

**OHIO BOARD OF TAX APPEALS**

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| BROCK E. MILSTEIN, (et al.),    | ) |                       |
|                                 | ) |                       |
| Appellant(s),                   | ) | CASE NO(S). 2021-2776 |
|                                 | ) |                       |
| vs.                             | ) |                       |
|                                 | ) | (PERSONAL INCOME TAX) |
| PATRICIA HARRIS, TAX            | ) |                       |
| COMMISSIONER OF OHIO, (et al.), | ) | DECISION AND ORDER    |
|                                 | ) |                       |
| Appellee(s).                    | ) |                       |

**APPEARANCES:**

|                      |                                                                                                                                                                                                                                                                                                                                                                                                                       |
|----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| For the Appellant(s) | - BROCK E. MILSTEIN<br>Represented by:<br>KENNETH J. FISHER<br>KENNETH J. FISHER CO., L.P.A.<br>TERMINAL TOWER<br>50 PUBLIC SQUARE, SUITE 3301<br>CLEVELAND, OH 44113                                                                                                                                                                                                                                                 |
| For the Appellee(s)  | - PATRICIA HARRIS, TAX COMMISSIONER OF OHIO<br>Represented by:<br>RAINA M. NAHRA BOULOS<br>ASSISTANT ATTORNEY GENERAL<br>OHIO ATTORNEY GENERAL<br>30 EAST BROAD STREET, 25TH FLOOR<br>COLUMBUS, OH 43215<br><br>PATRICIA HARRIS, TAX COMMISSIONER OF OHIO<br>Represented by:<br>DANIEL W. FAUSEY<br>SECTION CHIEF<br>OFFICE OF OHIO ATTORNEY GENERAL()<br>30 EAST BROAD STREET, 25TH FLOOR<br>COLUMBUS, OH 43215-3428 |

Entered Monday, October 5, 2026

Ms. Clements, Ms. Allison, and Mr. Seitz concur.

This is an appeal from a final determination of the Tax Commissioner. The appellant bears the burden of proving that the Commissioner’s findings were incorrect. *Accel, Inc. v. Testa*, 2017-Ohio-8798. Those findings are presumed valid subject to rebuttal. *Id.* In applying the law, our task is “to provide a fair reading of what the legislature has enacted: one that is based on the plain language of the enactment and not slanted toward one side or the other.” *Stingray Pressure Pumping, L.L.C. v. Harris*, 2023-Ohio-2598, ¶ 22.

At the outset, we note that the taxpayer has introduced several arguments on appeal that were not first raised in its petition for reassessment. When arguments are not properly raised below, they cannot be considered by this Board. *DeWeese v. Zaino*, 2003-Ohio-6502, ¶ 21. (“The only issues that can be determined by the Tax Commissioner on a petition for reassessment are those that are presented to him in writing by the taxpayer. In turn, the only issues that can be appealed to the BTA from a final determination by the Tax Commissioner are those that were considered by him, as set forth in his final determination.”). Accordingly, we will not consider the taxpayer’s claims related to any other disallowed credits or deductions.

In its notice of appeal, appellant describes the relevant facts:

The Appellant is the sole beneficiary of the Carl Milstein Trust tlb/o Brock Milstein, a nongrantor trust (the “Trust”). The Trust filed a federal income tax return Form 1041 and an Ohio Fiduciary Income Tax return Form IT 1041 for 2017. Brock Milstein has also filed personal federal income tax return Form 1040 and an Ohio income tax return Form IT 1040 for the year at issue.

The Appellant timely filed a Petition for Reassessment to an assessment issued by the Ohio Department of Taxation (“ODT”) raising several objections to the assessment including that the Ohio depreciation adjustment expense must be apportioned between the Trust and the Beneficiary based upon the income allocated to each. Moreover, the Appellant also argued that all Schedule A adjustments reported by the Trust to convert Federal Taxable Income to Ohio Taxable Income must be apportioned among the Trust and the Beneficiary based upon the income allocated to each. For 2017, for federal income tax purposes, the Trust distributed 100% of the adjusted total income reported by the Trust to the Beneficiary. Accordingly, the Trust reported **no income** for federal income tax purposes and all federal income was reported to the beneficiary on Form 1041 K-1. (emphasis sic.)

Generally, Ohio levies an income tax on individuals residing in, or earning or receiving income in the state, based on their Ohio adjusted gross income. R.C. 5747.02. Ohio also levies a fiduciary income tax on a trust's retained earnings for the tax year based on its modified Ohio taxable income. R.C. 5747.02. Though related, they are separate and distinct taxes levied on different taxpayers, as a trust is a legally separate entity from its beneficiaries. The present appeal involves the Trust's fiduciary income tax and the beneficiary's personal income tax.

Former R.C. 5747(A)(20)(a) required taxpayers to add back 5/6 of a taxpayer's reported accelerated depreciation and spread the deduction over the following five tax years. This add-back applies to trusts when calculating their fiduciary income tax. Former R.C. 5747.01(A)(20)(a)(i) and (ii) and 5747.01(A)(21)(a)(i).

The heart of the issue in the present appeal is the beneficiary's attempt to utilize a portion of the depreciation added back by the Trust in a prior year because his taxable distributions were larger in proportion to the Trust's retained earnings for 2017 than it was during the first year of the add-back. There is no basis for this reallocation for later years in Ohio law. The Trust relies on federal income tax regulations to establish the propriety of the allocation. However, Ohio law is clear. When a taxpayer claims an accelerated depreciation expense on its federal return, that taxpayer must add back 5/6 and depreciate that amount over the following five years.

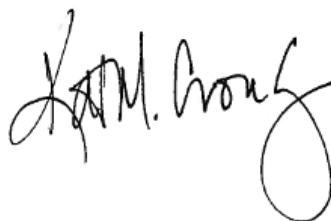
Here, the Trust claimed accelerated depreciation and added back 5/6 of the total for future depreciation expense deductions. The Trust was then eligible to claim 1/5 of that added back amount for each of the next five years. Nothing in the code passes this add-back through to the beneficiary to offset a future year's personal income tax. Indeed, a beneficiary could claim such a deduction, but only to the extent that it equals 1/5 of a 5/6 addback during the preceding year(s). In other words, for purposes of the withholding tax, the beneficiary's accelerated depreciation deduction is based on 1/5 of the total add-back taken on her behalf through the withholding tax for the first year, e.g., the year it was taken on the federal return. The taxpayer could claim a

deduction from the pass-through entity tax liability, but only to the extent that it represented 1/5 of the amount added back on the pass-through withholding return for the year the accelerated depreciation was claimed on the federal return. Thus, we agree with the Commissioner that the taxpayer's arguments lack merit.

The final determination is affirmed.

| <b>BOARD OF TAX APPEALS</b> |                                                                                   |    |
|-----------------------------|-----------------------------------------------------------------------------------|----|
|                             |                                                                                   |    |
| RESULT OF VOTE              | YES                                                                               | NO |
| Ms. Clements                |  |    |
| Ms. Allison                 |  |    |
| Mr. Seitz                   |  |    |

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



Kathleen M. Crowley, Board Secretary