the trustee to authorize the litigation, it may have declined to do so in the first place. Thus, the Commissioner was injured due to Mr. Loyd’s failure to obtain the trustee’s authority, and this Court may now redress such injury through dismissal.

*Fourth*, Mr. Loyd’s only authority to support its claim that the Commissioner lacks standing is dicta in a vacated BTA decision, and an unsupported one-sentence statement from a trial court decision from 1967 that has never been cited in any other court decision. See, the Trust’s third brief, at 36, citing *Donauschwaben’s German-American Cultural Ctr., Inc., v. Cuyahoga Cty. Bd. of Rev.* BTA Nos. 97-1309 and 97-1340, (Jul. 14, 2004), vacated through Aug. 11, 2000 Order, Appx. 50-54; and *Martins Ferry City School District v. Ohio Education Association*, 13 Ohio Misc. 308 (Belmont Cty. Common Pl., 1967), Appx. 57-61. The *Donauschwaben* and *Martins Ferry* decisions do not contain any additional case law or authority for the bare assertion that “an opposing party has no standing to question the authority of an attorney to initiate legal action on behalf of his or her client.”<sup>9</sup> These decisions obviously are not binding on this Court, and, based upon the foregoing discussion of the Commissioner’s standing,

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<sup>9</sup> When one actually reads *Martins Ferry*, it becomes apparent that the Common Pleas Court there substantially qualified that statement: “The court [the Belmont County Common Pleas 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 \*\*\*.” 13 Ohio Misc. at 311.

there is no basis for extending the assertions in *Donauschwabens* and *Martins Ferry* to the Commissioner. Accordingly, the Commissioner has standing to move for dismissal.

**B. Mr. Loyd’s “service of process” defenses to the Commissioner’s motion to dismiss are jurisdictionally waived and substantively erroneous.**

**1. The Trust has jurisdictionally waived its “service of process” defenses.**

The service of process defense that Mr. Loyd raised through his “motion to dismiss” is waived because it was not timely raised. The contention of improper service of a notice of assessment or a final determination under R.C. 5703.37 is waived if not timely raised. Indeed, “[t]he case law establishes that a method-of-service objection belongs to a very limited category of jurisdictional issues that can be waived \*\*\*.” *Abraitis v. Testa*, 137 Ohio St.3d 285, 2013-Ohio-4725, ¶ 41 (citing *Colonial Village Ltd. v. Washington Cty. Bd. of Revision*, 114 Ohio St.3d 49, 2007-Ohio-4641, ¶ 14); *Mantho v. Bd. of Liquor Control*, 162 Ohio St. 37, 41-42 (1954).

With respect to service of the *notice of assessment*, the Trust waived any service issue when it did not raise the issue in its petition for reassessment, or at any time during the Commissioner’s proceedings. See, the petition for reassessment, at S.T. 7-43.<sup>10</sup> Nor did the Trust assert a service issue in its BTA notice of appeal, or at any time prior to or during the BTA hearing. On the basis of this established case law, then, Mr. Loyd waived any “personal jurisdiction” claim on the ground that the Commissioner failed to serve the assessment.

Similarly, the Trust waived service of process issues with respect to *the final determination* because the issue was not raised in the BTA notice of appeal, or at any time prior to or during the BTA evidentiary hearing. When a party contending improper notice perfects its appeal at the BTA, that action, “manifests the fulfillment of the statutory purpose” of the service

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<sup>10</sup> For purposes of this brief, the Commissioner’s transcript of his administrative proceedings certified to the BTA pursuant to R.C. 5717.02 will be referenced as “S.T. \_\_\_.”

provision. *Colonial Village* at ¶ 14. Actually filing BTA notice of appeal, without raising the service issue, thus waived the service issue as to the final determination.

Additionally and independently, the Trust waived the service of process issue by failing to raise it in the petition, BTA notice of appeal, and notice of appeal to this Court, in direct violation of strict statutory requirements to “state objections” or “specify error.” R.C. 5747.13(B) provides that petitions for reassessment filed with the Commissioner “shall indicate the objections of the party assessed.” Failure to do so precludes raising the issue before the BTA and this Court. *Am. Fib. Sys. v. Levin*, 125 Ohio St.3d 374, 2010-Ohio-1468, ¶ 15.

Likewise, former R.C. 5717.02 and R.C. 5717.04 provide that appeals to the BTA and this Court must “specify error” and “set forth the errors complained of,” respectively. The BTA and this Court lack jurisdiction to consider errors with a final determination or BTA decision that were not set forth in notices of appeal. See, *Delaney v. Testa*, at ¶ 23 (BTA notice of appeal), and *Deerhake v. Limbach*, 47 Ohio St.3d 44, 45 (1989) (notice of appeal to Supreme Court).

Here, the Trust failed to raise the service of process issues regarding the assessment and the final determination in its petition, BTA notice of appeal, and appeal to this Court. These failures violate the appeal requirements under R.C. 5747.13(B), former R.C. 5717.02, and R.C. 5717.04, and preclude this Court from considering the service of process issue now.

**2. The Appellant’s “service of process” defenses to the motion to dismiss are substantively erroneous.**

**a. The Commissioner’s service of the assessment was proper.**

The Commissioner properly effectuated service of the notice of assessment because the mailing address that the Commissioner used is the same address that the Trust self-reported on

its 2006 Ohio income tax return, as filed with the Commissioner.<sup>11</sup> See, S.T. 96 (tax return); see also, the Commissioner’s “notice of assessment,” issued to the “ Legg Irrev Trust,” with a mailing address of 1300 Market St. Ste 605, Wilmington, DE 19801, reproduced at S.T. 44.

Pursuant to R.C. 5747.13(A), “the Commissioner may make an assessment against any person liable for any deficiency \*\*\* based upon any information in the commissioner’s possession.” R.C. 5747.13(A) further provides that the Commissioner shall provide notice of the assessment pursuant to R.C. 5703.37. Since R.C. 5703.37 does not expressly specify the address to be used, “the constitutional due process principle supplies the rule.” *Knickerbocker Properties v. Del. Cty. Bd. of Rev.*, 119 Ohio St.3d 233, 2008-Ohio-3192, ¶ 17. Specifically, the assessed party may be served at an address that is reasonably calculated to provide notice of the assessment. *Id.*; *Castellano v. Kosydar*, 42 Ohio St.2d 107, 110 (1975), quoting *Mullane v. Cen. Hanover Bank & Trust Co.*, 339 U.S 306, 314 (1950). There is no requirement of actual notice because such a rule would allow taxpayers to simply evade service. *Castellano*, at 110.

*First*, in this case the Commissioner mailed the notice of assessment to the address self-reported by the Trust on its 2006 Ohio income tax return. In situations where a taxpayer supplies the Commissioner with an address on a tax return that it filed, it should be fairly presumed that the taxpayer can be reached at such address. Therefore, the Commissioner used an address such that the Trust was “reasonably calculated” to be in receipt of the notice.

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<sup>11</sup> The notice of assessment is dated May 26, 2009, which was at least two years and four months prior to the expiration of the applicable four-year statute of limitations set forth in R.C. 5747.13(A), running from the due date for the filing of the annual income tax return, or the actual date of filing of the return, whichever is later. As reflected by the date of signature on the Ohio income tax return filed by the Trust for the 2006 tax year at issue, the Trust filed its Ohio 2006 income tax return on or after October 4, 2007. See St. 96. Thus, the Commissioner could timely have issued his notice of assessment for the 2006 tax year at any time from October 4, 2007 through at least four years thereafter, i.e., October 4, 2011.

*Second*, the Trust failed to provide the Commissioner with an address different than the self-reported address on its 2006 Ohio tax return despite the Commissioner's express guidance to Ohio taxpayers providing how to apprise the Commissioner of changes to mailing addresses. See, (1) "*Change of Ohio Employer, Name, Address or Status*" Form<sup>12</sup>; (2) Personal Income Tax Booklet page 11, left column under "*What if I Move After filing My Tax Return and I'm Due a Refund?*"<sup>13</sup>; and (3) The Commissioner's Business Address Update website.<sup>14</sup> Taxpayers can initiate these changes by calling the Department's Taxpayer Service Center to request a change of address, by submitting the aforementioned forms, or simply by filing an amended tax return reflecting a new address. The Trust failed to do so.

Instead, during the Commissioner's audit, the Trust filed a Form TBOR-1 with the Department on August 28, 2008. The Declaration denoted the Taxpayer's name as "Legg Irrevocable Trust, c/o Charles Schwab Bank, 500 Delaware Avenue, Suite 730." However, a plain read of the Form TBOR-1 confirms that it is not intended to communicate a change of address of the taxpayer. Rather, it is a means through which the taxpayer can authorize an agent by declaring a "Tax Representative," as its title describes. The address a taxpayer notes on the TBOR-1 can often be distinct from its primary address. The TBOR-1 is intended to reflect the *address of the authorizing agent* and not necessarily the primary address of the taxpayer. Therefore, the Trust did not officially inform the Commissioner that its primary address changed.

*Third*, the Commissioner's use of the Trust's own self-reported mailing address follows the General Assembly's directive under R.C. 5747.13(A) to make assessments "based upon any

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<sup>12</sup> The Change of Ohio Employer, Name, Address or Status form is available at: [http://www.tax.ohio.gov/portals/0/forms/employer\\_withholding/2008/WTH\\_ChangeofAddress.pdf](http://www.tax.ohio.gov/portals/0/forms/employer_withholding/2008/WTH_ChangeofAddress.pdf).

<sup>13</sup> The Personal Income Tax Booklet is available at: [http://www.tax.ohio.gov/portals/0/forms/ohio\\_individual/individual/2013/PIT\\_IT1040\\_Booklet.pdf](http://www.tax.ohio.gov/portals/0/forms/ohio_individual/individual/2013/PIT_IT1040_Booklet.pdf).

<sup>14</sup> The Commissioner's Business Address Update website is available at: <http://www.tax.ohio.gov/Business/BusinessAddressUpdate.aspx>

information in the commissioner's possession." The Trust's self-reported address is the very best kind of "information" relating to the Trust's mailing address because its source is the very source documentation provided by the Trust itself concerning the particular tax matter in controversy.

*Fourth*, the record, with reasonable certainty, shows that the then-trustee at the time the Commissioner issued his notice of assessment, Charles Schwab Bank (as successor trustee to U.S. Trust Co.), received *actual notice of the assessment*, and Mr. Loyd has not asserted otherwise. Specifically, the record reflects that the initial trustee of the Irrevocable Trust, namely, U.S. Trust Co., upon receipt of the Commissioner's mailing of the notice of assessment *forwarded* the mailing to Charles Schwab. Normally, a prior trustee would forward mail to the successor trustee; indeed, given that the Commissioner's mailing of the notice of assessment was *not* returned as undeliverable, that conclusion rises to the level of reasonable certainty. This conclusion is further buttressed by Mr. Loyd's filing of the petition for reassessment on or about July 20, 2009 (see S.T. 6-7). If, as the record shows with reasonable certainty, Charles Schwab received actual notice at least two years prior to the running of the statute of limitations for the Commissioner to issue assessments, such actual service constituted proper service on that trustee.

*Fifth*, because the Commissioner satisfied the service requirement notwithstanding the Trust's failure to officially notify the Commissioner, the Trust was not prejudiced. Rather, Mr. Loyd, without the authorization of the trustee, was able to timely file a petition. "A fundamental requirement of due process of law in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections\*\*\*." *Mullane*, at 314. Here, this requirement was satisfied because Mr. Loyd was able to timely file a petition and

present his objections. See also, *Skuratowicz v. Tracy*, 76 Ohio St.3d 103 (1996). For all these reasons, the Commissioner properly effectuated service of the assessment.

**b. The Commissioner's service of the final determination was proper.**

The Commissioner properly effectuated service of his final determination as well. As set forth in the Certification attached to the Commissioner's "Motion to Strike and for Additional Relief" filed with the BTA in response to Mr. Loyd's "motion to dismiss," the Commissioner effectuated service on May 9, 2013 by his certified mailing of the final determination to the Trust at the following mailing address: 500 Delaware Ave, Suite 730, Wilmington, DE 19801. As noted in the Certification, this address is the mailing address for the Trust set forth in the petition for reassessment and the documentation attached thereto. See S.T. 7-8. The Commissioner was not provided with any update to that address at any time during the administrative proceedings on the petition, as shown from a review of the statutory transcript. See also, the Certification.<sup>15</sup>

The conclusion that the Commissioner's service of the final determination was proper service follows directly from the same considerations concerning the Commissioner's service of the notice of assessment. The Trust failed to notify the Commissioner that UBS Trust had become the "successor trustee," so that the Commissioner could not possibly have known to mail the final determination to UBS Trust. It was incumbent on the Trust to apprise the Commissioner of the trustee change. The Commissioner used the best information available to him to effectuate service. Such service was "reasonably calculated to apprise" the Trust of the

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<sup>15</sup> As also set forth in the Certification and Ex. B thereto, the Commissioner previously unsuccessfully attempted to serve the final determination by certified mail at the following address: 500 Delaware Ave., Suite 730, Wilmington, DE 19801. But that certified mailing was returned as undeliverable. See Certification, Ex. B. The Commissioner then effectuated successful delivery of the final determination by certified mail received on May 9, 2013.

final determination, within the meaning of the controlling decisional law. See, *Castellano* and *Mullane*. Indeed, Mr. Loyd timely filed a notice of appeal with the BTA.<sup>16</sup>

**IV. The Trust abandoned the argument that R.C. 5747.01(BB)(4)(c)(ii) is unconstitutionally retroactive in its appeal to this Court and through its first brief.**

Separately, this Court should strike the Trust's attempt to argue that R.C. 5747.01(BB)(4)(c)(ii) is retroactive for the first time in its third brief, at 24. The Trust's notice of appeal to this Court (at page 2), and its opening brief (Proposition of Law No. II), assert that its income is "nonbusiness income" under R.C. 5747.01(C). Until its third (reply) brief, the Trust did not assert to this Court, and therefore abandoned, the mutually exclusive argument that its income is "modified nonbusiness income" under R.C. 5747.01(BB)(3) and (4)(c)(ii).

Because the Trust abandoned its retroactivity argument, the Commissioner's merit brief focuses on the Trust's R.C. 5747.01(C) argument. The Trust, not the Commissioner, carries the burden to allege and show that its income is allocable outside Ohio as "modified nonbusiness income." The Commissioner's final determination explained that R.C. 5747.01(BB)(4)(c)(2) is not retroactive as applied here because the Trust's 2006 income tax liability was *not* fixed and determinable at the time the statute was amended. Though the Commissioner briefed the retroactivity issue in his merit brief as a protective matter, the Trust should be foreclosed from making the argument now because the Commissioner has not had a fair opportunity to respond.

**V. Conclusion**

Based upon the foregoing, Trust's appeal is dismissible for failure to timely file a petition for reassessment with the Commissioner and notice of appeal with the BTA.

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<sup>16</sup> Even if the Trust's substantiated factually and legally that the final determination was not served, it would provide no basis to deny the Commissioner's motion to dismiss. The motion is based upon the invalidity of the petition for reassessment, separately and independently from the invalidity of the BTA notice of appeal. The petition was "void ab initio" and therefore failed to confer the Commissioner with jurisdiction to issue a final determination on the petition.

Respectfully submitted,



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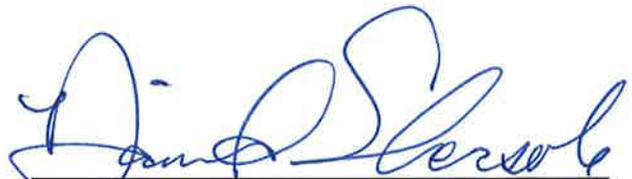
### **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Appellee/Cross-Appellant's Tax Commissioner's

Reply Brief was served upon the following by email on this 30th day of December, 2015:

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