IN THE SUPREME COURT OF OHIO

NASCAR HOLDINGS, INC.,	:	
	:	Supreme Court Case No. 2021-0578
Appellant,	:	
	:	
v.	:	Board of Tax Appeals
	:	Case No. 2015-263
JEFFREY A. MCCLAIN,	:	
TAX COMMISSIONER OF OHIO,	:	
	:	
Appellee.	:	

BRIEF AMICUS CURIAE OF THE OHIO CHAMBER OF COMMERCE IN SUPPORT OF APPELLANT NASCAR HOLDINGS, INC.

ON APPEAL FROM THE BOARD OF TAX APPEALS

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STATEMENT OF INTEREST OF AMICUS CURIAE

Founded in 1893, the Ohio Chamber of Commerce ("the Ohio Chamber") is Ohio's largest and most diverse statewide business advocacy organization, representing businesses ranging from sole proprietorships to some of the largest U.S. companies. The Ohio Chamber promotes and protects the interests of its more than 8,000 business members, and works to build a more favorable business climate in Ohio by advocating for the interests of Ohio's business community on matters of statewide importance. The Ohio Chamber seeks a stable and predictable legal system which fosters a business climate where enterprise and Ohioans prosper. Many of the Ohio Chamber's members are subject to Ohio's Commercial Activity Tax ("CAT"), and thus have an interest in the CAT being applied in a way that is fair and predictable, without creating an undue compliance burden. The Tax Commissioner's position in this case—and the Board of Tax Appeals decision upholding that position—undermines all of those goals.

The Ohio Chamber asks this Court to reverse the BTA decision upholding the assessments against NASCAR Holdings, Inc. ("NASCAR"), and state clear, predictable rules for the future application of the CAT. This will provide needed clarity to the Ohio Chamber's members regarding what companies and transactions are subject to the CAT. But even if the Court upholds the tax assessment, the Ohio Chamber also asks the Court to vacate the penalties assessed by the Tax Commissioner, which will eliminate unfair penalties in situations where the application of the CAT is unclear.

LAW AND ARGUMENT

NASCAR sanctions auto races, and it licenses the right to broadcast those races (and to use other NASCAR intellectual property) to other companies. The question in this case is where to situs NASCAR's revenues from selling those licenses (and by extension, the revenues of the Ohio Chamber's similarly situated members).

To state the case in concrete terms: From its Florida headquarters, NASCAR made the decision to sanction the 2007 Coca-Cola 600 in North Carolina. NASCAR also sold the rights to broadcast that race to Fox Broadcasting Company in New York for a lump sum that in no way depended on where Fox later decided to broadcast the race. Neither the product nor the transaction had anything to do with Ohio. The Tax Commissioner decided to tax that transaction anyway because Fox subsequently decided to broadcast the race in Ohio (or license the broadcasting rights to someone else who did). That decision violates both the CAT statute and the Interstate Commerce Clause of the U.S. Constitution, and this Court should reverse it.

I. The assessments against NASCAR Holdings, Inc. are contrary to the statute and regulation governing the situsing of CAT receipts

Ohio levies a Commercial Activities Tax on "on each person with taxable gross receipts for the privilege of doing business in this state." R.C. 5751.02(A). The CAT clarifies that "taxable gross receipts" means only those "gross receipts sitused to this state." R.C. 5751.01(G). "Taxable gross receipts sitused to this state" impacts the CAT in two ways: First, it is used to determine *whether* a taxpayer must pay the CAT. As relevant here, a person must file a CAT return and pay the CAT if that person has taxable gross receipts sitused to Ohio of more than $500,000.00. R.C. 5751.01(I)(3). Second, gross receipts are used to determine *how much* the taxpayer must pay; the taxpayer's liability is calculated based on the Ohio-sitused taxable receipts. R. C. 5751.02(A).

A. Under the CAT, receipts from the transfer of intellectual property are sitused to Ohio only to the extent that the taxpayer receives incremental receipts based on the customer's use of or right to use the transferred property in Ohio.

Section 5751.033 sets out a comprehensive scheme for how to situs a variety of gross receipts. For some types of revenue-generating activities, the situsing method is fair, objective, and predictable. Receipts from real property rental, for example, are sitused to Ohio if the real property is located in Ohio. R.C. 5751.033(A). Receipts from sale of tangible personal property are sitused to Ohio "if the property is received in this state by the purchaser." R.C. 5751.033(E).

While "intellectual property" is intangible, the principles for situsing IP-related receipts are the same as those for real or tangible personal property receipts. R.C. 5751.033(F). For the "sale, exchange, disposition or other grant of the right to use" intellectual property, such as trademarks and copyrights, receipts are sitused to Ohio for CAT purposes "to the extent that the receipts are based on the amount of use of the property" in Ohio. R.C. 5751.033(F). If the receipts are not based on the amount of use of the property in Ohio, receipts from such intellectual property are sitused to Ohio "to the extent the receipts are based on the right to use the property in Ohio." *Id.* The proper application of this statute to NASCAR, and to similarly situated taxpayers, depends on the meaning of the phrase "to the extent the receipts are based." NASCAR (and other similarly situated taxpayers) received lump sum payments from non-Ohio licensees for the right to use its intellectual property. Those payments in no way depended on where the licensees decided to use their rights—NASCAR received the same payment regardless of whether any licensees sold a product or used IP in Ohio. But the Tax Commissioner levied the CAT against NASCAR on the assumption that he could arbitrarily allocate a portion of

NASCAR's lump sum receipts to Ohio and declare that portion to be "based" on the use or right to use NASCAR's intellectual property in Ohio.[1]

The correct reading of the statutory phrase "to the extent the receipts are based" begins (and ends) with the plain, ordinary language of the statute. *In re T.R.*, 120 Ohio St.3d 136, 2008-Ohio-5219, 896 N.E.2d 1003, ¶ 8. And in ordinary understanding, gross receipts are "based" on use or right to use in Ohio if the amount of the receipts changes when the amount of use or right to use in Ohio changes. *See*, *e.g. HCP EMOH, L.L.C. v. Washington Cty. Bd. of Revision*, 155 Ohio St.3d 378, 2018-Ohio-4750, 121 N.E.3d 370 (holding that the BTA wrongly appraised property value "based" on the business value rather than the realty value, because the value of the underlying real estate changed as the business's revenues changed). So a taxpayers gross receipts are sitused to Ohio—"are based" on the use or right to use in Ohio—if and only if the taxpayer receives some incremental revenue as a direct result of the use or right to use the intellectual property in Ohio.

Suppose, for example, that a software developer receives software license fees based on the number of users. In that case, there would be incremental revenue to the developer from software licensed to Ohio users. The developer would have receipts sitused to Ohio because, to the extent that it has license fees from Ohio users, those receipts are based on use or right of use in Ohio. But if instead the developer, for a lump sum fee, authorizes a software distributor to license or re-license that software to individual users for a fee, then the developer would have no

[1] The Ohio Chamber and its members are also gravely concerned by the Tax Commissioner's use of off-the-cuff internet research and unreliable internet sources to determine NASCAR's tax liability. Even if the Tax Commissioner had correctly interpreted R.C. 5751.033 and assessed some tax liability to NASCAR, the final calculation was almost certainly inaccurate. More importantly, the Tax Commissioner's ad hoc methods were anything but fair, objective, and predictable—and to then assess penalties for failing to predict the Tax Commissioner's use of Infoplease.com smacks of arbitrary rule.

incremental Ohio revenue from the distributor's licensing of the software to individual users in Ohio or elsewhere. The *distributor* would receive incremental revenue from the Ohio use or right to the use of the software, but the *developer* would not. That is precisely what happened here. And in that that scenario, there is no extent to which the developer's receipts from the transfer of the intellectual property to the distributor is based on Ohio use, and thus none of the developer's receipts from the transaction should be sitused to Ohio. Only a taxpayer who receives incremental revenue from the use or right to use the software in Ohio would have Ohio sitused receipts.

But the Tax Commissioner rejected that common sense, ordinary language interpretation of RC. 5751.033(I). Instead, the Tax Commissioner reasoned that if the hypothetical software developer receives a lump sum from the distributor for the right to re-license the software, then the Tax Commissioner can estimate what percentage of the *distributor's* customers are located in Ohio, and situs that percentage of the *developer's* receipts to Ohio—even though the developer received no incremental revenue from the license of its software to Ohio customers of the distributor. In the Tax Commissioner's view, the developer's receipts "are based" on use or right to use in Ohio, *even if* the developer's receipts would not change if the number of Ohio customers changed. This is contrary to the plain wording of the statute. A portion of a lump sum receipt cannot be "based upon" the use of intellectual property in Ohio if no use in Ohio is required to generate those receipts. And a portion of the lump sum cannot be "based upon" a right of use of the intellectual property in Ohio if the amount received bears no relationship to whether any customer of their distributor is actually licensed to use the software in Ohio or how many customers are granted that right.

This analogy applies clearly to the transactions entered into by NASCAR. In the case of broadcast rights, NASCAR receives a fee for allowing a broadcaster sitused outside of Ohio to observe and report on a race outside of Ohio, to capture the sights and sounds of the race with its cameras and microphones, and to resell the resulting program to local cable television franchisee. The right to the sights and sounds of the race is intellectual property, like software, that is created by this taxpayer. But this taxpayer does not receive incremental revenue from any use or right to use the resulting broadcast program in Ohio. Rather, NASCAR receives a lump sum at its corporate headquarters, in return for which it transfers any rights to revenues from any actual use of the sounds and images of the race. As in the case of the hypothetical software developer and distributor, the creator of the intellectual property does not receive revenue based upon a use of or right to use broadcast rights in Ohio; but the creator's customer (in this case, the broadcaster) may have receipts based upon the actual use of or right to use the broadcast content in Ohio by the local cable television company.

In a similar lump-sum arrangement, NASCAR also transferred to manufacturers and distributors the right to brand NASCAR-themed merchandise. And like the broadcast rights, the branding rights are not based on any manufacture or sale of products in Ohio—so the receipts from the branding rights likewise are not based on the use or right to use NASCAR's intellectual property in Ohio.

Consider another example. Suppose NASCAR manufactured its own themed products and sold them to wholesalers (instead of licensing the right to manufacture those products to other parties). In that case, the intellectual property of NASCAR's trademarks and copyrights would be imbedded in the items they would manufacture, and the right to use that intellectual property by distributing the finished product would transfer with the goods themselves.

However, as a sale of tangible personal property, the situsing of the receipts would be governed by R.C. 5751.033(E). If NASCAR manufactured the branded merchandise and sold it to a wholesaler outside of Ohio, NASCAR's receipts from that sale would be sitused to the location where the wholesaler received the merchandise under R.C. 5751.033(E). There would be no allocation of a percentage of NASCAR's receipts to Ohio based on the theory that the wholesaler benefitted from its later resale of that merchandise to Ohio retailers. But the wholesaler, in that situation, would have Ohio sitused receipts from its shipments to Ohio retailers.

It is not reasonable to read the statute to provide a different result where NASCAR instead licenses another party to manufacture and distribute its branded merchandise. In both cases, NASCAR transferred its rights to earn further revenue from the item to a purchaser outside of Ohio, and that purchaser (or a party farther down the supply chain) in turn generates receipts from shipping the product to a purchaser in Ohio. In both cases, the purchaser from NASCAR received the property rights that NASCAR sold to them at a location outside of Ohio. In both cases, NASCAR's receipts from the transaction should be sitused outside of Ohio. The purchaser, at its corporate headquarters, controlled the right that it purchased to utilize the images and sounds of races (or the NASCAR branding), and there was no use of this right in Ohio until subsequent transactions between the purchaser and other parties (such as cable franchises or retail outlets in Ohio). The receipts in question should thus be sitused to the purchaser's corporate headquarters, not to the Ohio locations of the purchaser's customers or their customers.

B. If R.C. 5751.033(I) applies, the receipts at issue here should be sitused outside of Ohio because NASCAR's customers have no business locations in Ohio, and the CAT situsing statute and regulation allow the taxpayer to situs certain receipts using a reasonable and consistent method of determining where the customer received the benefit of the service (which can be the buyer's principal place of business).

Section 5751.033(F) was the BTA's fallback position. The Tax Commissioner originally levied the CAT against NASCAR based on the catch-all provision in R.C. 5751.033(I).[2] Gross receipts that are not otherwise sitused by a specific provision of the CAT statute are "sitused to this state in the proportion that the purchaser's benefit in this state with respect to what was purchased bears to the purchaser's benefit everywhere to what was purchased." R.C. 5751.033(I). The "benefit in this state" is primarily based on "the physical location where the purchaser ultimately uses or receives the benefit of what was purchased," *if* that location can be determined by the taxpayer's records. *Id.*[3] If the physical location or locations where the purchaser receives the benefit cannot be determined from the taxpayer's records, then the taxpayer is permitted to "use an alternate method to situs gross receipts . . . if the alternative method is reasonable, is consistently applied, and is supported by the taxpayer's records." *Id.*

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[2] Again, the Ohio Chamber and its members are concerned by the seemingly ad-hoc process used by the Tax Commissioner in this case. How can a taxpayer be expected to predict and pay her tax liabilities if the Tax Commissioner can change his mind on the applicable statute at the eleventh hour? This further underscores the unfairness of assessing penalties for failing to predict the Tax Commissioner's ultimate legal position.

[3] The Tax Commissioner, rather than relying on NASCAR'S business records, demanded that NASCAR produce business records of its customers to support the Tax Commissioner's situsing method . The Tax Commissioner's method here was first formulated on audit without support from any law or precedent. Further, the Tax Commissioner used third party estimates that were not part of the business records of either NASCAR or of those purchasing from NASCAR. Instead, the Tax Commissioner used records obtained from another audit by the same auditor of an unknown and unidentified taxpayer –records which NASCAR would never be able to acquire in the ordinary course of its business and would have no business purpose to seek. It is unreasonable to expect taxpayers to calculate tax based on information they do not possess and would typically be unable to obtain. It is also unreasonable for the Tax Commissioner to impose additional tax on audit after acquiring additional confidential business records from other taxpayers that the taxpayer filing the return would not collect in the ordinary course of the taxpayer's business and that no law or published guidance directs the taxpayer to collect. The statute and regulation clearly allow the taxpayer to rely on the taxpayer's business records to situs CAT receipts..

But even assuming that NASCAR's receipts (or some of them) should be sitused based on R.C. 5751.033(I) (as the Tax Commissioner originally assessed), or if situsing under (I) or (F) would lead to the same result (as the Tax Commissioner argued before the BTA), a proper reading of division (I) would not situs NASCAR's receipts to Ohio because NASCAR's customers (the broadcaster of its races, and the manufacturer and distributor of its branded merchandise) receive the benefits of what they purchased from NASCAR outside of Ohio. NASCAR does not receive benefits in Ohio. NASCAR's customers (the broadcasters, manufacturers, and distributors buying the broadcasting and branding rights) do not receive benefits in Ohio. Rather, the customers' customers are the ones who receive benefits in Ohio. *Cf. Defender Sec. Co. v. Testa*, 2020-Ohio-4594.

According to the Tax Commissioner's regulations, under 5751.033(I), "gross receipts . . . are sitused to Ohio in the proportion that the purchaser's benefit in Ohio with respect to what was purchased bear to the purchaser's benefit everywhere," and "the physical location where the purchaser ultimately uses or receives the benefit of what was purchased is paramount in determining the proportion of the benefit received in Ohio." O.A.C. 5703-29-17(A). But that regulation makes clear that it is the location of the purchaser (the broadcasters, manufacturers, and distributors), and not of the purchaser's customers, where the benefit of what was purchased is received. For example, if a business purchaser has no business locations outside of Ohio, it would necessarily receive all of the benefits from its purchases in Ohio, and the receipts from the items purchased would be sitused to Ohio. *See, e.g.,* O.A.C. 5703-29-17(B) & (C)(1)(a) (situsing of accounting services). If the business purchaser has no business locations in Ohio, there would be no gross receipts from their purchases sitused in Ohio. O.A.C. 5703-29-17(C)(1) (accounting services provided to a retailer located only in Kentucky are sitused to Kentucky). A receipt is allocated between and among Ohio and other states only in the case of "a purchaser with operations within and without Ohio". O.A.C. 5703-29-17(C)(1)(b). Here, since none of NASCAR's transactions were with businesses having Ohio locations, none of the receipts at issue should be sitused to Ohio under O.R.C. 5751.033(I),

When receipts are sitused under O.R.C. 5751.033(I), and thus under O.A.C. 5703-29-17, the taxpayer is provided some flexibility in determining how to situs receipts for their customers with multistate operations, to make the statute fairer and easier to administer. In many cases, the taxpayer has the option of using their customer's principal place of business as the situs of the receipts, as long as this is done in a "reasonable, consistent, and uniform way." *See, e.g.,* O.A.C. 5703-29-17(C)(1)(c) (seller has option to situs receipts from sale of accounting services to buyer's principal place of business). Here, NASCAR's customers each have their principal place of business outside Ohio, and NASCAR appropriately sitused the receipts outside of Ohio. In addition, taxpayers have some flexibility to situs receipts "in a reasonable, consistent and uniform method that is supported by the taxpayer's business records." O.A.C. 5703-29-17(A).

In view of the specific examples discussed above, NASCAR's allocation of receipts from the transactions at issue in this case are appropriately sitused for CAT purposes to their customer's business locations outside Ohio, and that allocation is reasonable and based on their business records. In fact, under O.A.C. 5703-29-17(C), "If a service is not specifically listed in this rule, the situsing provisions for a similar service may provide guidance." The Tax Commissioner's assessment uses a method that goes beyond the taxpayer's business records: it requires that receipts be sitused not to business locations of the companies to whom NASCAR made sales, but to the homes and business locations of the *customers* of the companies to whom NASCAR made sales.

For the foregoing reasons, to the extent that the receipts at issue are sitused by RC 5751.033(I), the taxpayer reasonably allocated the receipts at issue to their customer's primary business location, and none of the receipts should be allocated to Ohio because their customers had no Ohio business locations. Further, since even the Tax Commissioner agrees that situsing under both R.C. 5751.033(F) and 5751.033(I) would result in a similar amount of receipts being sitused to Ohio, taxpayers should reasonably be able to rely on a situsing analysis under RC. 5751.033(I) and O.A.C. 5703-29-17 for guidance in situsing under R.C. 5751.033(F). This is particularly true since the only meaningful published guidance that might assist a taxpayer in determining the appropriate situsing of the receipts in question is O.A.C. 5703-29-1. Thus, the Tax Commissioner's decision to situs a portion of these receipts to Ohio is contrary to the statute and his own regulation and should be reversed.

II. The assessments against NASCAR Holdings, Inc. are unconstitutional as applied under the Commerce Clause of the United States Constitution.

The Ohio Chamber has a stake in the "as applied" constitutionality of the assessments against NASCAR because it potentially affects not only the Ohio tax liability of its members, but also the potential that other states will apply similarly expansive interpretations of the scope of their taxing powers to its members. It is troubling that, under the reasoning of the Tax Commissioner's assessments here and the BTA's decision upholding it, a taxpayer that has no physical presence in Ohio, and whose customer has no physical presence in Ohio, has been found to have nexus with Ohio for purposes of the CAT and to owe CAT based on receipts that are sitused not based on the taxpayer's activities in Ohio, but on the activities of its customers or their customers. Under the Commerce Clause, a taxpayer with multistate operations may be taxed by a particular state only if (a) the activity taxed has substantial nexus with the taxing state, (b) the tax is fairly apportioned, (c) the tax does not discriminate against interstate commerce, and (d) the tax imposed on the activity is fairly related to serviced provided by the taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 278-82 (1977). The assessments here are unconstitutional as applied to NASCAR, and would be unconstitutional as applied to a similarly situated taxpayer, because the Tax Commissioner imposed that CAT to transactions that did not have substantial nexus to Ohio, he did not fairly apportion the tax, and he imposed a tax that is not fairly related to any services provided by Ohio to the taxpayer in connection with the taxed transactions.

A. The Tax Commissioner apportioned receipts to Ohio that do not have a substantial nexus with Ohio.

The receipts at issue in this appeal were received by NASCAR, which itself has no physical presence in Ohio, from purchasers of its intellectual property who also had no physical presence in Ohio. As shown below, a taxpayer does not have substantial nexus with Ohio for purposes of a tax unless either the taxpayer, or the taxpayer's customer in the taxed transaction, has a physical presence in Ohio. Since neither NASCAR nor its purchasers have a physical presence in Ohio, the receipts at issue here due not have substantial nexus with Ohio.

Ohio's ability to tax an activity or transaction "requires some definite link, some minimum connection, between [Ohio] and the person, property or transaction it seeks to tax." *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1991) (quoting *Miller Bros. Co. v. Maryland,* , 347 U.S. 340, 344 (1954), *overruled on other grounds* by *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018). "[I]n the case of a tax on an activity, there must be a connection to the activity itself, rather than only a connection to the actor the State seeks to tax." *Corrigan v. Testa*, 149 Ohio St. 3d 18, 2016-Ohio-2805, ¶ 33 (quoting *Allied-Signal v. Dir., Div. of Taxation*, 504 U.S. 768, 778 (1992)). Here, there must be a connection between the activity Ohio seeks to tax and Ohio for Ohio have sufficient nexus to the activity to tax that activity. That NASCAR conducts some activities (such as an occasional non-series race) in Ohio is not enough for Ohio to be able to tax another activity (the sale of broadcast rights to races, or branding rights for NASCAR-themed merchandise) that takes place *outside* Ohio. Instead, the taxpayer must "purposely avail" itself of benefits in within Ohio in connection with an activity for Ohio to have jurisdiction to tax that activity. *Corrigan* at ¶ 32. NASCAR did not purposely avail itself of any benefits within Ohio by making a sale to a purchaser that, like NASCAR, has no physical presence in Ohio.

Since the CAT is a privilege tax based on Ohio-sitused gross receipts, we must look primarily to business income tax cases (which are privilege taxes) and to sales tax cases (which are based on the gross receipts from a transaction) for guidance on whether there is substantial nexus between Ohio and the gross receipts it attempts to tax. Under either analysis, the receipts at issue here to not have substantial nexus with Ohio and thus are not taxable by Ohio. If this were an income tax, NASCAR would be taxable by Ohio only to the extent that the income in question was earned from NASCAR's property or business operations in Ohio. *See Hillenmeyer v. Cleveland Bd. Of Rev.*144 Ohio St. 165, 2015-Ohio-1623 *,* ¶ 41, quoting *Shaffer v. Carter*, 252 U.S. 37, 52 (1920). There is no question that the gross receipts here were not earned by NASCAR's business operations in Ohio, nor were they earned as a result of the presence of any NASCAR property in Ohio. In fact, any intellectual property that NASCAR might have potentially had in Ohio was transferred to other taxpayers who used the property rights thus acquired in Ohio. Further, the income-producing activity must result from a direct, not indirect, availment of Ohio's protection and benefits for Ohio to tax that income. *See Corrigan* at ¶ 36. In *Corrigan*, this Court held that a pass-through entity investor directly availed himself of Ohio's protections and benefits with respect to his share of the pass-through entity's income earned in Ohio, but that in his capital gain from sale of his interest in that entity he "did not avail him of Ohio's protections and benefits in any direct way" and thus was not constitutionally subject to Ohio's income tax. *Id.*, ¶¶ 36, 37. Like the gain on the sale of the business interest in *Corrigan*, NASCAR did not directly avail itself of Ohio's protections and benefits when it sold its intellectual property to non-Ohio companies. Its receipts therefore are not taxable by Ohio.

If the CAT is regarded as a transactional sales tax for purposes of determining whether the receipts at issue have the constitutionally required nexus with Ohio to be taxable by Ohio, constitutional nexus is also absent here. Until recently, a taxpayer's obligation to collect a sales tax and pay it to a State required that the taxpayer have a physical presence in the taxing state. *See generally Quill,* 504 U.S. 298. Although the U.S. Supreme Court has now overturned *Quill*'s physical presence requirement, it still requires that at least the taxpayer's customer be physically present within the taxing State. In a decision overruling *Quill* in part, the high court held that "substantial nexus" with a State could be shown either by a physical presence of the taxpayer in the taxing State or by the taxpayer making a certain volume of sales to customers in the taxing state. *Wayfair*, 138 S.Ct. at 2092-2093 (a sale to a customer located in a State is has sufficient nexus with that State to be subject to its sales tax); *id.* at 2099-2100 (a seller located outside of a State may be required to collect its sales tax if its sales to customers within the State exceed certain volume thresholds). Analyzed as sales tax transactions, the gross receipts at issue here do not have substantial nexus with Ohio because neither the taxpayer (NASCAR) nor the entities purchasing from it in these transactions has a physical presence in Ohio. Lacking substantial nexus to NASCAR's receipts from transfer or intellectual property rights here, Ohio's imposition of the CAT on those transactions is unconstitutional.

B. The Tax Commissioner did not use a fair apportionment method because his apportionment is not based on the taxpayer's activities in Ohio, but rather on an estimate of the activities of the taxpayer's customers and their customers.

In tax law, "apportionment" means a process by which a taxable quantity that cannot clearly be allocated to a single State has a portion of that quantity assigned (apportioned) to the taxing State. In Ohio, for example, an apportionment factor is used to determine the portion of a multistate pass-through entity's "business income" that is subject to Ohio's income tax. R.C. 5747.21. The assessments against NASCAR in this case are based on the Tax Commissioner's attempt to apportion some part of an out-of-State (or at least multi-State) gross receipt to Ohio.

Where it is difficult to ascertain what portion of some taxable value of an interstate taxpayer is properly apportionable to a State, numerous cases of the U.S. Supreme Court allow a State to use an apportionment formula to determine a reasonable portion of a multistate taxpayer's income or property that Ohio may tax. But a common element in all of these cases is that the apportionment formula upheld by the Court used ratios of a clearly within-State value of the taxpayer to the total value of the taxpayer both within and without the State. Put another way, "the entire net income of a corporation . . . may be fairly apportioned among the States for tax purposes by formulas *utilizing in-state aspects of interstate affairs*." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 460 (1959) (emphasis added). Further, an apportionment formula is valid only if there is "a rational relationship between the income attributed to the State and *the intrastate values of the enterprise*." *Mobile Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 437 (1980) (emphasis added). In *Mobile*, for example, the State of Vermont apportioned the taxpayer's income to that State "under a three-factor apportionment formula" under which "net income is multiplied by a fraction representing the arithmetic average of sales, payroll, and property values *within Vermont* to those ratios of the corporation as a whole." *Id.* at 439 (emphasis added). But for NASCAR, there are no in-state values of its enterprise that can support an apportionment of some portion of its gross receipts to Ohio: no property in Ohio, no payroll in Ohio, and no sales in Ohio. Rather than apportioning based on "intrastate values of the enterprise," the Tax Commissioner has imputed to Ohio a portion each of several out-of-state transactions based on audience ratings, Ohio's percentage of the U.S. population, and similar measures derived from data external to the enterprise. There is no rational relationship between the gross receipts Ohio attempts to apportion here and "the intrastate values of" NASCAR itself. Thus, the Tax Commissioner's apportionment of NASCAR's receipts is unconstitutional.

C. Ohio provides no "protection, opportunities, and benefits" to NASCAR with regard to the receipts or transactions at issue and thus has provided nothing to NASCAR for which it may require payment of a tax.

The imposition of the CAT on NASCAR is unconstitutional for another reason: Ohio has provided no protection or benefits in relationship to the transactions it has attempted to tax for which it may require NASCAR to pay tax. "[T]he State's power to tax an individual's or corporation's activities is justified by the 'protection, opportunities, and benefits' the State confers on those activities." *Allied-Signal*, 504 U.S. at 778 (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)). In the case of the transactions at issue in this case, no "protection, opportunities, and benefits" were provided by Ohio. The transactions occurred between taxpayers located outside of Ohio, and no Ohio operations of the taxpayer contributed to the gross receipts that the Tax Commissioner wishes to tax. While others farther down in the chain between the customers who purchase branded merchandise in Ohio, or who watch NASCAR races on cable television, may utilize "protection, opportunities, and benefits" conferred by Ohio (by virtue of having paying customers, property, and perhaps payroll in Ohio), the same cannot be said of NASCAR. Since Ohio has provided no "protection, opportunities, and benefits" to NASCAR with respect to the gross receipts at issue here, the tax thus imposed bears no relationship to services provided by Ohio relating to the transactions. Ohio has provided no services that enable these transactions, and thus any tax imposed with respect to these transactions is necessarily not fairly related to any services

Ohio provided. The imposition of the CAT on NASCAR with regard to transactions where Ohio has provided no services or benefits is thus unconstitutional.

III. The penalty assessment against NASCAR Holdings, Inc. is contrary to the CAT situsing regulation and to case law because the taxpayer sitused receipts in good faith.

Even if this Court upholds all or some portion of the CAT assessed against NASCAR, it should abate all of the penalty imposed because its imposition was an abuse of the Tax Commissioner's discretion, the taxpayer acted in good faith in determining its tax liability (or lack of liability), and the published guidance available to the taxpayer prior to the audit determination either supported the taxpayer's position or was ambiguous.

In his original assessment, the Tax Commissioner apportioned NASCAR's gross receipts under the authority of R.C. 5751.033(I), as applied through O.A.C. 5703-29-17. With respect to penalties, O.A.C. 5703-29-17(B)(2)(b) provides that "In the event the commissioner disagrees with a taxpayer's reasonable, consistent and uniform method of situsing its gross receipts, a penalty will not be imposed if the situsing was found to be made in good faith." The discussion above regarding why NASCAR believed it was properly situsing the receipts at issue is surely sufficient to show that it acted in good faith and consistent with any published authority that predated the audit. There is also no evidence of bad faith by NASCAR. Thus, if a tax is imposed under R.C. 5751.033(I), then NASCAR had a reasonable expectation that it would not be subject to penalties just because the Tax Commissioner later disagreed with the taxpayer's situsing method.

At the BTA, the Tax Commissioner argued that he should have sitused NASCAR's gross receipts under R.C. 5751.033(F) rather than R.C. 5751.033(I). The BTA apparently agreed (even though (F) was not the statute cited in the original assessment), in part because it determined that NASCAR's liability would be the same under (I) or (F). But since a penalty was imposed, there might indeed be a difference in a taxpayer's liability if a taxpayer situsing gross receipts in good faith under R.C. 5751.033(F) is not given the same protection against penalties as a taxpayer whose receipts are sitused under R.C. 5751.033(I). That protection is also appropriate where, as here, even the Tax Commissioner appears to be confused about which situsing provision applies.

Where, as here, the taxpayer acts reasonably and in good faith, without notice prior to audit that it may be subject to tax liability for its activities, the penalty should also be remitted under the authority of this Court's decision in *Renacci v. Testa*, 148 Ohio St.3d 470, 2016-Ohio-3394. The Tax Commissioner's penalties are reviewed for abuse of discretion. *Id.* at ¶ 32. The Tax Commissioner abuses his discretion in imposing a penalty on a taxpayer who calculated his liability on a "reasonable" but "mistaken" interpretation of the law. *Id.* at ¶¶ 43-44). In *Renacci*, the Court found that the taxpayer's interpretation was "reasonable" even though it was contrary to an Information Release issued by the Tax Commissioner; an Information Release does not have the force of law. *Id.*, ¶ 39. Here, there is not even an Information Release, or any other notice to NASCAR prior to the audit, that would put NASCAR on notice that its interpretation of the situsing statutes and regulations was incorrect. The discussion above supporting the taxpayer's interpretation of the situsing laws is sufficient to show that NASCAR's interpretation is reasonable, even if this Court finds it to be mistaken. This makes the imposition of penalty against NASCAR in this case an abuse of discretion under *Renacci.* Thus, NASCAR's penalty should be remitted even if this Court finds that is it liable for some or all of the assessed tax.

CONCLUSION

The Tax Commissioner's assessment appealed in this case, and the BTA decision affirming it, should be overturned because the taxpayer determined its liability under a reasonable interpretation of the statute that is consistent with the Commerce Clause, while the Tax Commissioner's assessment is based on an unreasonable interpretation of the statute, as well as on an interpretation that would unconstitutional as applied to this taxpayer. Moreover, even if this Court upholds that Tax Commissioner's situsing for the taxpayer's gross receipts, it should overturn the penalty assessed against the taxpayer as an abuse of discretion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that a true and accurate copy of the foregoing was served to the following pursuant to Civ.R. 5(B)(2)(f) and R.C. 5717.04 on this 9th day of August, 2021.

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