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.	:	

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE BOARD OF TAX APPEALS

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INTRODUCTION

The Commissioner admits he got it wrong: "in retrospect, the Commissioner agrees that division (F) of that section may be more appropriate." (Appellee's Br. at 12.) In other words, the assessment and final determination incorrectly sitused NASCAR's receipts under R.C. 5751.033(I) instead of under R.C. 5751.033(F). Despite the fact that these statutes employ different language, ask different questions, and lead to different results, the BTA affirmed the Commissioner's Final Determination. The BTA improperly gave the Commissioner a second bite at the apple. This Court should vacate the Final Determination on that basis alone.

To try to avoid that result, the Commissioner's brief resorts to ad hominem attacks rather than law. The Commissioner claims that NASCAR did not cooperate, but that contradicts the Commissioner's prior sworn statements. (Supp. 32 ("Q: Would you say that NASCAR was pretty cooperative during the audit period? A: They provided the information we asked of, yes.").) And he wants the Court to make improper negative inferences about NASCAR just because it calls Florida home. Either NASCAR's receipts should be sitused "in this state," or they should not. The text of the statutes answers that question. But unhappy with those answers, the Commissioner pretends that the statutory text does not matter. All told, the Commissioner ignores the text of four different statutes—R.C. 5703.05, 5751.033(I), 5751.033(F), and 5703.58.

Even if the Commissioner got to start over under the correct statute, he can prevail only by ignoring the plain language of R.C. 5751.033(F), which creates a three-step process to determine whether intellectual property receipts are sitused to Ohio. The text first asks whether "the receipts are based on the amount of use of the property in the state." The Commissioner admits, as he must, that this part of the statute does not apply. (Appellee's Br. at 19.) Step two asks whether "the payor has the right to use the property in this state." The "payors" here—FOX, Turner, BSI, and AFLAC—have the right to use NASCAR's intellectual property in Ohio.

NASCAR has never disputed that. Thus, the Commissioner argues that NASCAR's receipts should be sitused in Ohio because the receipts include "the right to use [NASCAR's] intellectual property in Ohio." (Appellee's Br. at 19–20.)

But the text of the statute does not end there. When the "payor has the right to use" intellectual property in Ohio, then the "receipts from the sale . . . shall be sitused to this state to the extent the receipts are ***based on*** the right to use the property in this state." R.C. 5751.033(F) (emphasis added). So it is not enough that a third-party payor had the mere right to use NASCAR's intellectual property in Ohio. NASCAR's revenue (or "receipts") from the third-party payor must also be "based on" the right to use NASCAR's intellectual property in Ohio.

The Commissioner offers no interpretation of "based on," and goes so far as to suggest that a close reading of a statute's language is improper. (Appellee's Br. at 19.) The result is that the Commissioner asks the Court to effectively delete the last 17 words in subsection (F), which would eliminate the requirement that receipts "shall be sitused to this state ~~to the extent the receipts are based on the right to use the property in this state~~."

When it came to the scope of the territory, the Commissioner just made up a new burden. NASCAR apparently needed to show its "presence or fan base" in other territories before the Commissioner would include that territory in his assessment. (*Id.* at 9.) The Commissioner does not explain why he singles out the Caribbean Basin and then assumes that NASCAR would not have "the same draw in the Caribbean Basin that it has in the United States." (*Id.*) But the Court should reject the Commissioner's fact-free analysis, which made NASCAR's tax ***220 times*** higher than it should be even under his already novel methodology. In the end, these arguments all underscore how the Commissioner's situsing methodologies are completely untethered from any statute—and how he just wants unfettered discretion to apply the CAT.

ARGUMENT

I. R.C. 5717.03 is not limitless, nor can it save the Commissioner's mistakes.

The Commissioner admits that the Final Determination was wrong. (*Compare* Appellee's Br. at 12 ("[I]n retrospect, the Commissioner agrees that division (F) of [R.C. 5751.033] may be more appropriate."), *with* Appx. 22 (situsing the receipts under subdivision (I)), *and* Appx. 8 ("[T]he broadcast revenue assessment was initially situsing under the wrong statute.").)[1] The Commissioner also admits that, under R.C. 5703.05, he "is without power to modify [a final determination]" on appeal. (Appellee's Br. at 14.) The Commissioner, however, argues that the BTA could still fix the Final Determination under the general provisions of R.C. 5717.03, and thus, the BTA simply "modified" his mistakes. But the Commissioner is wrong for at least four reasons.

First, the Commissioner is wrong as a factual matter: The BTA did not "modify" the assessment, it "affirmed" it. (Appx. 10 ("Accordingly, the final determination must be, and is hereby, affirmed.").) That is a fundamental problem with the BTA's decision. The BTA did not "modify" the Final Determination under R.C. 5717.03. Instead, the BTA admitted the Final Determination was wrong and affirmed it anyways. That is error—plain and simple.

Second, a textbook canon of statutory construction forecloses the Commissioner's expansive reading of R.C. 5717.03. The surplusage canon prevents an interpretation of a statute that would render another statutory provision meaningless, inoperative, or superfluous. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174–79 (2012); *accord Rhodes v. New Philadelphia*, 129 Ohio St.3d 304, 2011-Ohio-3279, 951 N.E.2d 782,

[1] After this audit from 2005 to 2010, the Commissioner continued to audit NASCAR. For those later audits, the Commissioner admits that "division (F) of R.C. 5751.033 was used by the auditor." (Appellee's Br. at 12.) So the Commissioner is continuing to move the goalposts.

¶ 23. But that is exactly what the Commissioner's interpretation would accomplish. R.C. 5703.05(H) says that "the Commissioner shall not . . . correct any tax assessment [or] determination . . . to which an appeal . . . has been filed with the [BTA]." If the Commissioner could merely "suggest" a correction for a wrong assessment or determination on appeal, and the BTA could then step in, fix the mistake, and ***still affirm*** the wrong assessment or determination, such an exception would swallow the rule. This defies common sense, the surplusage canon, and the text of R.C. 5703.05.

Third, when two statutes potentially govern a situation, the more specific statute controls. *MacDonald v. Cleveland Income Tax Bd. of Rev.*, 151 Ohio St.3d 114, 2017-Ohio-7798, 86 N.E.3d 314, ¶ 27. R.C. 5703.05(H) specifically precludes the Commissioner from correcting any tax assessment or determination while the matter is pending before the BTA. But that is exactly what the Commissioner did. While R.C. 5717.03(F) grants the BTA the power to affirm, reverse, vacate, modify, or remand tax assessments, there is no authority for the BTA to reassess under a different statute and situsing methodology. As such, R.C. 5703.05(H) applies more directly, and under this Court's precedent, must control.

Fourth, the Commissioner's argument conflicts with both *Caraustar* decisions. The Commissioner conveniently ignores the salient legal principle of *Caraustar I*: The BTA cannot "provide an order to do precisely what [the Commissioner] is precluded from doing under [R.C. 5703.05]." *Caraustar Paperboard Corp. v. Wilkins*, BTA Case No. 2005-V-1147, 2007 WL 953670, at *2 (Mar. 19, 2007). For *Caraustar II*, there was no dispute about whether the Commissioner applied the correct statute. 2008 WL 2781938, at *2. Instead, the BTA decided whether equipment were "molds, patterns, jigs, dies or drawings." *Id.* at *3–6. That factual review led to the BTA's holding, where it "affirmed in part and reversed in part." *Id.* at 9.

Caraustar II (attached to the Commissioner's brief), which granted a motion to quash a subpoena, is also wholly irrelevant here. It did not even reference, much less apply, R.C. 5703.05 or R.C. 5717.03. Regardless, this Court should focus on the true lessons from the *Caraustar* decisions, which work together to show how the BTA should review final determinations. On one hand, the Commissioner does not get to make "a new final determination" on appeal. *Caraustar I,* at *3. And on the other hand, if the BTA does find that the Commissioner made errors, the correct remedy is to "reverse" that part of the assessment. That did not happen here. The Commissioner offers no authority that the BTA can "affirm" a final determination that relied on the wrong statute.[2]

II. R.C. 5703.58 bars any new assessment or determination.

It has been more than 10 years since the end of NASCAR's last relevant reporting period. That length of time has consequences. The General Assembly limited the Commissioner's ability "to make or issue an assessment for any tax . . . to ten years . . . from the date the tax return or report was due." R.C. 5703.58. This Court recognizes the importance of such statutes: "to ensure fairness to defendant; to encourage prompt prosecution of causes of action; to suppress stale and fraudulent claims; and to avoid the inconvenience engendered by delay." *O'Stricker v. Jim Walter Corp.*, 4 Ohio St.3d 84, 88, 447 N.E.2d 727 (1983).

In response, the Commissioner argues, with no support, that he could simply "modify his assessment" and issue "a new final determination" on remand to avoid the statute of limitations. (Appellee's Br. at 18.) But the Commissioner's view ignores the text—and this Court's interpretation—of the statute. To "make" and "issue" an assessment simply means to journalize

[2] The Commissioner's cursory reference to NASCAR's cases from this Court cannot expand the scope of R.C. 5717.03. (Appellant's Br. at 23.) These case are not, as the Commissioner put it,

the assessment and send notice to the taxpayer. *Carstab Corp. v. Limbach*, 40 Ohio St.3d 89, 90, 532 N.E.2d 102 (1988). That is what the Commissioner did here. (Appx. 27.) And if the Court vacates that assessment, or to use the Commissioner's words, orders him to "recalculate" or "further refine" the assessment, he would need to journalize a new assessment and send a new notice to NASCAR. (*See* Appellee's Br. at 18, 23.) Even if the Commissioner is correct about the procedure (he is not), a "modified assessment" is still "an assessment." (*Id.* at 18.)

III. The Commissioner's argument ignores the plain text of R.C. 5751.033(F), which prohibited him from situsing NASCAR's intellectual property to Ohio.

The Commissioner does not seriously dispute the text of R.C. 5751.033(F). Nor does he offer any alternative meaning of "based on"; he just ignores it. (Appellee's Br. at 20.) The Commissioner explains that R.C. 5751.033(F) covers two scenarios: "receipts that are paid based on the amount of use, and receipts that are paid for the right to use." (*Id.*) But that is not what the statute says. The second scenario also requires the receipts to be "***based on*** the right to use the property" in Ohio. R.C. 5751.033(F) (emphasis added).

This Court agrees that taxing statutes must be interpreted according to their common and ordinary meaning, not an acquired meaning. For example, in *Defender*, this Court rejected the Commissioner's argument that the term "benefit" in R.C. 5751.033(I) should be granted some special or acquired meaning. *Defender Sec. Co. v. McClain*, 162 Ohio St.3d 473, 2020-Ohio-4594, ¶¶ 28–29. Rather, the Court simply gave "benefit" its ordinary meaning as defined in a dictionary. Likewise, the Court should give "based on" its common, ordinary meaning.

Instead of accepting the plain meaning of the statute, the Commissioner provides a broad gloss on the statute that eliminates "based on" altogether. For example, the Commissioner

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mere "window dressings." They show how this Court has cabined R.C. 5717.03, and thus how it should be limited by R.C. 5703.05 to give the latter effect.

suggests he could tax NASCAR just because "NASCAR-branded items are readily available for purchase at retail outlets like Target, Walmart, and Kohl's." (Appellee's Br. at 19.) In doing so, the Commissioner ignores the relevant statutory questions, including ***how*** the items end up on shelves in Ohio—and whether NASCAR was paid ***based on*** the right to sell those items in Ohio. The Commissioner is advocating a "you-get-taxed-no-matter-what" approach. (*Id.* at 11–12.)

The Commissioner's argument is akin to the but-for test rejected in *Defender*. In *Defender*, the Commissioner argued that ADT realizes the benefit of its contracts in Ohio because "[w]ithout Ohio, the Alarm Services Contract fees at issue would be wholly impossible." *Defender* at ¶ 8. While that may be true, the Commissioner has no authority to tax receipts in violation of the statutory rule. *See Defender* at ¶¶ 31-32. The same analysis applies here. While no one in Ohio would be able to watch a NASCAR race without the licensing agreements with FOX (and other third-parties), that alone cannot justify taxation of NASCAR's receipts. Instead, because the receipts are not "based on" its customers' amount of use or right to use the property in Ohio (*i.e.*, the amount of the receipts does not change when the amount of use or right to use in Ohio changes), division (F) does not permit taxation of those receipts.[3] It does not matter whether Ohioans can watch the Daytona 500 on TV.

The Commissioner's view of R.C. 5751.033(F) would also flip the statute's language on its head. Rather than require a showing that NASCAR's receipts are "based on the right to use" the property in Ohio, the Commissioner wants to situs the receipts to Ohio unless the receipts ***exclude*** Ohio. (Appellee's Br. at 21.) But that would require a rewrite of the statute in two

[3] The Commissioner's astonishment with the plain reading of the CAT situsing statute is not new, despite being unfounded. (*See, e.g.*, *Defender* at ¶ 11 ("It belies logic that the purchaser (ADT) receives no benefit in Ohio from the contracts it purchase from Defender.").)

major ways. *First*, it would make part of the statutory text meaningless, which already asks whether "the payor has the right to use the property in this state." R.C. 5751.033(F).

Second, for the Commissioner's interpretation to work, the Court would have to add words and delete others: "the receipts . . . shall be sitused to this state to the extent the receipts are **not excluded from** ~~based on the right to use the property in~~ this state." Both approaches, of course, contradict well-established canons of statutory interpretation. *Hulsmeyer v. Hospice of SW Ohio, Inc.*, 142 Ohio St.3d 236, 2014-Ohio-5511, 29 N.E.3d 903, ¶¶ 23, 26 (a court can make "neither additions nor deletions from words chosen by the General Assembly"); *State ex rel. Nat'l Lime & Stone Co. v. Marion Cnty. Bd. of Comm'rs*, 152 Ohio St.3d 393, 2017-Ohio-8348, 97 N.E.3d 404, ¶ 14 ("Our role is to evaluate the statute [and] give effect to every word and clause, avoiding a construction that will render a provision meaningless or inoperative.").

It is no surprise then that the Commissioner seeks to emphasize legislative history over statutory text. (Appellee's Br. at 3–4.) But there is no need to consider such history or intent.[4] As this Court instructs, "we do not look at legislative intent to determine the meaning of a statute when the statute is unambiguous." *Wayt v. DHSC, LLC*, 155 Ohio St.3d 401, 2018-Ohio-4822, 122 N.E.3d 92, ¶ 29. The Commissioner has never argued that R.C. 5751.033 is ambiguous.

A. The Commissioner doubles-down on his situsing mistake under subdivision (I) rather than subdivision (F) of R.C. 5751.033.

According to the Commissioner, "there is no substantive difference in the manner in which the receipts are sitused under either" subdivision (I) or (F) of R.C. 5751.033. (Appellee's Br. at 12.) But this Court and the text of the statute say otherwise.

[4] Even if the Court did look at legislative history, the Commissioner is wrong about the CAT including only "market based" sourcing. The Ohio Administrative Code contains numerous examples of non-market based sourcing. Moreover, R.C. 5751.033 and the regulations thereunder clearly allow for alternative situsing methodologies. *See* R.C. 5751.033(I)–(J); OAC 5703-29-17.

Start with the text. R.C. 5751.033(I) instructs that receipts "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." And importantly, when making this determination, "[t]he physical location where the purchaser ultimately uses or receives the benefit . . . shall be paramount in determining the proportion of the benefit in this state to the benefit everywhere." R.C. 5751.033(I). So under subsection (I), the question is ***where*** do NASCAR's licensees, such as FOX, "use or receive the benefit" of the intellectual property. FOX, for example, is in New York—and that is where FOX receives NASCAR's intellectual property. (Appellant's Br. at 7.)

In contrast, R.C. 5751.033(F) says nothing about "proportions," "benefits," or "physical locations." Those words do not exist in subsection (F). Rather, as already detailed at length, subsection (F) asks whether receipts are "based on" the use or right to use intellectual property in Ohio. Under subsection (F) then, the question is ***how*** is NASCAR paid for the use or right to use its intellectual property. Those are two very different statutory inquiries.

This Court agrees. Just last year, the Court explained that the situsing analysis under subsection (F) is different that the situsing analysis under subsection (I). *Defender* at ¶ 32. The Commissioner tries to quickly distinguish (and then ignore) *Defender*. (Appellee's Br. at 17–18.) But *Defender* forecloses the Commissioner's cursory argument. And if the Commissioner is correct that subsections (F) and (I) are the same, *Defender* shows that none of NASCAR's receipts from FOX can be sitused in Ohio because FOX is located in New York and would receive the benefit in New York. The same is true for NASCAR's other receipts—none of which came from Ohio companies.

Defender involved three parties: (1) Defender, a company that procured service contracts with consumers in Ohio; (2) ADT, a company that provided security monitoring services for consumers "throughout the country," including Ohio; and (3) consumers in Ohio that purchased monitoring services. 2020 Ohio 4594, ¶¶ 5–6. ADT paid Defender for the contract rights to provide monitoring services to consumers in Ohio (essentially taking over Defender's contracts with Ohio consumers). *Id.* ¶ 6. The Commissioner wanted to situs these receipts in Ohio. *Id.* This Court, however, refused to do so under the plain language of R.C. 5751.033(I), which asked where ADT "benefited" from these contracts. The Court distinguished between (i) ADT's location *outside* Ohio, where it received payments from Ohio consumers and provided the monitoring services remotely, and (ii) the location of consumers in Ohio, where their properties were protected by ADT. *Id.* ¶¶ 22–23. For situsing purposes, the correct focus was where ADT benefited (outside Ohio)—not where the consumers benefited (inside Ohio).

The same analysis applies here. FOX paid NASCAR for the right to broadcast races to consumers. (Supp. 262, § 1.21.) And just like *Defender*, the Commissioner wants to situs those contract receipts in Ohio "because [FOX] could provide these televised races to Ohio viewers." (Appellee's Br. at 17.) But the Commissioner repeats the same mistake he made in *Defender*: He fails to distinguish between (i) FOX's location *outside* Ohio, where it received payments at its headquarters and produced broadcasts in its studios, and (ii) the location of consumers in Ohio, where they could view NASCAR races (or buy NASCAR-branded products). (*See id.*) As a result, if R.C. 5751.033(I) applies, or, as the Commissioner argues, there is no "substantive difference" between subsection (I) and (F), then the receipts must be sitused where FOX benefited (outside Ohio)—not where the consumers benefited (inside Ohio).

Defender also shows how attenuated NASCAR's connection to Ohio really is with regard to the transactions and receipts at issue. In *Defender*, Defender contracted exclusively with ADT to sell monitoring service contracts for consumers ***in Ohio*** to ADT. 2020-Ohio-4594, ¶ 6. But that still was not enough to situs Defender's receipts to Ohio. *Id.* ¶¶ 21–23. NASCAR's connection to Ohio is even more attenuated. FOX, unlike ADT, did not provide services directly to Ohio consumers. (Appellant's Br. at 2, 7, 13.) Instead, FOX contracted with third parties, such as cable television companies and similar distributors, which then took NASCAR's property to Ohio, as shown below:

If ADT's direct relationship with Ohio could not support situsing Defender's receipts to Ohio, then certainly FOX's diminished connection to Ohio cannot support situsing NASCAR's receipts to Ohio. The Commissioner ignores the other parties involved in selling NASCAR's intellectual property to Ohio consumers. According to the Commissioner, NASCAR products and broadcasts are available in Ohio, so NASCAR must be taxed. The Commissioner offers no statutory basis for his expansive view of the CAT; of course, there is none.

The textual difference between subsections (I) and (F) also shows how the Commissioner is trying to force a square peg into a round hole. The Commissioner started the audit by incorrectly applying R.C. 5751.033(I). (Appellant's Br. at 15–16.) So from the beginning, the

Commissioner was evaluating the alleged "benefit" to FOX. (*Id.* at 16.) But now, the Commissioner must show that the receipts are "based on" the right to use NASCAR's intellectual property in Ohio. *See* R.C. 5751.033(F). This is why the BTA should have reversed—the entire record is about the wrong question under the wrong statute. If this were a criminal case, the Commissioner would essentially be arguing that a wire fraud conviction is valid even though the evidence related only to mail fraud. While this is not a criminal case, a taxing statute improperly applied is also a taking.

B. The Commissioner offers no interpretive tool or legal authority that the situsing of receipts under subsections (I) and (F) is the same.

The Commissioner cites no authority, statutory or otherwise, for the idea that he can situs receipts under subsections (I) and (F) using the same methodology. (Appellee's Br. at 12–13.) Nor does the Commissioner explain why the General Assembly would include subsection (I) and (F) if they are really just the same. Rather, the Commissioner only cites his own practice of treating the statutes the same as somehow providing authority that the statutes are in fact the same. (*Id.* at 13.) But that just highlights the Commissioner's error. It does not excuse it. The Court should reject the Commissioner's "the-text-of-the-statute-does-not-matter" argument.

The Commissioner's contention that the two statutes are the same also directly conflicts with *Defender*, where this Court highlighted the differences between subsection (I) and (F):

> The tax commissioner points to R.C. 5751.033(F), which "allows Ohio to tax the 'right to use' a trademark in Ohio." Division (F) does link tax situs to the use of intellectual property in Ohio. But this case does not address license fees for intellectual property, and all agree that the analysis here is controlled by R.C. 5751.033(I), not division (F). Under division (I), situs is determined not by looking at where ADT uses the contract rights, but where ADT "uses or receives the benefit of" the contract rights. (Emphasis added.)

Defender at ¶ 32. If this Court required the Commissioner to differentiate (I) from (F) in *Defender*, why should there be a different result here?

Further, in Ohio, tax statutes are strictly construed, with all doubts resolved in favor of the taxpayer. *Davis v. City of Willoughby*, 173 Ohio St. 338, 343, 182 N.E.2d 552 (1962). Thus, the Commissioner cannot issue an assessment under one statute, then try to fix his mistake and affirm the same assessment under a different statute. If the Commissioner cannot even interpret his own tax laws well enough to apply the correct statute throughout an assessment process (and until a final determination), it would be improper to impose a higher standard on a taxpayer.

C. The Commissioner mischaracterizes NASCAR's plain reading of R.C. 5751.033(F), which does not require purchasers to "actually use" the intellectual property in Ohio.

Left without a textual argument, the Commissioner resorts to criticizing NASCAR's motives and mischaracterizing its arguments. The Commissioner claims that reading and applying the plain words of the statute is actually an exercise taking the Court down "a semantical black hole." (Appellee's Br. at 19.) The Commissioner chides NASCAR for giving meaning to the statute's words by "arguing that . . . the receipts that FOX paid to NASCAR had to be 'based on' the right to broadcast in Ohio." (Appellee's Br. at 19.) That is not some obscure grammatical argument from NASCAR—those are simply the words in the statute.

The Commissioner then plays misdirection—hoping that his mischaracterization of NASCAR's reading of the statute will dwarf the text itself. For example, the Commissioner argues that, "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." (*Id.* at 18–19.) But NASCAR said no such thing. NASCAR agrees with the Commissioner that the CAT applies to "receipts for the right to use intellectual property in Ohio, whether or not that use actually occurs." (*Id.* at 20.) But those receipts must still be "based on" the right to use the intellectual property in Ohio. And it matters ***who*** is bringing the property to Ohio.

Take the Commissioner's concern with Ohioans finding NASCAR-branded items on the shelves in Walmart, Target, and Kohl's. Those items could end up in Ohio stores as the result of several different licensing agreements—each with different tax consequences depending on how NASCAR is paid for the right to use its intellectual property. For example, NASCAR's revenue could depend on a licensee's amount of sales in Ohio. Then again, NASCAR's revenue could come from a licensee's opportunity to sell in Ohio, irrespective of the actual sales (or "use") in Ohio. Different market factors in Ohio could drive the price of this type of agreement, such as the number of stores, the size of the fan base, history of sales, and shipping costs. But in both situations, NASCAR's revenue would be "based on" Ohio, and the licensee would be directly responsible for using the property in Ohio.

But neither of these situations exist here. Instead, NASCAR's revenue was unconnected to Ohio because, among other things, it left the discretion to the licensees on where to exercise those rights. And the licensees used other third parties to actually bring the property to Ohio. This does not mean that NASCAR products or broadcasts in Ohio escape the CAT. Rather, it means the proper company in the supply chain pays the CAT—*i.e.*, the company that actually received revenue "based on" Ohio. (*See* Chart, *supra* p. 11.)

IV. The Commissioner provides no support for his invented situsing methodology.

The Commissioner's other arguments suffer from the same problem: They are untethered from the text in R.C. 5751.033. NASCAR exposed this problem. (Appellant's Br. at 32–34.) Unable to connect Ohio to NASCAR's receipts under the statute, the BTA instead sitused "the total receipts paid for NASCAR's intangible assets to Ohio ***based on*** either the percentage of the population or the percentage of cable televisions in Ohio compared to the total number [of] cable televisions outside of Ohio." (Appx. 6 (emphasis added).) Armed with his invented "audience

factor" and "consumer count," the Commissioner then relied on unofficial census information from Infoplease.com, along with an unverified "Summary" of Nielsen "Estimates" provided by an unknown and random taxpayer in an unrelated audit. (Appellant's Br. at 12–14.)

The Commissioner concedes that there is no statute or rule that authorizes this methodology. (Appellee's Br. at 21–22.) Instead, the opposite is true. The Commissioner confirms that 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." (*Id.* at 22.) But rather than return to the text of the statute, the Commissioner did exactly what the General Assembly said not to do—he invented his own methodologies and applied them retroactively. This was the precise problem that NASCAR highlighted in its brief: "This means that no taxpayer in Ohio, including NASCAR, received notice (or the ability to comment) on this proposed methodology. Nor did anyone know how the Commissioner would apply or calculate this new methodology." (Appellant's Br. at 33.) And now, stuck with no statute, rule, or authority to even make a rule, the Commissioner boldly blames NASCAR, arguing that NASCAR still deserves the assessed tax because, according to the Commissioner, NASCAR did not "cooperate" enough during the audit process. The Commissioner even goes a step further, saying that NASCAR should have agreed with the Commissioner's methodology even in "the absence of an administrative rule." (*Id.*) In other words, the Commissioner wanted NASCAR to just comply and pay whatever tax the Commissioner thought it should pay.

V. The auditor confirmed that NASCAR fully cooperated with the audit.

When addressing the dubious information that he relied on, the Commissioner suggests that he was forced to use that information because NASCAR failed to provide other information. (Appellee's Br. at 6–9 (asking for "television ratings, demographic information regarding

NASCAR's fan base, and any other information that would assist in this situsing").) But NASCAR did not have that information. The Commissioner ignores this section in NASCAR's brief, including R.C. 5703.20, which allows the Commissioner to use his ***subpoena*** power to obtain information from third parties that actually have the information—assuming it exists at all. (Appellant's Br. at 12–14, 20, 35–36.) NASCAR did, however, give the Commissioner the receipts, contracts, and documents that, under the statute, are relevant to situsing.

The Commissioner also ignores his own confirmation that NASCAR cooperated and responded to all information requests from the Commissioner. (*Id.* at 20 (quoting Supp. 32) (confirming through his auditor's sworn testimony that NASCAR was "cooperative during the audit process" and "provided the information [the Commissioner] asked of").) The Court should reject the Commissioner's attempt to shift blame to NASCAR for his own failure to root his assessment in statutory authority or to collect the information he needed.

VI. The Commissioner admits that he applied his invented methodology incorrectly.

Even if the Commissioner could use the unverified information that he did, he still acknowledges that his assessment and determination were wrong. For example, the Commissioner admits that NASCAR's contracts "included areas outside of the United States." (Appellee's Br. at 9.) The Commissioner then concedes that he "didn't consider all of the territory of the various licensing agreements in computing the portion to situs to Ohio." (*Id.*) This is after the Commissioner already explained that he needed to consider the international scope of the territory—and that, if he had, NASCAR's CAT would have been lower. (Appellant's Br. at 35.) Indeed, it would have been ***220 times*** lower. (*Id.* at 37.)

The Commissioner's only defense to his failure to consider the proper scope of the territory in the agreements is to create a new burden out of thin air: "NASCAR provided no

information showing its presence or fan base in those [international] territories." (Appellee's Br. at 9.) The Commissioner posits that had NASCAR "provided any such documentation to show [its presence or fan base], the Commissioner would have taken it into account." (*Id.*) The problem is, to comply with such a burden, NASCAR would need to know what the standard was.

Further, the Commissioner cites nothing to support the idea that NASCAR needed to show that it "would have the same draw in the Caribbean Basin that it has in the United States" before he could properly consider the entire territory. (*Id.*) NASCAR appreciates its fans in the Caribbean Basin just as much as its fans in Ohio and everywhere else, but it does not routinely maintain detailed reports of viewers around the globe. Nor is there a business purpose to do so. There is a difference between fans and customers—and while viewers may be *fans* of NASCAR, they are not its *customers*. Requiring NASCAR to provide third party viewership reports (that it does not have) is not only impractical, it also highlights the key issue in this case: The Commissioner is attempting to tax NASCAR based on the activities of third parties, not its own.

VII. NASCAR properly raised its constitutional claim.

The Commissioner had notice of NASCAR's constitutional claim: The CAT, as applied, in unconstitutional under the Commerce Clause. In response, the Commissioner dissects the underlying reasoning supporting that challenge, arguing that the Court cannot review the constitutional challenge because NASCAR's reasoning "has broadened."[5] (Appellee's Br. at 25–26.) The Commissioner even suggests that NASCAR's claim is now barred just because it includes "a long discussion" of a new case. (*Id.* at 25.) These are all distractions to avoid a decision on the merits of this case. Plus, the Commissioner is wrong for two key reasons.

[5] It is notably ironic for the Commissioner to argue that an assessment under one statute can be fully affirmed under another statute on appeal (over 10 years after the assessment period), and that NASCAR's constitutional argument should not even be heard because it has "broadened."

First, the Commissioner admits, as he must, that NASCAR raised a constitutional challenge under the Commerce Clause. (*See id.* at 25.) That qualifies as sufficient notice. As this Court explained, when it comes to a notice of appeal for a tax decision, "we are not disposed to deny review by a hypertechnical reading of the notice." *MCI Telecomm. Corp. v. Limbach*, 68 Ohio St.3d 195, 197 (1994) (citation omitted). Instead, this Court found sufficient notice when a taxpayer alleged that it was "denied . . . equal protection of the laws." *Id.* at 197. Alleging an "equal protection" challenge is no more specific than alleging a "Commerce Clause" challenge.

NASCAR claims that the CAT is unconstitutional under the Commerce Clause, so it walked through the four-factors used to determine whether a tax, like the CAT, is valid under the Commerce Clause. (Appellant's Br. at 39 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 278–82 (1977)).) But the Commissioner asks this Court, for notice purposes, to divvy-up those four factors—from the same case—into independent notice requirements. That would create the very "hypertechnical" notice that this Court forbids.

Second, the BTA lacks authority to even resolve constitutional claims. As the BTA explained, "We make no findings regarding NASCAR's constitutional arguments, however, as such arguments may only be addressed on appeal by a court which has the authority to decide constitutional challenges." (Appx. 4.) It makes sense, then, that the notice of appeal to the BTA is broad—it is not going to resolve the constitutional questions anyway. In the end, the Court should see this argument for what it really is—the Commissioner cannot defend the merits of the constitutional challenge, so he would prefer the Court ignore it altogether.

VIII. The Commissioner's limited response to NASCAR'S constitutional claim is wrong about the law and the facts.

The Commissioner provides no response to NASCAR's main constitutional argument that the CAT, as applied to NASCAR, is unconstitutional under the Commerce Clause. And

when it comes to the Factor Presence Test, the Commissioner's hasty response does two things: (1) it exposes the true breadth of his argument, and (2) he reverts to just making things up.

For the former, the Commissioner confirms that he wants to tax the hypothetical foreign videographer who creates a popular pet video. (*See* Appellant's Br. at 46.) According to the Commissioner, NASCAR engaged in sufficient commercial activity in Ohio by engaging in other activities *outside Ohio* so long as those "activities [were] growing its fanbase in Ohio." (Appellee's Br. at 28.) But like most of its brief, the Commissioner cites no authority for this conclusory statement; there is none. Still, such an expansive test would capture all content creators because adding viewers from Ohio would grow someone's fanbase in Ohio.

For the latter, the Commissioner claims that "NASCAR chose to earn income ***from the use*** of its property in Ohio." (Appellee's Br. at 28 (emphasis added).) That is false—and the Commissioner knows it. The Commissioner admits that there is no evidence in the record about "the use" of NASCAR'S property in Ohio. (Appellee's Br. at 19.) Nor does NASCAR receive any receipt "based on" the use of its property in Ohio. This undermines the Commissioner's entire (and already limited) response to NASCAR's constitutional challenge. The activity the Commissioner cited as providing "a sufficient activity to pass constitutional muster" does not even exist. (Appellee's Br. at 28.) The CAT and R.C. 5751.01(I) are unconstitutional.

IX. The Court should vacate NASCAR's penalties and late payment penalties.

The Court should vacate all penalties. NASCAR acted in good faith by employing a reasonable, consistent, and uniform method of situsing. (Appellant's Br. at 48–49.) The BTA did not make a contrary finding. Indeed, it is hard to imagine how NASCAR acted in "bad faith" when it was correct about applying subsection (F) instead of (I). In response, the Commissioner offers two reasons why he thinks NASCAR acted in "bad faith," both of which are wrong.

First, it does not matter where NASCAR sitused its receipts so long as it did so consistently. *See* O.A.C. 5703-29-17(B)(2)(b). But the Commissioner likes to reference Florida, where NASCAR is located, as some implicit evidence of bad faith. (Appellee's Br. at 1, 30.) The only relevant inquiry is whether the receipts are sitused "in this state" or ***not*** "in this state." This is the same inquiry this Court answered in *Defender*. 2020-Ohio-4594, ¶ 20 ("Defender's second proposition of law presents the following question: Do Defender's ADT funding receipts have their situs ***within*** Ohio or ***outside*** Ohio under R.C. 5751.033(I).") (emphasis added).

Second, the Commissioner is wrong on the facts. The Commissioner's main argument about bad faith is that NASCAR did not employ any "tax advisors" to evaluate the CAT. (*Id.* at 31.) That is simply not true. NASCAR explained that it has an in-house tax advisor and accountant, as well as "outside tax advisors." (Supp. 79–80.) It also explained that, among other things, "we use tax advisors for tax advice, tax preparation, and tax review." (*Id.* at 80, 82 (explaining the process).) This included advice about the CAT and other state-by-state taxes. (*See id.* at 123, 125, 128–30 (explaining the process NASCAR employs).) NASCAR's consistent decision about where to situs the relevant receipts, which was made at the advice of its tax advisors, was not in bad faith just because the Commissioner disagreed with it.

CONCLUSION

The Commissioner has abandoned any pretext that he is applying the text of *any* statute. Instead, he now argues that different statutes, with different language, actually mean the same thing. And that he can use whatever post-hoc methodology he wants. Setting that, and the Commissioner's rhetoric, aside, this really is a simple case. The Final Determination applied the wrong statute, so the BTA should have reversed and vacated. But when the BTA affirmed anyways, it erred. This Court should reverse and vacate the Final Determination.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties through the Court's electronic filing system. Parties may access this filing through the Court's system. A copy was also emailed to all parties' counsel of record.

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