In the
Supreme Court of Ohio

NASCAR HOLDINGS, INC.	:	Case No. 2021-0578
Appellant,	:	On Appeal from the Ohio Board of Tax Appeals
v.	:	
	:	BTA Case No. 2015-263
JEFFREY MCCLAIN, TAX COMMISSIONER OF OHIO	:	
Appellee.	:	

MERIT BRIEF OF APPELLEE JEFFREY MCCLAIN, TAX COMMISSIONER OF OHIO

Jeremy A. Hayden (0075736)
Aaron M. Herzig (0079371)
Brian A. Morris (0093539)
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202
Telephone: (513) 381-2838
Facsimile: (513) 381-0205
jhayden@taftlaw.com
aherzig@taftlaw.com
bmorris@taftlaw.com

Counsel for Appellant
NASCAR Holdings, Inc.

Dave Yost (0056290)
Ohio Attorney General
Christine T. Mesirow (0015590)
Raina Nahra Boulos (0080238)
Assistant Attorneys General
Taxation Section
30 E. Broad Street, 15th Floor
Columbus, Ohio 43215
Telephone: (614) 995-3753
Facsimile: (866) 459-6679
christine.mesirow@ohioago.gov
raina.nahraboulos@ohioago.gov

Counsel for Appellee
Jeffrey A. McClain, Tax Commissioner of Ohio

TABLE OF CONTENTS

Table of Authorities v

INTRODUCTION 1

STATEMENT OF FACTS AND CASE 2

A. NASCAR's streams of revenue 2
B. The General Assembly chose to impose a market-based business tax when it enacted the CAT 3
C. NASCAR ignored the CAT market-based situsing provisions, and sitused nearly 100% of its receipts to Florida, which does not have an income tax. 5
D. NASCAR refused repeated requests to work with the auditor to situs its receipts. Not liking the consequences of its recalcitrance, it mischaracterizes the auditor's approximation of the portion that is subject to the CAT. 6
E. The Commissioner sitused NASCAR's broadcast receipts under R.C. 5751.033(F) in later audit periods, determining that they should be treated as receipts from the licensing of intellectual property. This difference was of no consequence in calculating the portion of receipts to situs to Ohio. 8
F. NASCAR chose not to assist the auditor in situsing the receipts from its licensing of its intellectual property. The auditor's use of census population data was a reasonable methodology for situsing the receipts under R.C. 5751.033(F) 8

LAW AND ARGUMENT 9

Standard of Review 10

I. Tax Commissioner's Proposition of Law No. 1:

The BTA decision affirming the Commissioner's assessment of NASCAR's broadcast receipts under R.C. 5751.033(F) is reasonable because it is based on the hearing testimony and documentary evidence in the record. It is lawful because the BTA has broad authority under R.C. 5717.03(F) to affirm, reverse, vacate, modify or remand tax assessments 11

A. The CAT "Situsing Statute" 11
B. The Commissioner's assessment is correct because the measure of the receipts to be sitused to Ohio under division (I) and division (F) is the same. 12
C. NASCAR's assertion that R.C. 5703.05(H) prohibits the BTA's affirmance is an obvious misreading of the plain language of that statute 14

D. NASCAR's assertion that the BTA acted unlawfully in situsing the broadcast receipts under division (F) of R.C. 5751.033 ignores the statutory grant of power to the BTA in R.C. 5717.03 to issue orders in appeals that may "affirm, reverse, vacate, modify or remand" final determinations. 15
E. This Court's decision in *Defender* does not apply, even if the broadcast receipts are situsued under division (I) of R.C. 5751.033, because Fox receives a portion of the benefit of its broadcast rights in Ohio. 17
F. There is no statute of limitations impediment 18

II. Tax Commissioner's Proposition of Law No. 2:

The situsing of NASCAR's receipts from the licensing of its intellectual property, under R.C. 5751.033(F), including broadcast, media, license, and sponsor fees is proper because the payors of those receipts purchased the right to use that intellectual property in Ohio 18

A. The plain language of R.C. 5751.033(F) applies to NASCAR's licensing receipts. 19
B. NASCAR could have raised any objections that it had to the methodology used by the auditor to situs NASCAR's licensing receipts during the audit but it chose to simply insist that the receipts should be situsued to Florida. 21
C. If the Court finds that the calculations for determining the portion of NASCAR's licensing receipts that should be situsued to Ohio should have considered other factors, the remedy is to remand the appeal to the Commissioner to correct the calculation—not to invalidate the assessment. 22
D. NASCAR's complaint that the CAT has negative implications for Ohio is a policy argument that the General Assembly rejected. It is not a basis for overturning a BTA decision that is reasonable and lawful. 23

III. Tax Commissioner's Proposition of Law No. 3:

NASCAR cannot raise new constitutional claims at the BTA or in its appeal to this Court that were not raised first with the Commissioner 23

A. NASCAR's notice of appeal to the BTA raised limited constitutional challenges, primarily focused on the CAT factor presence provisions. 23
B. NASCAR's claim that the CAT is discriminatory and not fairly related was not raised in its BTA Notice of Appeal. Therefore, this Court has no jurisdiction to consider it and it should be stricken from NASCAR's brief. 26

IV. Tax Commissioner's Proposition of Law No. 4

The CAT's factor presence test has been upheld by this Court as a constitutional measure for determining when a person has substantial nexus with Ohio 26

A. NASCAR's argument that the CAT situsing provisions violate the commerce clause is based on false premises that are not present in this appeal. This Court should recognize NASCAR's use of this straw man fallacy and reject its contention that the factor presence test violates the Commerce Clause. 26

B. The CAT is fairly apportioned to NASCAR's business activities in Ohio.....27

V. Tax Commissioner Proposition of Law No. 5

The BTA's denials of NASCAR's motions to compel discovery and to amend its notice of appeal to raise additional constitution violations were correct, and NASCAR's attempt to restart or "fix" its appeal was untimely......29

VI. Tax Commissioner Proposition of Law No. 6

NASCAR did not employ an alternate situsing methodology in situsing its receipts from the licensing of its intellectual property, let alone a good faith, reasonable methodology. Thus, Ohio Admin. Code 5703-29-17(B)(2)(b) does not apply and the penalty properly was imposed by the Commissioner. Having failed to present evidence of a good faith effort to comply with the CAT situsing statute, the BTA reasonably and lawfully affirmed the assessment of the penalty.....30

CONCLUSION.....31

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Fiber Sys. v. Levin,
125 Ohio St.3d 374, 2010-Ohio-1468, 928 N.E.2d 695 10

Am. Natl. Can Co. v. Tracy,
72 Ohio St.3d 150, 648 N.E.2d 483 (1995) 10

Castle Aviation, Inc. v. Wilkins,
109 Ohio St.3d 290, 2006-Ohio-2420, 847 N.E.2d 420 26

Cleveland Gear Co. v. Limbach,
35 Ohio St.3d 229, 520 N.E.2d 188 (1988) 26, 29

CNG Dev. Co. v. Limbach
(1992) 29

CNG Dev. Co. v. Limbach,
63 Ohio St.3d 28 (1992) 29, 30

Columbus City Sch. Dist. Bd. of Educ. v. Zaino,
90 Ohio St.3d 496, 739 N.E.2d 783 (2001) 10

Corrigan v. Testa,
149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381 ..... 25, 26

Crutchfield Corp. v. Testa,
151 Ohio St.3d 278, 2016-Ohio-7760 ..... 5, 7, 23, 27

Defender Sec. Co. v. McClain,
162 Ohio St.3d 473, 2020-Ohio-4594, 165 N.E.3d 1236 ..... 17, 18

Dulay v. Testa,
BTA No. 2014-2074, 2015 Ohio Tax LEXIS 2125 (Apr. 15, 2015) 25, 30

Krehnbrink v. Testa,
148 Ohio St.3d 129, 2016-Ohio-3391, 69 N.E.3d 656 17

Obetz v. McClain,
Slip Op. No. 2021-Ohio-1706 10

S-W. City Schs. Bd. of Educ. v. Franklin Cnty. Bd. of Revision,
152 Ohio St.3d 548, 2018-Ohio-919, 98 N.E.3d 270 16

Satullo v. Wilkins,
111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954 10

State v. Wilson,
77 Ohio St. 3d 334, 673 N.E.2d 1347 (1997) 20

Stds. Testing Labs., Inc. v. Zaino,
100 Ohio St.3d 240, 2003-Ohio-5804, 797 N.E.2d 1278 10

The Chapel v. Testa,
129 Ohio St.3d 21, 2011-Ohio-545, 950 N.E.2d 142 17

United Parcel Service, Inc. v. Testa,
2017 Ohio Tax LEXIS 2186 30

Statutes

R.C. 1.47 20

R.C. 5703.05 14

R.C. 5703.05(H) 14, 16, 17

R.C. 5717.02 26

R.C. 5717.03 ..... 1, 2, 15

R.C. 5717.03(B) 17

R.C. 5717.03(F) 11, 16

R.C. 5733.05(B)(20(c)(ii) 21

R.C. 5751.01(H)(2) 24

R.C. 5751.09(A) 10

R.C. 5751.033 ..... *passim*

R.C. 5751.033(I) 8, 17

R.C. 5751.033(F) ..... *passim*

Other Authorities

Ohio Admin. Code 5703-29-17(B)(2)(b) 30

Report of the Committee to Study State and Local Taxes, Mar. 1, 2003,
https://tax.ohio.gov/static/research/csslt_final_draft.pdf 4

INTRODUCTION

NASCAR's appeal is an example of the pain of facing the consequences of one's own actions. NASCAR chose to situs its receipts from the licensing of its intellectual property to Florida, where it is headquartered. Florida does not have a tax that is imposed on those receipts, so this was a happy consequence for NASCAR. But then Ohio enacted the Commercial Activity Tax ("CAT"), and it requires that a portion of those receipts that represent the right to use the intellectual property in Ohio be sitused to Ohio. NASCAR did not make this change, and it suffered the consequence of being audited. When the auditor asked NASCAR for any information that would help him determine the proper calculation of receipts to situs to Ohio, NASCAR did not share what information it had, because it took the position that the receipts should continue to be sitused to Florida. So, NASCAR suffered the consequences of not having its voice heard on this issue in the audit.

NASCAR was assessed and appealed the assessment. Its appeal makes a lot of noise about errors that may have been made in the audit, but are of little consequence and don't affect the amount of tax that was assessed. It contains a litany of alleged errors made by the Tax Commissioner and the Board of Tax Appeals ("BTA"), all in an effort to divert attention from its own behavior and avoid the consequences of its decision to not comply with the CAT. The BTA reviewed the evidence and found that the audit mistakes that were made were insignificant, and used its authority under R.C. 5717.03 to modify the Tax Commissioners final determination accordingly. This court should find that the BTA decision is reasonable and lawful, and finally require NASCAR to deal with the consequences of its own actions.

STATEMENT OF FACTS AND CASE

NASCAR Holdings, Inc. ("NASCAR") sanctions stock-car races throughout the United States and in select foreign countries. Because NASCAR has a loyal and devoted fan base that has an interest in watching these races, it licenses the rights to telecast races to broadcasters such as Fox Broadcasting Company ("Fox"). Fox and other licensees are willing to pay NASCAR for these rights because they can generate revenue from cable and satellite television systems and advertisers who want to reach NASCAR fans.

A. NASCAR's streams of revenue

The impetus of the CAT audit came from a pass-through-entity audit of NASCAR. Information reviewed in that audit indicated that NASCAR was not registered for the CAT, but that it probably had CAT liability based on its revenue streams. ST at 55-56. A CAT audit would verify that possible CAT liability and address potential situsing issues. *Id*. A review of NASCAR's business activities showed that its revenue streams included license Fees, sanction fees, broadcast/media revenue, sponsor fees, and memberships. ST at 56.

The majority of NASCAR's receipts were related to broadcast revenue. NASCAR entered into contracts whereby media outlets such as Fox and Speed Channel, Inc. ("Speed") acquired the right to broadcast certain races in specified territories, primarily in the United States. Supp. 259-300. These broadcasting contracts granted media outlets the right to broadcast the specified races in the United States and its territories, which includes Ohio. *Id*. NASCAR characterized these receipts as intangible income, and sitused them "almost entirely to Florida." Supp. 100.

NASCAR also generated receipts from media-related agreements, whereby NASCAR licensed the right to use its intellectual property in the purchaser's marketing efforts. One such

agreement was with Turner, whereby Turner paid a license fee for the worldwide right to use www.nascar.com and for the right to use NASCAR trademarks. Supp. 301-348. NASCAR also licensed the use of its intellectual property to be incorporated into products. Under these agreements, NASCAR's trademarks were used by the licensees on a variety of products, like banners, yard spinners, flags, and seat cushions. Supp. 206-217. NASCAR sitused revenue from all of these sources to Florida, treating it as income from the sale of intangibles, notwithstanding the CAT provisions requiring situsing of receipts to the purchaser's market state(s), i.e., where the purchaser ultimately uses or receives the benefit of what was purchased. Supp. 101, 103.

Another source of revenue to NASCAR is sponsor fees paid by corporate sponsors. For example, AFLAC paid for the right to use NASCAR's trade name, trademarks, and other intellectual property in its marketing and advertising of its insurance products nationwide. Supp. 218-258. NASCAR treated this revenue as intangible income and sitused it to Florida, again ignoring the CAT provisions requiring market-based situsing. Supp. 103.

B. The General Assembly chose to impose a market-based business tax when it enacted the CAT.

The Ohio legislature passed major tax reform in 2005, eliminating the corporation franchise tax for most taxpayers and the tax on tangible personal property used in business. Sub.H.B. 66, 126th Gen. Assemb. (Ohio, 2005). In place of these two taxes, the General Assembly enacted the CAT, which imposes a low-rate, broad based tax on taxable gross receipts that are sitused to Ohio. The General Assembly undertook this major revision of Ohio's tax scheme after a seven-month study conducted by the legislatively-created Committee to Study State and Local Taxes. This tax study committee presented the General Assembly with a report providing options to improve Ohio's tax system in a manner that would promote economic

development in the state. Report of the Committee to Study State and Local Taxes, Mar. 1, 2003, https://tax.ohio.gov/static/research/csslt_final_draft.pdf (last accessed Sept. 20, 2021).

A system that is "market-based" sources receipts based on where the market of the sale is located. Generally, sales of goods are sourced to the state where they are delivered; services to where the benefit of the service provided is received; and intangibles to where the purchaser has a right to use the intangible property. This market-based sourcing is a growing trend among states, and 34 state tax systems have adopted this sourcing method to some degree.[1]

Under the older, cost of performance sourcing method, receipts from services were sourced to the state where the taxpayer incurred the greatest cost of performance, and receipts from intangibles were sitused to the taxpayer's domicile. This allowed many taxpayers to avoid state taxation of receipts from the sale of services or licensing of intangibles by locating in a state without a corporate income tax and segregating their cost-incurring activities to states with no tax or low income tax rates.

The General Assembly chose to adopt a tax system that employed market-based sourcing when it enacted the CAT. Specifically, R.C. 5751.033, identifies various types of receipts and specifies where those receipts should be sitused. R.C. 5751.033(F) provides that gross receipts from the sale or grant of the right to use trademarks, trade names or similar intellectual property shall be sitused to Ohio to the extent the receipts are based on the right to use the property in this state. This reflects a market-based approach—if the purchaser's right to use the intellectual property includes Ohio, the portion of the receipts that are based on that right to use are sitused to Ohio.

---

[1] See CCH State Tax SmartCharts for listing of states and code citations. https://static1.squarespace.com/static/5c6b12e294d71a0fec5f5915/t/5da8d49292155e362f31b43e/1571345555227/CCH-+Business+Income+-+States+with+Market+Based+Sourcing+-+Oct-2019.pdf (last accessed Sept. 20, 2021).

C. NASCAR ignored the CAT market-based situsing provisions, and sitused nearly 100% of its receipts to Florida, which does not have an income tax.

NASCAR's Managing Director of Finance, Chris Glenn, testified at the BTA hearing about NASCAR's process in year-end tax compliance activities. Glenn testified that NASCAR routinely uses a couple of different third-party international tax firms to advise NASCAR in its compliance functions. Supp. 81. Glenn further testified that NASCAR convened annually in the fourth quarter of the year to review any changes in its business activities and in tax law that occurred during the previous year in order to determine the jurisdictions where NASCAR needed to file returns. *Id*. at 81-82.

With respect to the audit period, Glenn testified that NASCAR had a physical presence in Ohio in that it had employees who temporarily worked in here for the seven events that NASCAR sanctioned and conducted in the state. *Id*. at 83. And yet even though NASCAR had a presence in Ohio through its employees and its conducting of races here, and even though NASCAR was advised by international tax consultants who presumably were aware of current law in the jurisdictions about which they render tax advice, NASCAR failed to register for or file CAT returns in Ohio. Glenn did not divulge whether or not the tax consultants advised NASCAR to register for the CAT.

A review of Glenn's testimony shows that NASCAR's focus was on its physical presence in Ohio, and not on attempting to understand or comply with the CAT's market-based situsing requirements. This appeal began as a challenge to the CAT's bright-line nexus standards, and NASCAR asserted that a physical presence in Ohio was necessary for the imposition of the CAT. NASCAR did not conform to the requirements of the CAT while the nexus issue was in litigation. After this court issued its decision in *Crutchfield Corp. v. Testa*, 151 Ohio St.3d 278, ,

2016-Ohio-7760, ruling that a physical presence is not required, NASCAR recharacterized its failure to properly situs its receipts under the CAT, claiming that it had adopted an alternative method to situs its receipts.

NASCAR offered no testimony or documentary evidence to show that it ever considered the CAT's requirements or that it had made a good faith effort to determine the Ohio proportional benefit to its purchasers in obtaining the right to broadcast and/or use NASCAR's intellectual property. NASCAR simply carried on with its methodology employed generally, situsing the revenue from its intellectual property to Florida, its domicile. Supp. 99-102. When asked what NASCAR's method was for situsing the revenue from the contracts in the Joint Exhibits, Glenn said nothing about any attempt to apply the CAT's market-based situsing provisions. He simply stated that income from intellectual property was properly sitused to Florida, where NASCAR is domiciled. *Id*. at 101.

D. NASCAR refused repeated requests to work with the auditor to situs its receipts. Not liking the consequences of its recalcitrance, it mischaracterizes the auditor's approximation of the portion that is subject to the CAT.

The auditors explained to NASCAR that under the CAT, receipts from its revenue streams are sitused based on where the purchaser used or had the right to use the intellectual property. NASCAR was asked repeatedly for information to aid the auditor in computing the portion of the receipts that reflected the right to use the intellectual property and to broadcast the races in Ohio. Supp. 104-05, 122-23, 177-79. The auditor asked for television ratings, demographic information regarding NASCAR's fan base, and any other information that would assist in the situsing of its broadcast receipts. Supp. 148-53.

Although NASCAR had ratings information for various regional television markets, NASCAR did not provide that information to the auditor because it did not believe that such

information was "appropriate" for state tax purposes. Supp. 122-23. NASCAR steadfastly adhered to its position that receipts from the licensing of intellectual property should be sitused to the domicile of the entity that owns the property. *Id*.

NASCAR claims that its involvement in the generation of receipts from the licensing of its intellectual property was limited to its collection of the fees in Florida. App. Br. ("App. Br."), at 2. The contracts say otherwise. Section 2.1 of the Fox broadcasting contract requires NASCAR to provide prior written consent for Fox or Speed to sublicense any telecast rights or provide any telecast footage to any person or entity. Supp. 263. And the AFLAC agreement requires NASCAR to: 1) provide administrative assistance for business to business events; 2) foster public awareness of AFLAC's sponsorship, including global communications support; 3) display AFLAC's logo in its offices and on the NASCAR Nextel Cup Series competition trailers; and 4) assist in providing relevant research data as it relates to the overall attributes of NASCAR fan demographics. Supp. 250.

Because NASCAR did not provide any assistance with respect to the situsing of the receipts, the auditor used information available to him to determine what portion should be sitused to Ohio. For broadcast receipts, this portion represents the right to use that Fox and other purchasers received to broadcast NASCAR races in Ohio in proportion to Fox's right to use the broadcast rights everywhere. The auditor used information from Nielsen concerning cable television subscribers to make this estimation. Supp 148-152. The auditor also used this methodology to compute the receipts received from the Turner agreement that should be sitused to Ohio. ST at 63.

NASCAR's mischaracterization of the auditor's efforts to determine the appropriate portion of its receipts from its broadcast revenue stream to situs to Ohio is a desperate attempt to

avoid the consequences of its own actions. It chose to stonewall the auditor's attempts to cooperatively determine an agreed method for sourcing the broadcast receipts. The auditor reviewed the categories of receipts set forth in R.C. 5751.033 to determine how those broadcast receipts should be sitused, and determined that those receipts were not specifically addressed, and should be sitused under the catch-all provision of R.C. 5751.033(I).

E. The Commissioner sitused NASCAR's broadcast receipts under R.C. 5751.033(F) in later audit periods, determining that they should be treated as receipts from the licensing of intellectual property. This difference was of no consequence in calculating the portion of receipts to situs to Ohio.

In later audit periods, the Commissioner decided that the broadcast receipts were in the nature of a license to use intellectual property, and sitused them under the specific provision of R.C. 5751.033(F), rather than the catch-all provision of division (I) of that section. But under either provision, the receipts are sitused based on the purchaser's proportion of the benefit received or right to use the intangibles in Ohio. Both provisions require the auditor to employ a methodology that yields a reasonable approximation of the portion of the total receipts that relate to the grant of rights to use the intellectual property, including the broadcast rights in Ohio. The auditor testified that the apportionment would have been the same under either section's methodology. Supp.147. This undermines NASCAR's puffery over this purported "mistake" and its outrage over the BTA's determination that it was of no consequence.

F. NASCAR chose not to assist the auditor in situsing the receipts from its licensing of its intellectual property. The auditor's use of census population data was a reasonable methodology for situsing the receipts under R.C. 5751.033(F).

NASCAR sitused the receipts from the licensing of its intellectual property to AFLAC and others entirely to Florida, even though the contracts granted the purchaser the right to use the intellectual property throughout the United States and elsewhere. NASCAR made no attempt to determine what portion of those receipts represented the value of the right to use the intellectual

property in Ohio, taking the position that receipts from the licensing of intellectual property should be sitused to its Florida domicile. The auditor used U.S. Census data to determine the ratio of the population of Ohio versus the population of the United States and applied that percentage to the receipts to determine the amount that should be sitused to Ohio. ST. p. 61-64.

NASCAR complains that the auditor didn't consider all of the territory of the various licensing agreements in computing the portion to situs to Ohio. Had NASCAR worked with the auditor in situsing its receipts, it could have addressed any such concerns. The AFLAC contract was limited to the United States. Supp. 243. As for contracts that included areas outside of the United States, NASCAR provided no information showing its presence or fan base in those territories. It isn't immediately apparent that NASCAR would have the same draw in the Caribbean Basin that it has in the United States, but had NASCAR provided any such documentation to show that, the Commissioner would have taken it into account.

Even at the BTA hearing, NASCAR presented no testimony or other evidence indicating that the situsing and tax due would have been materially different had the audit considered the territories outside of the United States. Therefore, NASCAR has failed to make any attempt to carry its burden of documenting the extent of the Commissioner's error.

LAW AND ARGUMENT

The Commissioner's assessment and the BTA decision affirming the correctness of that assessment should be upheld as the proper application of Ohio statutory law to NASCAR's receipts. NASCAR now wails that the auditor should have considered other factors in approximating the amounts of the various streams of receipts that should be sitused to Ohio. Unfortunately, when the auditor tried to engage NASCAR during the audit to determine the best

way to make the calculation, NASCAR chose to remain silent, holding fast to its strategy to situs nearly all of its receipts to a state that does not tax them. Ohio law does not require perfection in the situsing of the receipts. It authorizes the Commissioner to make an assessment, "based on any information in the commissioner's possession" when any person fails to file a return or pay any tax that is required under the CAT. R.C. 5751.09(A).

The assessment withstands NASCAR's facial and as applied dormant commerce clause challenges, as well. This court has rejected similar challenges in recent years, and there are no facts regarding NASCAR's activities in this appeal that would warrant a different outcome. Some of the constitutional challenges raised in NASCAR's brief were not raised in its Notice of Appeal to the BTA, and this court does not have jurisdiction to review them. These will be addressed later in this brief.

Standard of Review

In reviewing a decision of the BTA, this court determines whether that decision is reasonable and lawful. *Obetz v. McClain*, Slip Op. No. 2021-Ohio-1706, ¶14; *Columbus City Sch. Dist. Bd. of Educ. v. Zaino,* 90 Ohio St.3d 496, 497, 739 N.E.2d 783 (2001). The BTA's determinations of factual issues will stand if the record contains reliable and probative evidence to support its findings. *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954; *Am. Natl. Can Co. v. Tracy,* 72 Ohio St.3d 150, 152, 648 N.E.2d 483 (1995). The burden rests on the taxpayer to "show the manner and extent of the error of the [ ] Commissioner's final determination." *Stds. Testing Labs., Inc. v. Zaino,* 100 Ohio St.3d 240, 2003-Ohio-5804, 797 N.E.2d 1278, ¶ 30; *Am. Fiber Sys. v. Levin,* 125 Ohio St.3d 374, 2010-Ohio-1468, 928 N.E.2d 695, ¶ 38. This court applies a de novo review of the BTA's legal determinations. *Obetz,* 2021-Ohio-1706, ¶ *14*.

I. Tax Commissioner's Proposition of Law No. 1:

The BTA decision affirming the Commissioner's assessment of NASCAR's broadcast receipts under R.C. 5751.033(F) is reasonable because it is based on the hearing testimony and documentary evidence in the record. It is lawful because the BTA has broad authority under R.C. 5717.03(F) to affirm, reverse, vacate, modify or remand tax assessments.

A. The CAT "Situsing Statute"

R.C. 5751.033 provides for the situsing of various types of receipts under the CAT. Divisions (A) through (E) address receipts from rents, royalties from real and tangible property, sales of electricity, sales of tangible personal property, and the sale of real property.

Division (F) addresses how receipts from the sale, exchange or right to use intellectual property are to be sitused:

> **(F)** Gross receipts from the sale, exchange, disposition, or other grant of the right to use trademarks, trade names, patents, copyrights, and similar intellectual property shall be sitused to this state to the extent that the receipts are based on the amount of use of the property in this state. If the receipts are not based on the amount of use of the property, but rather on the right to use the property, and the payor has the right to use the property in this state, then the receipts from the sale, exchange, disposition, or other grant of the right to use such property shall be sitused to this state to the extent the receipts are based on the right to use the property in this state.

The other division that is pertinent to this appeal is division (I), which is a catch-all provision for receipts that are not specifically addressed in the other divisions:

> **(I)** Gross receipts from the sale of all other services, and all other gross receipts not otherwise sitused under this section, shall be 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 with respect to what was purchased. The physical location where the purchaser ultimately uses or receives the benefit of what was purchased shall be paramount in determining the proportion of the benefit in this state to the benefit everywhere. If a taxpayer's records do not allow the taxpayer to determine that location, the taxpayer may use an alternative method to situs gross receipts under this division if the alternative method is reasonable, is consistently and

uniformly applied, and is supported by the taxpayer's records as the records exist when the service is provided or within a reasonable period of time thereafter.

B. The Commissioner's assessment is correct because the measure of the receipts to be situsedto Ohio under division (I) and division (F) is the same.

There is no specific provision in R.C. 5751.033 that addresses the situsing of receipts from the sale of broadcasting rights. Therefore, the auditor situsedthem under division (I), the catch-all provision, for this audit. This was not an unreasonable reading of the situsing statute, but in retrospect, the Commissioner agrees that division (F) of that section may be more appropriate, because the receipts are for the licensing of the right to broadcast NASCAR's races, rather than receipts from the broadcasting of the races. Supp. 147, 189. In subsequent audit years, division (F) of R.C. 5751.033 was used by the auditor. The BTA, too, found that division (F) is more appropriate.

NASCAR wrongly asserts that once the BTA made this finding, the Commissioner's Final Determination should have been vacated, and the assessment invalidated, ignoring the fact that there is no substantive difference in the manner in which the receipts are situsedunder either provision. App. Br. at 21-22.

Both division (F) and division (I) of R.C. 5751.033 direct a market-based situsing approach, where the receipts are situsedin the proportion that the purchaser either enjoys the benefit of the purchase in Ohio or is granted a right to use its purchase in Ohio. Under division (I), Fox "enjoys the benefit" of its purchase to the extent that it has the right to use its purchase of broadcast rights in Ohio. Under division (F), Fox has the right to use the broadcast rights in Ohio, and the receipts are situsedto the extent of that right of use. It is difficult to discern any substantive factual or legal distinction between the two, as applied to NASCAR's broadcast

receipts. What is clear is that under both divisions, NASCAR benefited by licensing its intellectual property for the benefit of broadcasting its events to Ohio viewers.

Moreover, neither division (F) nor (I) of R.C. 5751.033 specifies how the calculation of the portion to be sitused to Ohio is to be made. This allows taxpayers and the Commissioner to review the particular facts involved in generating such receipts and determine the method most appropriate to the receipts being reviewed. Receipts from the licensing of broadcast rights could reasonably be calculated based on the size of the potential audience in Ohio, or based on the population, or some other measure that yields a reasonable approximation of the portion representing the right to use the broadcast rights in Ohio. The auditor attempted to engage NASCAR in an effort to determine the potential audience in Ohio, but NASCAR declined to share what information it possessed, because it wanted to hold fast to situsing those receipts to a non-taxing state. Supp. 122-23. In the end, the auditor used a potential audience factor to determine the amount of receipts to situs to Ohio, but he could have used population, or some other measure as long as it reasonably approximated the portion attributable to Fox's right to use the broadcast rights in Ohio.

This is no different from how he would calculate the portion of the receipts to situs to Ohio under division (F) of that section. It would be equally reasonable to use an audience factor to compute the Ohio portion of receipts under division (F). Using the population method is easier, as the information is more readily available, and that is ultimately the method that was employed in later years. Both of these methods are reasonable ways to approximate the portion of the receipts that should be sitused to Ohio, and both are within the market-based situsing statutory framework.

C. NASCAR's assertion that R.C. 5703.05(H) prohibits the BTA's affirmance is an obvious misreading of the plain language of that statute

NASCAR wrongly contends that R.C. 5703.05 bars the Commissioner and BTA from applying division (F) of R.C. 5751.033 to the situsing of the broadcast receipts and upholding the assessment. But the plain language of R.C. 5703.05 shows that it has no applicability to this issue. That section enumerates the powers of the Commissioner. Division (H) of that section empowers the Commissioner as follows:

> (H) Making all tax assessments, * * * the department of taxation is by law authorized and required to make and, pursuant to time limitations provided by law, on the commissioner's own motion, reviewing, redetermining, or correcting any tax assessments, * * * the commissioner has made, *but the commissioner shall not review, redetermine, or correct any tax assessment, * * * which the commissioner has made as to which an appeal or application for rehearing, review, redetermination, or correction has been filed with the board of tax appeals, unless such appeal or application is withdrawn by the appellant or applicant or dismissed*;
>
> (emphasis added)

The plain language of this statute merely states that once a final determination has been appealed to the BTA, the Commissioner himself is without power to modify it unless the appeal has been withdrawn or dismissed. The Commissioner has not amended or modified his assessment—he stands by his situsing of NASCAR's broadcast receipts based on Fox's potential audience in Ohio. Whether that calculation is made because the receipts are from the licensing of intellectual property or because they are receipts whose situsing is not specified is immaterial—the situsing calculation is the same. There simply has been no "modification" or "correction" of the assessment by the Commissioner, as NASCAR asserts.

D. NASCAR's assertion that the BTA acted unlawfully in situsing the broadcast receipts under division (F) of R.C. 5751.033 ignores the statutory grant of power to the BTA in R.C. 5717.03 to issue orders in appeals that may "affirm, reverse, vacate, modify or remand" final determinations.

NASCAR asserts that the BTA unlawfully applied division (F) to the situsing of NASCAR's broadcast receipts, and ignored its own precedent in the process. But NASCAR's reliance on and discussion of an interim order issued by the BTA in *Caraustar Paperboard Corp. v. Wilkins*, BTA Case No. 2005-V-1147, 2007 Ohio Tax LEXIS 462 (Mar. 19, 2007), is inapposite. Appendix to Merit Brief of Appellee, at 1. The order was in response to a pre-hearing motion filed by counsel for the Commissioner two weeks before the hearing asking the BTA to direct the Commissioner to increase the assessment liability of the taxpayer, or, in the alternative, to remand the case to the Commissioner for reassessment. This interim order has no applicability to this appeal, because the Commissioner is not seeking an increase in the assessment issued to NASCAR.

The Commissioner appreciates NASCAR's reference to *Caraustar,* however, because the BTA's Decision and Order on the merits actually supports affirmance of the BTA's situsing of the receipts under division (F) of R.C. 5751.033. *See Caraustar Paperboard Co. v. Wilkins*, BTA Case No. 2005-V-1147; 2008 Ohio Tax LEXIS 1329 (July 8, 2008). In the audit of *the taxpayer in that case*, the Commissioner had treated some items of tangible personal property as exempt jigs and dies, but denied exemption for other items. The taxpayer appealed to the BTA, claiming that the Commissioner should have exempted many more of the property items. At the BTA hearing, the Commissioner argued that some of the property that he had found to be exempt was actually taxable, and that Caraustar had failed to report a significant amount of other property on its return. The Commissioner asked the BTA to remand the appeal to address the alleged omissions of personal property from Caraustar's report.

The BTA agreed with the Commissioner that some of the property that had been treated as exempt was actually taxable, and subjected those items to taxation. *Id*., at *23 ("We further find that the following items exempted by the commissioner within the clay-coating section do not constitute a jig, die or mold. * * * Therefore items 61, 63, 64, 66, 105, 139, 161, 162, 165, and 171 are taxable and not entitled to exemption."). The BTA "fixed" the Commissioner's final determination by imposing the tax on items that the Commissioner previously had found to be exempt. Thus, *Caraustar* directly refutes NASCAR's contention that the BTA did not follow its own precedent.

The BTA decision in *Caraustar* is a perfect example of the application of its statutory powers under R.C. 5717.03(F). That statute empowers the BTA to issue orders in appeals that may "affirm, reverse, vacate, modify, or remand the tax assessments, valuations, determinations, findings, computations, or orders complained of in the appeals determined by the board. . .". Thus, the BTA, itself, has the statutory power to modify or remand the Commissioner's assessment for action in accordance with its findings. It makes sense that the Tax Commissioner cannot *on his own* make changes to a final determination while it is under appeal, but there is no legal basis for contending that the BTA cannot modify it in its decision. R.C. 5717.03(F) and *Caraustar* highlight the fallacy of NASCAR's assertion to the contrary.

The remaining cases that NASCAR in its brief (*see* App. Br. at 23) are no more supportive than *Caraustar* of its proposition that R.C. 5703.05(H) precludes the BTA from situsing the broadcast receipts under division (F) of R.C. 5751.033. None of them address the issue of whether the BTA may modify a final determination on appeal. In *S-W. City Schs. Bd. of Educ. v. Franklin Cnty. Bd. of Revision*, 152 Ohio St.3d 548, 2018-Ohio-919, 98 N.E.3d 270, ¶ 22 this Court held that the BTA had a statutory duty to determine value under R.C. 5717.03(B), and that remand to the BOR to do so was inappropriate. In *The Chapel v. Testa*, 129 Ohio St.3d 21, 2011-

Ohio-545, 950 N.E.2d 142, ¶¶ 25–28, this Court dealt with waiver of an issue by the Commissioner, both in his final determination and in his BTA brief. In *Krehnbrink v. Testa*, 148 Ohio St.3d 129, 2016-Ohio-3391, 69 N.E.3d 656, ¶ 24, this Court criticized the Commissioner's initial failure to inform the taxpayers that his assessment was based on the presumption of Ohio residency, but it also recognized that the Commissioner can take a position at the BTA that proof of particular points is required and the de novo nature of the BTA proceeding allows that. The citation of these cases may appear to add some legitimacy to NASCAR's distorted reading of R.C. 5703.05(H), but upon inspection they are seen to be mere window dressing.

E. This Court's decision in *Defender* does not apply, even if the broadcast receipts are sitused under division (I) of R.C. 5751.033, because Fox receives a portion of the benefit of its broadcast rights in Ohio.

NASCAR wrongly argues that if the BTA and Commissioner sitused the broadcast receipts under division (I) of R.C. 5751.033, this court's holding in *Defender Sec. Co. v. McClain,* 162 Ohio St.3d 473, 2020-Ohio-4594, 165 N.E.3d 1236, would require that the receipts be sitused to Fox's physical headquarters in New York. App. Br. at 25. NASCAR's reading ignores the bases underlying this Court's decision.

In *Defender*, this Court noted that R.C. 5751.033(I) provides that the paramount consideration when determining the proportion of the benefit attributed to Ohio is "[t]he physical location where the purchaser [ADT in this case] ultimately uses or receives the benefit of what was purchased." 2020-Ohio-4594 at ¶21. The court then found that the benefit derived by ADT from its purchase of contract rights from Defender was the receipt of payments from Ohio customers for the contracted monitoring services that ADT provided outside of Ohio. *Id.* ¶23.

Contrast that with Fox, which televised NASCAR races held throughout the United States. Fox enjoyed the benefit of its ability to derive revenue from Ohio cable television companies because it could provide these televised races to Ohio viewers. So even under this Court's ruling in *Defender*,

a portion of the receipts that reflected the benefit enjoyed by Fox for its use of the purchased broadcast rights would be properly sitused to Ohio by NASCAR.

F. There is no statute of limitations impediment

NASCAR imagines that the reason the BTA did not remand the appeal to the Commissioner is that any subsequent action taken by the Commissioner would violate the statute of limitations for making an assessment. App. Br. at 24. This argument either shows a total lack of understanding of the appeal and remand procedure or is a disingenuous attempt to confuse the court.

If the BTA remands an appeal to the Commissioner with instructions to modify his assessment, no new assessment is issued by the Commissioner. He simply issues a new final determination, if necessary, implementing the BTA order. Therefore, there is no need to be concerned about a statute of limitations with respect to making assessments, because the assessment has already been made, long before the statutory deadline. This is just another of the many straw men that NASCAR has employed in its effort to impugn the correctness of the BTA decision, and this Court should give it no credence.

II. Tax Commissioner's Proposition of Law No. 2:

> *The situsing of NASCAR's receipts from the licensing of its intellectual property, under R.C. 5751.033(F), including broadcast, media, license, and sponsor fees is proper because the payors of those receipts purchased the right to use that intellectual property in Ohio.*

NASCAR unabashedly contends that it escapes taxation on any of its receipts from broadcasting, media, license and sponsor fees because the contracts that granted the payors the right to use its intellectual property in the United States did not specifically grant the purchasers the right to use it in Ohio. NASCAR asserts that because the purchasers would pay the same amount to NASCAR, whether they actually used the intellectual property in Ohio or not, the receipts were not "based on" the right to use the property in Ohio. In other words, according to

NASCAR, unless the purchasers actually used the intellectual property in Ohio, NASCAR's licensing receipts were not "based on" the right to use the property in Ohio. This is pretzel logic at its worst.

A. The plain language of R.C. 5751.033(F) applies to NASCAR's licensing receipts.

R.C. 5751.033(F) reads:

> (F) Gross receipts from the sale, exchange, disposition, or other grant of the right to use trademarks, trade names, patents, copyrights, and similar intellectual property shall be situsedto this state to the extent that the receipts are based on the amount of use of the property in this state. If the receipts are not based on the amount of use of the property, but rather on the right to use the property, and the payor has the right to use the property in this state, then the receipts from the sale, exchange, disposition, or other grant of the right to use such property shall be situsedto this state to the extent the receipts are based on the right to use the property in this state.

NASCAR blithely states that its licensees did not "use" any intellectual property in Ohio. Fox televised races "using" its right to NASCAR's intellectual property in Ohio. The record does not show what uses of the intellectual property other licensees may have made in Ohio, but NASCAR-branded items are readily available for purchase at retail outlets like Target, Walmart and Kohls. So, NASCAR's statement that its licensees did not use the intellectual property in Ohio is questionable, at best.

But NASCAR then takes its argument into a semantical black hole, arguing that it is not enough that Fox purchased the right to broadcast races in Ohio; the receipts that Fox paid to NASCAR had to be "based on" the right to broadcast in Ohio. NASCAR says because the statute does not define what "based on" means, the court should look to dictionary definitions and find that it means "dependent on" or "the basis for" something. Thus, NASCAR urges a reading of R.C. 5751.033(F) that only situses licensing receipts to Ohio to the extent that the purchasers actually use the licensed rights in Ohio.

NASCAR's amicus, the Ohio Chamber of Commerce, goes even further. It urges the court to construe the phrase "to the extent the receipts are based on" to require the amount of the receipts remitted to NASCAR to change based on usage of the rights in this state.

But these urged interpretations of the statute make the provision a nullity. The first sentence of R.C. 5751.033(F) already situses receipts based on usage in the state. To interpret the second sentence to require actual usage, as well, strips the first sentence of any meaning. The General Assembly covered both scenarios in R.C. 5751.033(F)—receipts that are paid based on the amount of use, and receipts that are paid for the right to use. Had the General Assembly intended that the receipts would only be sitused to Ohio to the extent of the purchaser's actual use of and payment for the use of the property, it would have said that. Instead, the General Assembly made it clear that receipts from the licensing of the right to use the intellectual property also were subject to tax, whether those rights were actually used by the purchaser or not, and the measure should reflect the value of the right to use them in Ohio. That is what "based on" means.

NASCAR's and the Chamber's reading of the statute also violates the rules of statutory construction. R.C. 1.47 provides that in enacting a statute, it is presumed that the entire statute is intended to be effective. "In reviewing a statute, a court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body." *State v. Wilson*, 77 Ohio St. 3d 334, 336, 673 N.E.2d 1347 (1997). When R.C. 5751.033(F) is read as a whole, NASCAR's restrictive reading must be rejected. The General Assembly intended that the CAT apply to both receipts for the right to use intellectual property in Ohio, whether or not that use actually occurs, and receipts that are tied to the amount of usage of intellectual property.

NASCAR next argues that Ohio shouldn't be permitted to situs any of the receipts to the state because Ohio isn't important to NASCAR. It contends that Ohio simply is not relevant to NASCAR's receipts, and that none of NASCAR's revenue depended on business activities in Ohio. First, that is a patently false statement because NASCAR itself sponsored races in Ohio, and those races generated revenue. But if NASCAR doesn't want to be bothered by Ohio, then NASCAR can avoid any further conflict with the Commissioner by specifically excluding Ohio from all of its licensing contracts. That's all that is necessary to avoid having to situs a portion of those receipts to reflect the purchaser's right to use its purchase in Ohio. But as long as Ohio is included in its licensing agreements, Ohio is relevant to NASCAR's receipts.

B. NASCAR could have raised any objections that it had to the methodology used by the auditor to situs NASCAR's licensing receipts during the audit but it chose to simply insist that the receipts should be situsued to Florida.

NASCAR contends that the BTA "created a novel interpretation of R.C. 5751.033 and applied it retroactively." App. Br. at p. 33. There is nothing novel about the way the Commissioner situsued the licensing receipts. Population and audience factors have long been used by taxing authorities in the apportionment and situsing of receipts. In fact, Ohio used these methods where appropriate for apportionment of the sales factor under the corporation franchise tax. See: R.C. 5733.05(B)(20(c)(ii). Receipts from the sale, exchange, disposition, or other grant of intellectual property were apportioned in the same manner under the corporation franchise tax in effect long before the CAT existed.

Most audits are conducted cooperatively, where the auditors and company tax staff work out the procedures that will be followed and the methodology that will be used in calculating the tax due. Every company has its own ways of keeping its accounts, and no one method will fit all taxpayers. Had NASCAR worked with the auditor, it could have raised any issues that it had

with how the receipts were being sitused and worked to arrive at a methodology that both parties endorsed. Cooperation in the conduct of an audit does not divest the taxpayer of the right to appeal its findings. Instead, it stuck to its mantra that most of the receipts should be sitused to Florida.

Having sat on its hands during the audit, NASCAR now complains that the situsing is invalid because there are no administrative rules that specifically address how to calculate the amount of receipts to situs to Ohio with respect to various kinds of licensing receipts. The General Assembly did not direct the Commissioner to promulgate any such rules, even though it has done so for other tax purposes, like the assessment of real property. *See, e.g.,* 5715.01(A), *("The commissioner shall adopt, prescribe, and promulgate rules for the determination of true value * * *").* Despite NASCAR's protestations about the absence of an administrative rule, the lack of a rule really didn't affect NASCAR's response to the CAT —NASCAR's legal strategy was to assert that a physical presence in Ohio was required for imposition of the CAT; it was going to situs its receipts from its intellectual property to Florida until a court ruled otherwise.

C. If the Court finds that the calculations for determining the portion of NASCAR's licensing receipts that should be sitused to Ohio should have considered other factors, the remedy is to remand the appeal to the Commissioner to correct the calculation—not to invalidate the assessment.

NASCAR argues that the calculations of the portions of its licensing receipts that should be sitused to Ohio contained errors, in that they didn't consider all of the territories covered by the agreements. According to NASCAR, this resulted in the assessment being higher than is proper. NASCAR did not provide any documentation to support this contention, but has made such allegations. Because the burden is on NASCAR to prove the extent of the Commissioner's

error, the BTA did not find such allegations without any support warranted reversal of the assessment or even a remand to the Commissioner for a recalculation. The Commissioner believes this decision is reasonable—that allegations alone do not meet the burden of proof for showing the extent of the Commissioner's error.

If this Court disagrees, then the appropriate remedy would be to remand the case to the Commissioner for a recalculation of the situsing of receipts with instructions on further refining the situsing.

D. NASCAR's complaint that the CAT has negative implications for Ohio is a policy argument that the General Assembly rejected. It is not a basis for overturning a BTA decision that is reasonable and lawful.

NASCAR and its amicus, the Ohio Chamber of Commerce, are asking this court to second guess the General Assembly. They present arguments in their briefs that the General Assembly considered and ultimately rejected when it enacted the CAT. Every tax system has good points for some kinds of businesses and negative implications for others. This is the province of the General Assembly, however, and this Court should not accept NASCAR's invitation to interpret the CAT in a manner that nullifies the legislature's choices.

III. Tax Commissioner's Proposition of Law No. 3:

NASCAR cannot raise new constitutional claims at the BTA or in its appeal to this Court that were not raised first with the Commissioner

A. NASCAR's notice of appeal to the BTA raised limited constitutional challenges, primarily focused on the CAT factor presence provisions.

NASCAR filed its notice of appeal with the BTA prior to the issuance of this Court's decision in *Crutchfield, supra.* At that time, many out of state businesses that had received CAT assessments filed constitutional challenges to the CAT factor presence nexus standards, contending that there could be no substantial nexus to tax unless the business had a physical

presence in Ohio. NASCAR's BTA notice of appeal raised this same challenge, contending that the factor presence provisions were both facially unconstitutional and unconstitutional as applied to NASCAR's licensing of intellectual property for use by third parties, under the dormant commerce clause. NASCAR also challenged whether obtaining a certificate of compliance is a constitutionally sufficient basis for asserting nexus under R.C. 5751.01(H)(2). *See* BTA Notice of Appeal.

NASCAR sought leave of the BTA to amend its notice of appeal in order to add the following five additional constitutional challenges: 1) The commissioner's erroneous interpretation and application of Ohio's CAT situsing statute constitutes an improper attempt to legislate in violation of the Ohio Constitution; 2) The commissioner's application of Ohio's CAT situsing statute to NASCAR'S activities violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution; 3) The commissioner's application of Ohio's CAT situsing statute to NASCAR's activities violates the Dormant Commerce Clause; 4) The CAT as-applied to NASCAR is discriminatory and not fairly related to the services provided to NASCAR by the State; and 5) The taxes assessed are unconstitutional under the Equal Protection Clauses of the Constitution of the United States and the Ohio Constitution. *See* NASCAR's Motion for Leave to Amend BTA Notice of Appeal.

The BTA denied this Motion, which means that not one of these additional constitutional challenges this Court. But NASCAR has expanded its arguments in support of the constitutional challenges that were raised before the BTA to append constitutional challenges that were not, like an attendee bringing an uninvited guest to a dinner party.

NASCAR's brief has broadened its lack of substantial nexus claim from what had been presented before the Commissioner and in its notice of appeal to the BTA. NASCAR's BTA notice of appeal premised its challenge to the CAT's bright-line nexus factors on their not requiring a physical presence of the taxpayer in Ohio. *See* BTA Notice of Appeal, Part I.B (*"In this case, the Taxpayer lacked the constitutionally required substantial physical presence in order to be subject to Ohio's taxing jurisdiction.").* Now that this assertion has been soundly rejected by both the Ohio and United States Supreme Courts, NASCAR is morphing its lack of substantial nexus argument into a due process challenge, without calling it that. App. Br. at 39-42. NASCAR includes a long discussion of *Corrigan v. Testa*, 149 Ohio St.3d 18, 2016-Ohio-2805, 73 N.E.3d 381, in its revamped substantial nexus challenge, contending that Ohio does not have nexus over the activity that is being taxed, NASCAR's licensing of its intellectual property. This is a different challenge altogether from NASCAR's lack of substantial nexus contentions in its BTA Notice of Appeal. The Commissioner had no notice or opportunity to build a record on this point or to initially review the contentions. Because this new substantial nexus challenge was not presented to the Commissioner or included in NASCAR's BTA Notice of Appeal, this court has no jurisdiction to consider it. *Dulay v. Testa*, BTA No. 2014-2074, 2015 Ohio Tax LEXIS 2125 at *2-4 (Apr. 15, 2015) (citing *CNG Dev. Co. v. Limbach*, 63 Ohio St.3d 28 (1992)).

But even if this Court were to consider this new substantial nexus challenge, NASCAR should not prevail. *Corrigan* did not involve a tax on business activity; it was a personal income tax case about subjecting a nonresident's capital gains from the sale of stock to Ohio's personal income tax. Unlike *Corrigan*, NASCAR has a substantial presence in Ohio from the races in Ohio that it sponsors, the races that are televised, and the branded merchandise that is sold.

B. NASCAR's claim that the CAT is discriminatory and not fairly related was not raised in its BTA Notice of Appeal. Therefore, this Court has no jurisdiction to consider it and it should be stricken from NASCAR's brief.

NASCAR's brief includes a "fairly related" challenge to the constitutionality of the CAT that is jurisdictionally barred. App. Br. at 43-44. NASCAR argues that the CAT violates the fourth prong of the *Complete Auto* test, which is that the tax must be fairly related to services provided by the taxing state. This was not raised by NASCAR in its petition for reassessment or in its Notice of Appeal to the BTA. A claim that a statute is unconstitutional as applied to the taxpayer must be raised in the notice of appeal filed with the BTA; failure to do so is a jurisdictional bar to its consideration. *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 520 N.E.2d 188 (1988); *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 290, 2006-Ohio-2420, 847 N.E.2d 420. Therefore, there is no jurisdiction under R.C. 5717.02 to consider this contention and it should be stricken from NASCAR's brief.

IV. Tax Commissioner's Proposition of Law No. 4

The CAT's factor presence test has been upheld by this Court as a constitutional measure for determining when a person has substantial nexus with Ohio

A. NASCAR's argument that the CAT situsing provisions violate the commerce clause is based on false premises that are not present in this appeal. This Court should recognize NASCAR's use of this straw man fallacy and reject its contention that the factor presence test violates the Commerce Clause.

NASCAR pretends that the assessment of tax on its receipts from the licensing of its broadcast rights arises simply because Ohioans can access NASCAR races in Ohio. App. Br. at 45-47. In fact, NASCAR takes many actions to grow its fanbase in Ohio and elsewhere, so as to increase the value of the intellectual property that it licenses. NASCAR's contract with Fox and Speed includes a provision dedicating 30 second time slots in telecasts to be used by the

promoters of races for promotion of NASCAR event ticket sales and for NASCAR's use in the general promotion of NASCAR series racing. Supp. 298-299.

NASCAR's hyperbolic assertion that R.C. 5751.033(F) subjects every content creator whose work is viewable by people in Ohio to the CAT is an exaggerated falsehood. The content creator would have to meet the bright line presence standards sufficient for establishing substantial nexus in Ohio.

NASCAR sets up another false analogy in its argument that the BTA decision greatly expands *Crutchfield,* subjecting the manufacturers of the products sold by Crutchfield to the CAT. If those manufacturers, like Sony or Samsung, had sold the right to use its trademarks and intellectual property in Ohio to Crutchfield, then those receipts would be subject to situsing under the CAT, assuming that the bright line threshold was met. Crutchfield's sales of the electronics would not subject the manufacturers to the CAT.

NASCAR purposefully licensed the use of its intellectual property in Ohio when it included Ohio in the territories in its licensing contracts. NASCAR sponsored events in Ohio, and the use of its intellectual property in Ohio is an aid in expanding and deepening the loyalty of its fanbase—and that translates into revenue. This court should reject NASCAR's distorted analogies and affirm the BTA's decision.

B. The CAT is fairly apportioned to NASCAR's business activities in Ohio

NASCAR also asserted in its original constitutional challenge that the CAT violated the commerce clause because it was not fairly apportioned. NASCAR based this challenge on its contention that imposing the CAT on receipts earned by NASCAR from the licensing of the right to use its intellectual property in Ohio was a tax that was not related to the activities of the taxpayer. *Id*., ("*It is improper to refer to gross receipts received by the Company* ***from the use***

of intangible personal property by third parties *in Ohio as sufficient activity to support the imposition of the CAT.").* Of course, this mischaracterizes the assessment of CAT on NASCAR's intellectual property receipts. The CAT is imposed on *NASCAR's* commercial activity, which includes the licensing of the right to use its intellectual property in Ohio and elsewhere. NASCAR chose to include Ohio in the license to use its intellectual property, and that is a business activity of NASCAR that augments NASCAR's other activities in growing its fanbase in Ohio. The portion of the receipts that NASCAR earned that is attributable to the right to use the property in Ohio was based on a population factor, and not the activities of the purchasers of the rights. NASCAR could have excluded Ohio from the locations where its intellectual property could be used by the purchasers, but it didn't. Therefore, NASCAR chose to earn income from the use of its property in Ohio, exploiting the Ohio marketplace, and this is a sufficient activity to pass constitutional muster.

This same mischaracterization of the assessment formed the basis for NASCAR's constitutional challenge to the CAT's situsing of service receipts based on the benefits received by the purchaser in Ohio. BTA Notice of Appeal, Part II.A. Again, the CAT is being imposed on the business activities of *NASCAR –it's* licensing of *its* rights to broadcast *its* races in Ohio. The proportion of those receipts that are properly taxed by Ohio is determined by comparing the benefit received in Ohio as compared with the benefit everywhere. NASCAR again confuses the imposition of the tax with the measure of the tax. The imposition of the tax is based on *NASCAR's* commercial activity-- the sale of the right to broadcast its races in Ohio.

V. Tax Commissioner Proposition of Law No. 5

The BTA's denials of NASCAR's motions to compel discovery and to amend its notice of appeal to raise additional constitution violations were correct, and NASCAR's attempt to restart or "fix" its appeal was untimely.

NASCAR presents the same flawed analysis of Ohio law in its appeal of the BTA's rulings on its motions that the BTA rejected in its rulings. NASCAR's original notice of appeal challenges the final determination while raising dormant commerce clause challenges. NASCAR participated in a lengthy audit process and a hearing before the Commissioner on its petition for reassessment, but never raised any issue of the issues that it sought to add in an amended notice of appeal. There was no reason why the issues could not have been identified and raised—NASCAR's counsel at that time simply didn't include them.

Three of the claims that NASCAR wanted to add--improper legislation, violation of due process, violation of equal protection—require consideration of the facts pertaining to them, which the Commissioner has a duty to review in issuing his final determination. There is "no appreciable difference between notices of appeal and petitions for reassessment in this procedural context," and thus the requirement to raise these issues in the petition for reassessment "runs to the core of procedural efficiency." *CNG Dev. Co. v. Limbach*, 63 Ohio St.3d 28, 32 (1992). NASCAR failed to preserve these claims, and the Board properly found that NASCAR's discovery requests relating to them were improper because those issues were not before the Board. NASCAR's reliance on *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229 (1988), separated from the procedural and jurisdictional mandates of the later-decided *CNG Dev. Co. v. Limbach* (1992), is misguided.

Having failed in its attempt to broaden the scope of its constitutional challenges using the back-door discovery approach, NASCAR then sought to amend its notice of appeal to overtly

add these new claims. Where an appellant seeks leave to amend its notice of appeal, the BTA uses *CNG Dev. Co.* not only to limit the scope of permissible amendment, but also to assess whether justice requires amendment. *See, e.g. Dulay v. Testa*, 2015 Ohio Tax LEXIS 2125 (order of April 15, 2015) (citing *CNG Dev. Co. v. Limbach*, 63 Ohio St.3d 28 (1992)). This is because "the specificity requirement runs to the core of procedural efficiency because compliance with it advises the commissioner of the scope of the requested review." *CNG Dev. Co. v. Limbach*, 63 Ohio St.3d 28, 32 (1992).

NASCAR's reliance on *United Parcel Service, Inc. v. Testa*, 2017 Ohio Tax LEXIS 2186, is unfounded. That case did not even involve a motion for leave to amend its notice of appeal because the appellant there did timely amend its notice of appeal, and the decision relied in part on the fact that the issues raised in the notice of appeal were factually raised prior to the issuance of the final determination. *United Parcel Service, Inc. v. Testa*, 2017 Ohio Tax LEXIS 2186, at 2.

The BTA decision denying the motion to amend the notice of appeal, adding allegations that the Commissioner had no opportunity to review, was reasonable and lawful, and should be upheld by this Court.

VI. Tax Commissioner Proposition of Law No. 6

> *NASCAR did not employ an alternate situsing methodology in situsing its receipts from the licensing of its intellectual property, let alone a good faith, reasonable methodology. Thus, Ohio Admin. Code 5703-29-17(B)(2)(b) does not apply and the penalty properly was imposed by the Commissioner. Having failed to present evidence of a good faith effort to comply with the CAT situsing statute, the BTA reasonably and lawfully affirmed the assessment of the penalty.*

NASCAR sitused nearly all of its receipts at issue to Florida before the CAT was enacted and continued to situs them to Florida after the CAT became law. Its Managing Director of Finance, Chris Glenn, testified that NASCAR secures the services of international tax advisors

annually to review any changes in NASCAR's business or tax laws that would affect its compliance responsibilities. Supp. 81-82.

Glenn did not testify that its tax advisors reviewed Ohio's CAT and NASCAR's situsing of receipts for compliance with the law. He did not testify that the advisors signed off on NASCAR's continuing to situs the receipts to Florida. NASCAR offered no evidence to indicate that any analysis of the CAT situsing provisions had taken place internally or with the assistance of its advisors, and that a decision was made that situsing the receipts to Florida was a reasonable, alternative method. Indeed, the only evidence that was presented was Glenn's testimony that he didn't think it was appropriate to situs the receipts using the CAT's market-based approach. Contrary to NASCAR's protestations otherwise, there simply is nothing in the record to indicate that NASCAR made a good faith effort to utilize a reasonable alternative methodology to R.C. 5751.033(F).

CONCLUSION

NASCAR's tale of woe is the lament of someone suffering the consequences of its own actions. NASCAR enjoyed the benefit of situsing the majority of its receipts to a state that does not impose a tax on them. It decided that it would not comply with the CAT, but would be one of several taxpayers who would challenge the imposition of the CAT on businesses under the factor presence nexus standards. When this Court affirmed the constitutionality of the CAT nexus standards while NASCAR's appeal was pending, NASCAR claimed that its refusal to situs its receipts as required by the CAT was the adoption of a reasonable, alternative situsing method. The Commissioner didn't see any evidence of that, and found that the situsing of NASCAR's receipts was not reasonable at all. The BTA reviewed the evidence presented and the pertinent law and agreed with the Commissioner. Its decision is supported by the testimony and

documentary evidence submitted, and this Court should find that it is reasonable and lawful and affirm.

Respectfully submitted,

Dave Yost (0056290)
Ohio Attorney General

/s/ *Christine Mesirow*

Christine T. Mesirow (0015590)
Raina Nahra Boulos (0080238)
Assistant Attorneys General
Taxation Section
30 E. Broad Street, 15th Floor
Columbus, Ohio 43215
Telephone: (614) 995-3753
Facsimile: (866) 459-6679
christine.mesirow@ohioago.gov
raina.nahraboulos@ohioago.gov

Counsel for Appellee
Jeffrey A. McClain, Tax Commissioner of Ohio

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by electronic mail this 28th day of September 2021, upon the following:

Jeremy A. Hayden (0075736)
Aaron M. Herzig (0079371)
Brian A. Morris (0093539)
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202
jhayden@taftlaw.com
aherzig@taftlaw.com
bmorris@taftlaw.com

Counsel for Appellant
NASCAR Holdings, Inc.

/s/ *Christine Mesirow*