Supreme Court of Ohio Clerk of Court - Filed February 12, 2024 - Case No. 2023-1296

In the
Supreme Court of Ohio

PATRICIA HARRIS, TAX COMMISSIONER OF OHIO, Appellant/Cross-Appellee, v. VVF INTERVEST, LLC, Appellee/Cross-Appellant.	: : : : : : : : : :	Case No. 2023-1296 On appeal from the Ohio Board of Tax Appeals BTA Case No. 2019-1233

FIRST BRIEF:
INITIAL MERIT BRIEF OF APPELLANT/CROSS-APPELLEE,
PATRICIA HARRIS, TAX COMMISSIONER OF OHIO

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INTRODUCTION

VVF Intervest, LLC ("VVF") has engaged in substantial commercial activity within Ohio, by selling millions of dollars' worth of its bar soaps and personal care products, and by those products being explicitly shipped to Ohio – and only to Ohio – pursuant to those sales. Those products sit for an indefinite period of time in Ohio, and only after VVF's purchasers later resell those products – pursuant to their own, wholly separate transactions to which VVF is not a party – do any of those products actually leave Ohio. As a result, because of its Ohio-only sales, VVF has availed itself of the privilege of doing business in Ohio. Accordingly, VVF has been subject to Ohio's commercial activity tax ("CAT") and has paid tax accordingly under that framework.

Now, VVF seeks a refund of those taxes – despite having acknowledged, in its CAT returns, that the taxes associated with those receipts both: (1) qualified as "taxable gross receipts" under the CAT statutes, and (2) were properly sitused to Ohio. It is undisputed that VVF consciously and willingly fulfilled countless purchase orders, knowing fully – at the time of those orders – that those products would be shipped to Ohio. Indeed, all of VVF's business records relating to those transactions – contemporaneous or otherwise – contemplated only that VVF's sold products would be shipped to Ohio. It is also undisputed that VVF had no involvement in determining whether – or, equally important, when – the companies who bought products from VVF would later turn around and themselves sell those same products to another set of purchasers. As such, in the transactions involving VVF, because VVF's purchasers ultimately received the products in Ohio, the Commissioner correctly determined that those transactions' receipts should be sitused to Ohio. *See* R.C. 5751.033(E). VVF's gross receipts at issue are thus properly subject to the CAT. In turn, the Commissioner correctly determined that the CAT paid in relation to those

taxable gross receipts were not "erroneously" paid – and thus VVF was not entitled to the refund that it requested.

As discussed below, the BTA erred in determining, among other things, that VVF's gross receipts necessarily depended upon the destination of the sales made, at some later date, by VVF's purchasers. As such, this Court should reverse the BTA's September 13, 2023 Decision & Order; and remand this matter with instructions to affirm the Commissioner's May 31, 2019 final determination, denying VVF's refund request in its entirety.

STATEMENT OF THE CASE AND FACTS

VVF is a corporation that manufactures and sells bar soaps and other personal care products, out of its plant facility in Kansas City, Kansas. *See* BTA Statutory Transcript, Sept. 16, 2019 ("ST"), at 1, 11-12. VVF manufactures products for other multinational companies, like Procter & Gamble, High Ridge Brands ("HRB"), Colgate, Henkel/Dial, and others. *See* BTA Hearing Transcript, Feb. 14, 2022 ("Tr."), at 76-77. During the tax periods at issue, the vast majority (about 93 percent) of the goods sold by VVF were to HRB. ST 1; Tr. 61. Other VVF sales during the same tax periods were to other corporate purchasers, such as Chemical Associates, L'Oreal, and Henkel. *Id.*

As observed in exemplar invoices previously submitted to the Department of Taxation ("Department"), the VVF products at issue were sold to purchasers and shipped to distribution centers located in Ohio. *See, e.g.*, ST 56-92, 98-104 (invoices reflecting Ohio shipping destinations). For example, HRB arranged for the products that it purchased from VVF to be shipped to a distribution center in Columbus. Tr. 18. From there, at some later time, HRB decided when and where to sell those products to retailers (*e.g.,* Walmart, K-Mart, Target, etc.), who then themselves could conduct retail sales of those products to individual customers. Tr. 21-25. This decision, however, belonged entirely to HRB – and VVF had no knowledge or involvement in deciding where those items would be shipped. Tr. 35 ("VVF has no knowledge of where we're shipping the product, zero knowledge."). Indeed, VVF's involvement and knowledge was limited to the information filled out in bills of lading and other required shipping documentation, as to when the sold items left VVF's warehouse. *Id.* Beyond knowing that those shipments were destined for an Ohio distribution center, VVF had "no idea" where or to whom those products may be shipped in the future. *Id.; see also* Tr. 39 (shipping documentation showed *only* that goods

were being shipped to Ohio); Tr. 51 (HRB's contract manufacturers – such as VVF – had no involvement with HRB's invoicing process for shipments to retailers); Tr. 99 (when VVF produced goods, "we were not told the destination the product would go to which state. . . . We do not know.").

Once those products reach the Ohio distribution center, they remain there indefinitely – it could be a day, it could be a year – until HRB receives customer orders from retailers. Tr. 43-44. Indeed, HRB's salespeople arrange for *sales* of those products to retailers. *Id.* These sales are separate and apart from the prior transactions between VVF and HRB; indeed, if, hypothetically speaking, any issues or problems arose with the shipment of the sold goods to the retailers, the retailers would contact HRB – not VVF. Tr. 45-47.

As to VVF's purchasers *other than HRB*, the final determination noted that VVF "makes sales which are factually similar to those made with" HRB. ST 2. As confirmed at the hearing, VVF sold manufactured products to Dollar General and Henkel, and sent those products to an Ohio distribution center – just as VVF did for HRB. Tr. 67-68. As for Chemical Associates and L'Oreal, VVF shipped raw materials to Ohio locations, for those companies to use in producing goods for later sale. *Id.*

VVF's refund request

VVF submitted a refund request to the Department, for $349,532 in CAT paid during the period January 1, 2010 through December 31, 2014. ST 131.[1] Of this amount, approximately $327,000 is associated with sales to HRB. ST 13; Tr. 66. After the Department initially denied the refund requests, VVF submitted additional information and requested a hearing. ST 108-29.

[1] As confirmed at the hearing as being a typographical error, the final determination incorrectly indicates that the refund amount sought is $249,532. Tr. 65; *see* ST 1.

Among that additional information, VVF submitted spreadsheets indicating, for HRB shipments to Ohio, where HRB later shipped those products. *See* Exs. D & E.[2] These spreadsheets reflected all the goods that VVF shipped to Ohio. Tr. 50-51. However, as confirmed at the hearing, these spreadsheets were prepared by HRB, and were first made available to VVF in July 2015 – shortly *after* VVF submitted its refund request. Tr. 62. In other words, VVF did not have this information at any time during the tax periods at issue, nor contemporaneous with the sales at issue. *Id.*; *see also* Tr. 54 ("VVF had no knowledge of anything [HRB was] doing with the product once it left their facility, nor did they have the right to know that. It was a hundred percent owned by [HRB].").

<u>The Commissioner's final determination and BTA proceedings</u>

In a May 31, 2019 final determination, the Commissioner affirmed the denial of VVF's refund request in its entirety. ST 1-8. In so doing, the Commissioner determined that VVF had more than $500,000 in gross receipts within Ohio during the tax periods at issue, and thus had "bright-line presence" in Ohio and was subject to CAT for those tax periods. ST 3; R.C. 5751.01(I)(3). The Commissioner also determined that the sales at issue here are properly sitused to Ohio for CAT purposes, and rejected VVF's contentions that they should be sitused elsewhere. ST 4-8; R.C. 5751.01(G); R.C. 5751.033(E).

After the Commissioner issued her final determination, VVF timely filed a notice of appeal with the BTA. At a February 14, 2022 hearing before the BTA, VVF presented evidence and testimony from three witnesses: (1) Richard Scott Kirk, Jr., a former officer of HRB; (2) Jacob

[2] At the hearing, VVF introduced – and the BTA admitted – Exhibits A through E. As confirmed at the hearing, Exhibits D and E are substantively similar (if not identical) to what VVF submitted to the Department alongside its refund request. *See* Tr. 108.

Henderson, VVF's Vice President of Finance; and (3) Kurussh Amrolia, President of VVF Kansas Services, LLC, a VVF subsidiary.

<u>The BTA's decision</u>

In a September 13, 2023 Decision & Order ("BTA Decision"), a divided BTA reversed the Commissioner's final determination, in part. The BTA determined that VVF carried its burden with regard to its sales to HRB, that those goods were ultimately delivered outside Ohio. BTA Decision, at 11. The BTA agreed with the Commissioner that the sales at issue were, in fact, the result of two separate transactions – *i.e.*, one sale to ship VVF's goods from Kansas to Ohio, and a second sale to ship those goods from the initial purchaser's Ohio distribution center to other locations. *Id.* However, the BTA nonetheless determined that, for CAT purposes, the shipment of VVF's sales to Ohio was but the first leg of a "continuous delivery process." *Id.* To that end, the BTA determined that the "temporary" housing of the sold goods in Ohio does not change the fact that those goods were later shipped elsewhere. *Id.* The BTA also determined that VVF did not carry its burden with respect to its sales to Dollar General, inasmuch as VVF failed to demonstrate that those goods were "ultimately delivered" outside Ohio. *Id.*

This BTA decision also included a dissenting opinion, which disagreed with the majority's conclusion that the "ultimate destination" of the goods in question here is determined based upon where "*HRB's customers* ultimately receive the goods." *Id.* at 13 (emphasis added). Rather, the dissenting opinion determined that R.C. 5751.033(E) "requires taxable gross receipts to be sitused where ultimately received by the purchaser in the sale generating the gross receipt, not where received by the ultimate purchaser." *Id.* at 13-14. Indeed, "[a]ny subsequent transportation is related to a separate transaction between HRB and its purchaser and has no bearing on where the goods were delivered to HRB." *Id.*

LAW AND ARGUMENT

In reviewing decisions of the BTA, this Court determines whether the BTA's decision is "reasonable and lawful." *Shiloh Auto., Inc. v. Levin*, 117 Ohio St.3d 4, 2008-Ohio-68, ¶ 15. This Court will affirm the BTA's determinations of factual issues if the record contains reliable and probative evidence to support the BTA's findings. *Id.* The burden rests on the taxpayer "to show the manner and extent of the error in the [Commissioner's] final determination." *Id.* ¶ 16. The Commissioner's findings "are presumptively valid absent a showing that they are clearly unreasonable or unlawful." *Id.* Further, this Court will defer to the BTA's determination of the credibility of witnesses and its weighing of evidence, overruling such determinations only if an abuse of discretion can be established on appeal. *Seaton Corp. v. Testa*, 155 Ohio St.3d 424, 2018-Ohio-4911, ¶ 7. Generally, it is well-settled that the General Assembly's statutory enactments are entitled to "a strong presumption of constitutionality." *E.g., State v. Hochhausler*, 76 Ohio St.3d 455, 458 (1996); *see also* R.C. 1.47 ("In enacting a statute, it is presumed that . . . [c]compliance with the constitutions of the state and of the United States is intended.")

Proposition of Law No. 1:

Where a taxpayer sells items of tangible personal property, and the records contemporaneous to those sales reflect that, pursuant to those sales, those items were delivered only to Ohio, then the receipts from those sales are properly sitused to Ohio pursuant to R.C. 5751.033(E).

R.C. 5751.08(A) generally authorizes CAT refunds for taxes that "are overpaid, paid illegally or erroneously, or paid on any illegal or erroneous assessment." To be entitled to refund, an applicant "shall provide the amount of the requested refund along with the claimed reasons for, and documentation to support, the issuance of a refund." *Id.*

Pursuant to R.C. 5751.02(A), one is subject to the CAT if, among other things, he or she has "substantial nexus" with Ohio. The General Assembly has provided clear guidance to the

Commissioner to make this determination – namely, in the form of certain "bright-line presence" criteria in R.C. 5751.01. A person has "substantial nexus with this state" if he "has bright-line presence in this state." R.C. 5751.01(H)(3). A person "has bright-line presence" in Ohio for a given reporting period if he "[h]as during the calendar year taxable gross receipts of at least five hundred thousand dollars." R.C. 5751.01(I)(3). In this context, "gross receipts" are "the total amount realized by a person without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person [including] [a]mounts realized from the sale, exchange, or other disposition of the taxpayer's property to or with another." R.C. 5751.01(F). Finally, "taxable gross receipts" include those gross receipts "sitused" to Ohio. R.C. 5751.01(G); R.C. 5751.033.

Here, VVF challenged the Commissioner's determination as to situsing the gross receipts arising from VVF's product sales to HRB and other companies. As set forth in the final determination, the Commissioner determined that the gross receipts at issue should be sitused to Ohio. *See* ST 6-8. The BTA disagreed – but in so doing, it erred in concluding that VVF was entitled to a CAT refund for receipts relating to its sales to HRB that, according to the BTA, were "ultimately delivered" outside Ohio. *See* BTA Decision at 11-13.

A. As set forth in her final determination, the Commissioner correctly determined that VVF's gross receipts were properly sitused to Ohio.

Relevant to this appeal, R.C. 5751.033(E) governs the situsing of taxable gross receipts from the sale of tangible personal property:

> Gross receipts *from the sale of tangible personal property* shall be sitused to this state *if the property is received in this state by the purchaser*. In the case of delivery of tangible personal property by motor carrier or by other means of transportation, the place at which such property *is ultimately received after all transportation has been completed shall be considered the place where the purchaser receives the property*. For purposes of this section, the phrase "delivery of tangible personal property by motor carrier or by other means of transportation" includes the situation

> in which a purchaser accepts the property in this state and then transports the property directly or by other means to a location outside this state. Direct delivery in this state, other than for purposes of transportation, to a person or firm designated by a purchaser constitutes delivery to the purchaser in this state, and direct delivery outside this state to a person or firm designated by a purchaser does not constitute delivery to the purchaser in this state, regardless of where title passes or other conditions of sale.

R.C. 5751.033(E) (emphasis added).

As the Commissioner detailed in her final determination, the Supreme Court and other Ohio courts have decisively ruled on issues surrounding the CAT, and the BTA –until now, at least – had similarly followed suit. *See* ST 3-6 (citing, *e.g.*, *Crutchfield Corp. v. Testa*, 151 Ohio St.3d 278 (2016); *Greenscapes Home & Garden Prods., Inc.*, BTA No. 2016-350, 2017 Ohio Tax LEXIS 1810 (July 19, 2017), *aff'd*, 2019-Ohio-384 (10th Dist.), *discretionary appeal denied*, 2019-Ohio-2261); *Mia Shoes, Inc. v. McClain*, BTA No. 2016-282, 2019 Ohio Tax LEXIS 1864 (Aug. 8, 2019). Guided by these and other cases, the Commissioner correctly determined that the gross receipts at issue were properly sitused to Ohio – thus properly subject to CAT, and not appropriate for refund.

Here, as confirmed through testimony at the merit hearing, all the gross receipts at issue involved sales of VVF's products (to HRB, etc.) that were shipped to distribution centers in Ohio. Indeed, it is indisputable that *all* the shipping labels, invoices, and any available contemporaneous documentation relating to VVF's sales evidenced orders with an Ohio address as the location where the products were to be ultimately received by the purchaser. Tr. 35, 39. Accordingly, the purchasers (*e.g.*, HRB, etc.) received those goods in Ohio "after all transportation has been *completed*" – and as such, the receipts associated with those sales are properly sitused to Ohio. *See* R.C. 5751.033(E).

Even if, after receiving the products in Ohio, the purchasers may subsequently ship some of the goods out of Ohio, that event has no bearing on the situs of *VVF's* gross receipts – which result from the (initial) sale of tangible personal property by VVF to its customers (*e.g.*, HRB). It bears noting that, at the time of sale and shipment, VVF had *no* knowledge as to if – let alone when – the goods being shipped would later be shipped (again) to a subsequent purchaser and/or location outside of Ohio. Tr. 51, 99. Indeed, once the goods reach their Ohio destination, they remain there for an indeterminate amount of time – maybe a day, maybe a year. Tr. 43-44. The key trigger for the goods moving again (and potentially leaving Ohio) is if HRB (or whomever transacted with VVF) engages in *a second sale transaction*, this time with a retail purchaser. *Id.* Such a transaction is separate and apart from the original transaction between VVF and HRB – and beyond VVF's knowledge or control. *Id.* As such, the only transportation involved in VVF's own sales (*i.e.*, those at issue here) is to ship its goods *to Ohio*. Certainly, VVF's purchasers could situs their receipts to locations in Ohio if, *pursuant to their own sales*, those products are shipped out of Ohio. But as to VVF, the plain language of R.C. 5751.033(E) calls for the situsing of VVF's gross receipts that arise *from VVF's sales* – not its purchasers' sales.

Accordingly, all the gross receipts at issue are properly sitused to Ohio, thereby giving VVF bright-line presence in – and thus substantial nexus with – Ohio. *See* ST 3. Moreover, because the situsing determination was correct, the Commissioner correctly determined that VVF is not entitled to a refund for CAT paid in relation to those taxable gross receipts. the BTA's decision erroneously runs contrary to this reasoning.

B. The BTA improperly conflated the two sales relating to VVF's products (*i.e.*, VVF to Purchaser #1, and Purchaser #1 to Purchaser #2), and in so doing, erroneously determined that VVF's gross receipts should be sitused based upon the destination associated with the latter sales.

In its decision, the BTA readily acknowledged, just as the Commissioner had noted, that: (1) "there are two transactions" involved with the products at issue here; (2) "the Commissioner is correct that the pertinent transaction *relates to HRB's purchase*" (*i.e.*, the "first" sale); and (3) "the situsing of goods must be based on the *ultimate delivery to HRB*." BTA Decision, at 11 (emphasis added). Yet, inexplicably, the BTA nonetheless concluded that the situsing of VVF's gross receipts must necessarily depend upon the destination associated with the "second" sale. Put in its simplest form, the first sale – *i.e.*, VVF to HRB – involves shipment from VVF's warehouse in Kansas to HRB's designated distribution center in Ohio; and the second sale – *i.e.*, HRB to its purchasers – involves shipment from Ohio to another destination. While it may well be the case that HRB fully contemplated that it later would resell the products it purchased from VVF, then ship those products outside Ohio, there can be no doubt that, pursuant to VVF's sales to HRB, there was but one destination for those purchases: Ohio. At its core, the BTA's error is in determining that the "ultimate delivery to HRB" was somewhere other than Ohio. At that point, there is no "delivery to HRB" – whether by VVF or anyone else. Rather, it's a delivery from HRB to HRB's purchasers – and VVF is entirely removed from that exchange.

1. The BTA erred in concluding that the shipment of VVF's products to Ohio was but one leg of a "continuous delivery process."

In reaching its conclusion, the BTA curiously reasoned that the Ohio distribution center "ends just one leg of HRB's transportation and *continuous* delivery process." BTA Decision, at 11. This is factually incorrect. As hearing testimony clearly demonstrated, once VVF products reaches the Ohio distribution center after having been sold to HRB, they remain there indefinitely

– it could be a day, it could be a year – until HRB received customer orders from retailers. Tr. 43-44. Indeed, HRB's salespeople arrange for sales of those products to retailers – without any involvement or input from VVF. *Id.* Furthermore, if, hypothetically, any issues or problems arose with the shipment of the sold goods to the retailers, those retailers would contact HRB – not VVF. Tr. 45-47. Though there is no explicit definition or statutory provision that the BTA cites in using the term "continuous," it is undeniable that under any plain, common-sense understanding of that term, there is a clear <u>break</u> in the transportation chain associated with these products. Notably, the BTA's dissenting opinion clearly points this out. *See* BTA Decision, at 13.

In fact, another clear break in that chain is exhibited simply by pointing to *the two separate transactions* that each result in the transportation of those products. The BTA appears to have concluded that simply because VVF could demonstrate that a particular widget could be traced from Kansas to Ohio to another, non-Ohio destination, then such a chain must be "continuous." The BTA's majority seems to have assumed (incorrectly) that at the time that it purchased the goods in question from VVF, HRB knew precisely where those goods would be headed after first being delivered to and being stored at the Ohio distribution center. Such an assumption does not reflect the reality of the transactions at issue. Indeed, hearing testimony clearly indicated that HRB had not decided which specific purchasers (often retailers such as Walmart, K-Mart, Target, etc.) would be receiving the specific products that HRB had already obtained; and in turn, it was those purchasers who decided where these products would be sent once they agreed to purchase them. Tr. 21-25. And, even had HRB known, all along, where those goods may be destined for locations outside Ohio, it was clear that the products still sat in Ohio for some indefinite amount of time (as noted above).

Accordingly, the BTA erred by wholly ignoring hearing testimony that clearly contradicts a primary supposition upon which the BTA's decision relies.

2. **The BTA plainly misconstrues the plain language of R.C. 5751.033(E).**

As discussed above, the BTA's erroneous decision focuses upon the fact that the BTA has misconstrued what it means to be "ultimately received" pursuant to R.C. 5751.033(E). To place further context on that misconstruction, one must recognize that the BTA has implicitly misconstrued even more fundamental terms within the CAT situsing statute: "the sale" and "the purchaser." The BTA's erroneous reading of R.C. 5751.033(E) runs contrary to the plain meaning of these terms, in that VVF's gross receipts relate to *VVF's* "sale" of tangible personal property to its "purchaser," HRB. No language within this statute even contemplates what the BTA does here, which is to consider what arises out of HRB's subsequent "sale" to HRB's "purchaser" – since, after all, what is at issue here is *VVF's* gross receipts, not HRB's. Indeed, while the question of HRB's gross receipts is plainly not at issue here, it is telling that one could perform the exact same analysis to determine how to situs HRB's gross receipts – by examining what arises out of HRB's "sale" of goods to its "purchaser." Contrary to the BTA's construction, there is no ambiguity here that could muddle the fact that both the "the sale" and "the purchaser" must ultimately refer here to VVF's business activities that generate VVF's gross receipts.

At its simplest reading, it cannot be more plainly read that "[g]ross receipts from *the sale* of tangible personal property shall be sitused to this state *if the property is received in this state by the purchaser*." R.C. 5751.033(E) (emphasis added). Indeed, here, as to the goods that HRB acquired via "the sale" from VVF, HRB plainly "received" that property in Ohio. To be clear, this statute does include additional language – upon which VVF and the BTA rely – that one must look to where the goods in question are "ultimately received after all transportation has been

completed." As noted above, in light of how other key terms within this statute are to be viewed within the prism of a *single* transaction between the taxpayer and its purchaser, it would not make sense – at least, without explicit language to the contrary – for any of the other terms to be viewed within a prism of multiple transactions. Accordingly, where the statute contemplates "after all transportation," the statute necessarily refers to transportation associated only with the transaction (*i.e.*, "the sale") at issue.

Viewed another way, consider the Commissioner's final determination, wherein the Commissioner noted that VVF's preferred construction of R.C. 5751.033(E) would lead to "absurd results involving numerous sales of products through numerous jurisdictions," and that "[s]uch a result does not account for [VVF's] commercial activity in Ohio and is contrary to the intent and plain language of the statute." ST 7. Under VVF's (and, in turn, the BTA's) reading of the CAT situsing language, one would be faced with several practical problems. For example, it is possible that VVF's "sale" might never actually be consummated for CAT purposes, since VVF would need to wait until all subsequent purchases of the sold products had occurred, in order to properly situs those receipts. Also, it is possible that the situsing location for a VVF "sale" could be correctly determined at one time, and yet change *every time* that a subsequent sale occurs; indeed, under this reading, it is possible that a receipt could be correctly sitused to Ohio, then non-Ohio, and then Ohio – all depending upon some subsequent sales. These cannot be results that the General Assembly intended in enacting this situsing provision. Rather, the very point of such language – even where scenarios could be increasingly complex – is for the taxpayer to be able to ascertain a single situsing location *and* have some certainty that such a determination is not a moving target. Certainly, a refund claim can be appropriate where a *mistake* has been made, say, in how a receipt was sitused, and a taxpayer wishes to recoup erroneously paid taxes. But the

General Assembly could not have intended that a taxpayer will routinely need to file refund claims, as a matter of course, just because a receipt's situsing has somehow changed.

And as the Commissioner noted, the BTA's reading could mute VVF's commercial activity in Ohio. Suppose that VVF sells product to HRB and ships them to the Ohio distribution center; and, later, HRB sells and ships that same product to Kentucky. Under the BTA's reading, both VVF's receipt *and* HRB's receipt would be sitused to Kentucky. Yet, whether that product sat in the distribution center for a day or a year, that product sat in an Ohio distribution center. This is not simply an example of product ethereally being transported through Ohio's roadways. Rather, some entity saw enough need to commit to building a non-trivial building in Ohio, and devised plans whereby Ohio would serve as a weigh station for its goods. Whether for a day or a year, that activity *is* commercial activity in Ohio – but would not be recognized as such under the BTA's reading. At its core, the CAT situsing statute (and R.C. Chapter 5751, generally) intends to measure one's commercial activity in Ohio. Yet, the BTA's reading runs contrary to that basic intent (not to mention the statute's plain language).

3. <u>The BTA misconstrued its own case law (as well as that of this Court).</u>

In reaching its decision, the BTA noted that its decision in *Loral Corp. v. Limbach*, BTA No. 83-C-914, 1988 Ohio Tax LEXIS 218 (Feb. 23, 1988), "was clear that [a taxpayer's] transactions should not be sourced to Ohio simply because Ohio was one stop in a singular delivery process to a purchaser." The BTA misconstrued and misapplied its own case law – as well as the case law from this Court upon which *Loral* was predicated. Simply, *Loral* (plus two Court cases that the BTA identified as "seminal" here)[3] offers only limited support for the BTA's reasoning,

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[3] *See* BTA Decision, at 6 (citing *Dupps, Inc. v. Lindley*, 62 Ohio St.2d 305 (1980); *House of Seagram, Inc. v. Porterfield*, 27 Ohio St.2d 97 (1971); *Loral*, 1988 Ohio Tax LEXIS 218).

inasmuch as those cases all involve a single-sale situation – whereby as part of the single transaction, sold products touch on multiple destinations, and all subsequent destinations were specifically and explicitly contemplated, corroborated, and known at the time of the single transaction. *See, e.g.*, *Loral*, 1988 Ohio Tax LEXIS 218, at *1-6. It followed, then, that the BTA announced in *Loral* that:

> Again, we expressly find that the plain language of [the corporation franchise tax situsing statute][4] and the Court's holdings in *House of Seagram* and *Dupps* establish the rule that *where delivery of goods is made outside of Ohio, the sale does not occur in Ohio*. Products which merely pass through Ohio or never enter Ohio cannot be said to be sold in Ohio. . . .

Id. (emphasis added).

The problem in the BTA majority's reasoning is that *Loral* speaks to a single sale – and necessarily (albeit implicitly) contemplates only *transportation that occurs pursuant to that sale*. Moreover, from a standpoint of using everyday language, the hearing testimony was clear that the products sold by VVF does not "merely pass through Ohio" – in the manner contemplated by the BTA in *Loral* – but, rather, that product sits in abeyance, until and unless HRB itself sells those products to a different purchaser. Notably, the BTA's dissenting opinion recognized this very distinction in cases (like Loral) that were cited by the BTA majority:

> In my opinion, *Greenscapes* and *Mia Shoes* are inapplicable herein as those cases involved continuing transportation by the purchaser to a location where the property would be resold by the purchaser. *The cases [cited by the BTA majority] did not involve a second sale by the initial purchaser*. . . . In this case, VVF sold soap to HRB and HRB received the goods at the Ohio distribution facility. Transportation was complete when the goods were received at the distribution facility. HRB stored the goods at this facility until the goods were resold and HRB's delivery to HRB's retail customers outside of Ohio would be relevant for situsing HRB's taxable gross receipts arising from HRB's sale to its customers. *However, in my opinion, HRB's*

[4] As discussed in numerous CAT cases, the situsing statute at issue here (*i.e.*, R.C. 5751.033(E)) contains substantially identical language to its counterpart within the now-defunct corporation franchise tax scheme. *See Greenscapes*, 2017 Ohio Tax LEXIS 1810, at *5 (citing *Dupps*, 62 Ohio St.2d at 308).

> *sale to its retail customers is a separate transaction and is irrelevant to the proper situsing of VVF's taxable gross receipts arising from VVF's sale to HRB.* Contrary to the majority's finding, *I would find R.C. 5751.033(E) requires taxable gross receipts to be sitused where ultimately received by the purchaser in the sale generating the gross receipt, not where received by the ultimate purchaser.*

BTA Decision, at 14 (emphasis added).

Notwithstanding the limited applicability of this line of cases, there is one aspect of these cases that can be instructive here. In *Mia Shoes*, some of the taxpayer's sales were to customers that owned or used distribution centers in Ohio, and the taxpayer was assessed for gross receipts arising from shipments thereto. 2019 Ohio Tax LEXIS 1864, at *1-2. Like VVF contends here, the taxpayer in *Mia Shoes* contended that, for most of its Ohio shipments, Ohio was the *initial*, but not *ultimate*, destination. *Id.* at *3. The BTA, however, rejected that contention and affirmed the assessment against the taxpayer, as "*the evidence shows* that Mia Shoes *shipped its goods to Ohio, knew it was shipping goods to Ohio, and lost visibility of the goods once they were delivered to the customers in Ohio*." *Id.* at *9 (emphasis added). In essence, the BTA in *Mia Shoes* rejected the taxpayer's request that the BTA ignore the *taxpayer's own contemporaneous records* – which showed an *Ohio destination only*. So, too, here, VVF asked the BTA – and now asks this Court – to ignore VVF's own records. Instead, VVF asks that is own records be supplanted with records from its purchasers (*i.e.*, HRB and others). However, the records of *VVF's purchasers* do not reflect the commercial activities of *VVF* – who was not involved in the purchasers' decisions to move goods from their Ohio distribution centers. Indeed, such activity is too attenuated from VVF's commercial activity to warrant a non-Ohio situsing.

In any event, the BTA's decision in *Loral*, and other cases cited here by the BTA majority, do not actually support the BTA's reasoning – and, in fact, cuts the opposite direction.

C. The BTA erred in determining that R.C. 5751.033(E) does not mandate "contemporaneous knowledge of the ultimate destination at the time of transportation."

Finally, the BTA erred in determining that "neither [R.C. 5751.033(E)] nor the case law have imposed a requirement of contemporaneous knowledge of the ultimate destination at the time of transportation." *See* BTA Decision, at 10.

Before delving into this issue, two points merit noting. First, as the BTA noted (both in the majority and dissenting opinions), the taxpayer's subjective knowledge at or near the time of the sale in question is "probative," even if not "dispositive." *Id.* at 10, 12. Second, and on a related note, this Court need not conclude that such a requirement is necessary in order for the Commissioner to prevail in this matter; as detailed above, the statutory plain language and intent, as well as prevailing case law, all point to the receipts in question being correctly sitused to Ohio – and VVF thus not being entitled to a CAT refund here.

It is true that R.C. 5751.033(E) does not explicitly provide for how to account for a taxpayer's subjective knowledge for situsing purposes. Yet, the real question is how, for all practical purposes, could a taxpayer convincingly demonstrate the correct situsing location without such knowledge – or, to put in a more practical/applicable form, contemporaneous documentation or ordinary business records, etc., that can corroborate what the taxpayer contemplated with the sales in question. As detailed above, the language in the CAT situsing statute clearly contemplates a *single* sale (as opposed to VVF's and the BTA's reading). To that end, the Department requires that, for purposes of R.C. 5751.033(E), a taxpayer must maintain "any invoices or documents relating to the situsing of receipts from the sale of tangible personal property" for a period of time. *See* O.A.C. 5703-29-18(E); R.C. 5751.12. Taken altogether, the pertinent corroborating

documents are most likely to be those that are contemporaneous to the time of sale – and, as such, offer the most reliable and credible support for the taxpayer.

Also as detailed above, one integral purpose of the CAT situsing statute is to provide singularity and certainty for taxpayers who are trying to make such situsing determinations. Without it, the CAT scheme would require taxpayers to file CAT returns – but then regularly file amended returns all because some additional information becomes available. Though a taxpayer may occasionally need to file an amended return based on the discovery of additional data, it would be absurd to assume that the General Assembly enacted a tax structure that required taxpayers to file amended returns and refund claims on a regular basis simply to comply with the CAT's basic situsing requirements. Put another way, situsing should be a simple concept for a taxpayer – and can be so, especially when it is based upon that *taxpayer's own knowledge and own records*. It is simply impractical to have the activities and records of another taxpayer to determine your tax liability. Typically, CAT returns are filed quarterly, and are due by the 10th day of the second month after the end of the quarter. This provides about 40 days for a taxpayer to gather the necessary information to file its CAT returns. It is thus illogical to think that a taxpayer should be allowed (let alone required) to request and procure data from its customers in order to comply with Ohio's tax laws. It is also illogical because that the CAT statutes neither require nor intend that.

In fact, if affirmed, the BTA's decision could essentially preclude taxpayers like VVF from being able to correctly or timely file their own CAT returns without first having to take numerous other steps, including: waiting for their purchasers (and perhaps even their purchasers' purchasers) to sell and distribute the property themselves; obtaining relevant information from their purchasers regarding those transactions; securing testimony and affidavits from their purchasers' personnel as to the supposed "ultimate destination" of those items. Such a process could take months, if not

years, to fully prepare and organize all that information for the purpose of either competently filing CAT returns or refund claims.

Similarly, it would be administratively unworkable for the Department to have to expect taxpayers to file and refile CAT returns and/or regularly file refund claims. And, if the Department were to accept anything other than contemporaneous knowledge at the time of sale, then other practical questions immediately arise. For example, if not contemporaneous, then how much time gap is acceptable? A few days? One week? One month? One year? Practically speaking, even business records that are contemporaneous to the time of a particular sale need not be created precisely on the date of that sale. However, a difference certainly exists for taxpayer who try to reconstruct information about past sales activity – and it is in the eye of the beholder as to where the dividing line is for whether certain information is sufficiently contemporaneous as to be credible. As such, the administratively workable scheme for the Department involves examining contemporaneous business documentation. Moreover, it is plain to note that contemporaneous information also comes with an additional air of reliability, so as to aid the Department in its examination of taxpayers' commercial activity.

Lastly, the instant matter presents an example of one other very real and practical problem for the Department. Here, VVF endeavors to rely upon information and testimony from a third-party (*i.e.*, HRB). As confirmed through hearing testimony, at the time of its sales to HRB, VVF had *no information or knowledge* as to how/whether/when HRB would resell the goods that it purchased from VVF. However, for the Department to open the box of acceptable information to things other than contemporaneous information that the taxpayer already possesses, then the Department would need to be able to vet the reliability and credibility of that third-party's information. In essence, the Department would then need to "audit" two entities: the taxpayer

and that third-party. But because that third-party is not actually being examined, the Department cannot comfortably rely upon that entity's business records. This fact gets highlighted even more when considering that the CAT is intended to reflect the *taxpayer's* – and not its purchasers' – commercial activity. In any event, having to rely upon the business records of an entity other than the taxpayer is administratively impractical – but it can be readily alleviated by the taxpayer relying upon and presenting contemporaneous information that the taxpayer itself regularly maintains.

Taken in its proper context, R.C. 5751.033(E) implicitly contemplates that taxpayers must demonstrate their subjective knowledge at or near the time of sale, as corroborated by contemporaneous documentation. But even if that is not deemed to be a requirement, this Court should nonetheless recognize the strong probative nature of such information, as compared to any possible alternatives that taxpayers might endeavor to provide.

CONCLUSION

For the foregoing reasons, the Commissioner respectfully requests that this Court reverse the BTA's September 13, 2023 Decision & Order, and remand this matter to the BTA with instructions to affirm the Commissioner's instant final determination in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "First Brief: Initial Merit Brief of Appellant/Cross-Appellee, Patricia Harris, Tax Commissioner of Ohio" (along with the accompanying "Appendix") was served by e-mail on February 12, 2024, upon the following:

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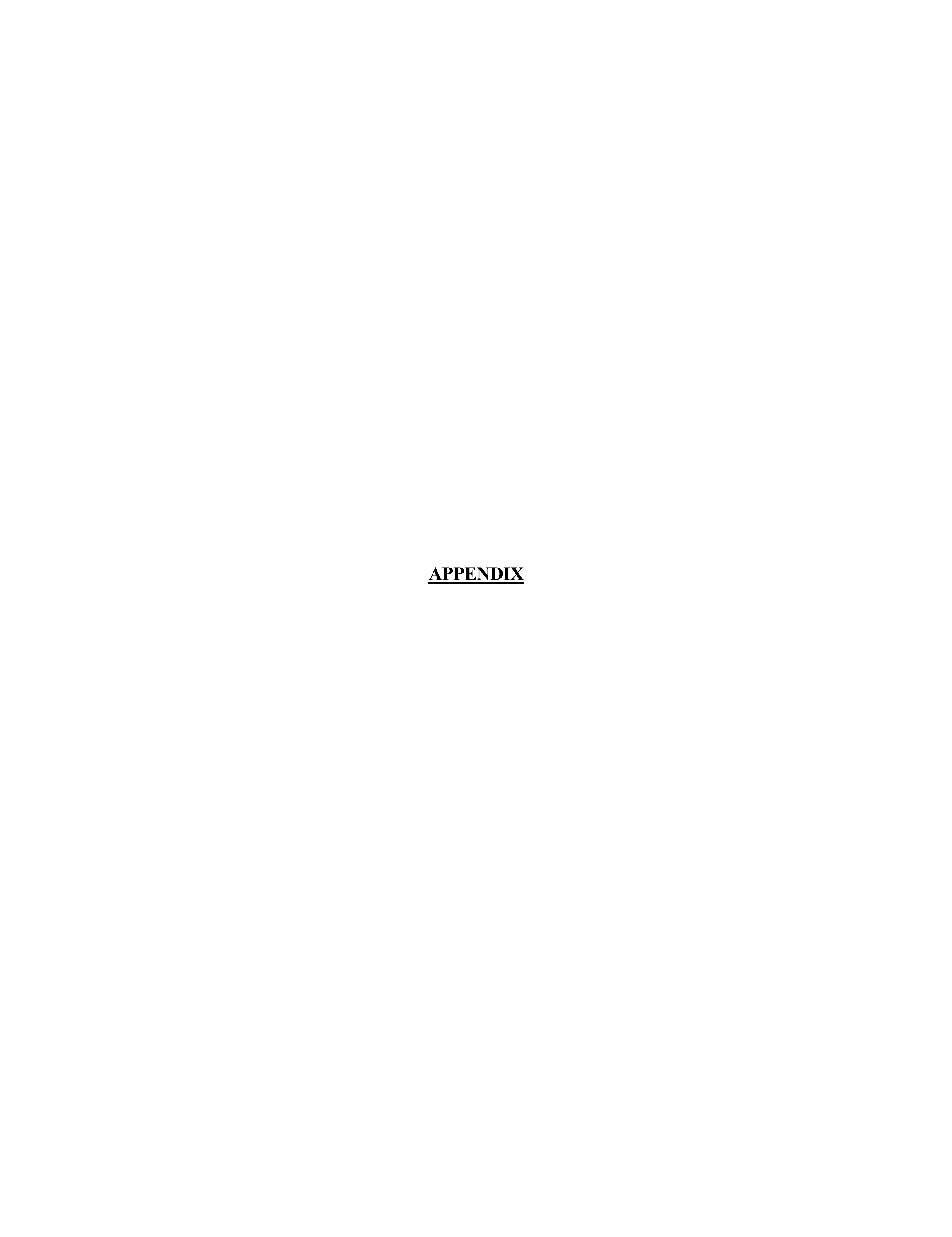

APPENDIX

OHIO BOARD OF TAX APPEALS

VVF INTERVEST, LLC, (et. al.), Appellant(s), vs. PATRICIA HARRIS, TAX COMMISSIONER OF OHIO, (et. al.), Appellee(s).	))))))))))	CASE NO(S). 2019-1233 (COMMERCIAL ACTIVITY TAX) DECISION AND ORDER

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Entered Wednesday, September 13, 2023

Mr. Harbarger and Ms. Clements concur. Ms. Allison dissents.

INTRODUCTION

VVF Intervest LLC ("VVF") appeals a final determination of the Tax Commissioner denying a commercial activity tax ("CAT") refund claim for the period January 1, 2010 through December 31, 2014. We decide the case on the notice of appeal, the statutory transcript ("S.T."), the record of this Board's hearing ("H.R."), and the parties' briefs. For the reasons that follow, we affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

The Manufacturing Process

VVF is a global manufacturer of oleochemicals and personal care products. H.R. at 76;

S.T. at 1. It contract manufactures bar soap, antiperspirant, deodorant, and similar items at its plant in Kansas. The location is twenty-seven acres improved with an approximately one million square feet plant. *H.R.* at 78. VVF acquired the plant from Colgate-Palmolive, which used it to manufacture its own brands, such as Irish Spring, for distribution in the United States and Canada. VVF has no property or employees in Ohio.

The main ingredient in bar soap is fat or oil. H.R. at 106. In some markets, vegetable or palm oil is preferred; however, tallow (animal fat) is common in North America. *Id*. VVF acquires the raw materials and adds fragrances, preservatives, and a color. *Id*. at 107. VVF's customers set the quality and recipe specifications, e.g., qualified raw material supplies, packaging. *Id*. at 81 (VVF CEO: "VVF is not at liberty to make any changes to the formula or the packaging * * *."). To operate, VVF uses a cost-plus agreement, and it is paid a "tolling fee," which is a fee to cover overhead, labor costs, etc. *Id*. It also receives a "finance fee" to compensate VVF for acquiring raw materials. *Id*. at 85. Depending on a customer's storage needs, a storage fee may also be due. *Id*. However, VVF's goal is to transfer the soap to trucks as quickly so it will not need to store the soap in its warehouse. *Id*. at 86, 88.

At the end of manufacturing and packaging, VVF has limited information about the ultimate destination of the soap. *Id*. at 88. VVF would know the next destination because it would prepare bills of lading, but VVF does not know where each bar will ultimately be delivered. The bars are free on board point of origin, and VVF has no control of the bars once they leave the docks. *Id*. at 88, 105-106.

High Ridge Brands

Relative to the receipts at issue in the claim, High Ridge Brands ("HRB") was by far VVF's largest customer. *Id*. at 83; Ex. B (manufacturing agreement between HRB and VVF Kansas Services LLC dated August 4, 2011); Ex. C (manufacturing agreement between same parties dated June 2014). HRB placed monthly orders with VVF based on demand forecasts, and

that information would be provided to VVF. H.R. at 16-17. HRB used VVF because its demand required a very large facility, which VVF had in Kansas City. HRB used warehouses/distribution centers in Columbus, St. Louis (Missouri), and California. *Id*. at 18-19. HRB would hold all products at its distribution centers and did not ship directly to stores. *Id*. Instead, HRB contracted with third-party trucking companies to transport goods from manufacturing facilities to the distribution centers. In the Columbus distribution center, HRB would hold approximately two months of inventory. H.R. at 21-22. HRB did not own the trucks or the distribution centers. No changes were made to the soap or its packaging at the distribution center. However, the distribution center would sometimes assemble product displays. *Id*. at 23 (HRB COO: "If Walmart was looking for promotional displays, you see them all the time when you walk through the stores, they're sitting in the aisles or at the end of the aisle. * * *."). Once a retailer such as Walmart or Target placed an order, HRB's third-party trucking company would transport the product to the retailer's distribution center. Goods from the Columbus distribution center were usually sent to retailer facilities in the Eastern United States. *Id*. at 24.

Procedural History

VVF filed its initial refund application seeking refund of CAT paid on bar soap receipts for the period January 1, 2010, through December 31, 2014. VVF originally sought a refund for CAT paid on receipts for sales to numerous customers, e.g., L'OREAL USA. The claim was initially denied, and VVF requested further review. S.T. at 11-23 (memorandum in support of refund). In that filing, VVF argued R.C. 5751.033(E) should apply, and the receipts should be sitused outside of Ohio. The Commissioner denied the refund claim, and this appeal ensued. This Board held a hearing, and VVF presented documentary and testimonial evidence. VVF specifically called Robert Kirk, Jr., COO and CFO of HRB for most of the refund period. He authenticated and testified to reports created by HRB for management showing the ultimate destination of units of soap. The reports are arranged by year and state. VVF also called a VP of finance, Jacob

Henderson, to testify about the refund claim. Finally, VVF called Kurussh Amrolia, president of VVF North America. We note that a small portion of VVF's refund claim related to a different purchaser, Dollar General. Henderson testified he estimated the ultimate destination percentage based on information obtained from Dollar General based on the number of stores served by the distribution center.

LAW AND THE PARTIES' ARGUMENTS

Standard of Review

This Board reviews the Commissioner's findings de novo, and those findings are presumptively valid, subject to rebuttal. *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, ¶ 14, 95 N.E.3d 345 (finding the taxpayer's burden for rebutting findings "is simply to prove that the findings were incorrect."). Tax statutes should be interpreted neutrally and not interpreted as "favoring tax collection." *Stingray Pressure Pumping v. Harris*, Slip Op. No. 2023-Ohio-2598, ¶ 22.

The CAT

The CAT is a privilege of doing business tax measured by gross receipts. *Ohio Grocers Ass'n v. Levin*, 123 Ohio St. 3d 303, 2009-Ohio-4872, 916 N.E.2d 446. "Gross receipts" are defined as "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person * * *. R.C. 5751.01(F); *see also* R.C. 5751.01(A) (defining "person"). The Ohio Supreme Court has recognized that "[b]ecause business is conducted across state and international boundaries, imposing the tax often raises the thorny issue of how to properly allocate receipts to Ohio for taxation." *Defender Sec. Co. v. McClain*, 162 Ohio St.3d 473, 2010-Ohio-4594, 195 N.E.3d 1236, ¶ 18. The CAT is imposed on those "persons with substantial nexus with this state." R.C. 5751.02(A).

R.C. 5751.033

There is some dispute about the correct situsing provision to be applied. R.C. 5751.01(G) defines "taxable gross receipts" as "gross receipts sitused to this state under section 5751.033 of the Revised Code." According to the Ohio Supreme Court, R.C. 5751.033 sets out "taxable categories" that govern where a particular kind of receipt should be sitused. *NASCAR Holdings, Inc. v. McClain*, Slip Op. No. 2022-Ohio-4131, 2022 Ohio LEXIS 2346, ¶ 7. In its brief, VVF argues the receipts should be sitused outside of Ohio pursuant to R.C. 5751.033(E) or (I). In her reply, the Commissioner argues this Board may only consider R.C. 5751.033(E) because VVF failed to raise arguments under R.C. 5751.033(I), e.g., in VVF's notice of appeal. We agree with the Commissioner that VVF forfeited its arguments under R.C. 5751.033(I) because they were not raised in the notice of appeal. *See Obetz v. McClain*, 164 Ohio St.3d 529, 2021-Ohio-1706, 173 N.E.3d 1200. VVF's refund claim has been premised on the application of R.C. 5751.033(E) since the claim was filed. *See* S.T. at 5. Accordingly, we limit our review to R.C. 5751.033(E), which states as follows:

> Gross receipts from the sale of tangible personal property shall be sitused to this state if the property is received in this state by the purchaser. In the case of delivery of tangible personal property by motor carrier or by other means of transportation, the place at which such property is ultimately received after all transportation has been completed shall be considered the place where the purchaser receives the property. For purposes of this section, the phrase "delivery of tangible personal property by motor carrier or by other means of transportation" includes the situation in which a purchaser accepts the property in this state and then transports the property directly or by other means to a location outside this state. Direct delivery in this state, other than for purposes of transportation, to a person or firm designated by a purchaser constitutes delivery to the purchaser in this state, and direct delivery outside this state to a person or firm designated by a purchaser does

not constitute delivery to the purchaser in this state, regardless of where title passes or other conditions of sale.

Both this Board and the Tenth District have had occasion to interpret this provision. Before reviewing those cases, we go back to three older corporate franchise cases that help analyze R.C. 5751.033(E) because of the similarities with the older corporate franchise sourcing statute.

Corporate Franchise Tax Cases

Because of the similarities between the CAT situsing statute and the defunct corporate franchise tax statute, the Commissioner, this Board, and the court of appeals have drawn insight from older corporate franchise tax case law. *See* S.T. at 5-8. The seminal cases are *House of Seagram, Inc. v. Porterfield*, 27 Ohio St.2d 97, 271 N.E.2d 827 (1971); *Dupps Co. v. Lindley*, 62 Ohio St.2d 305, 405 N.E.2d 716 (1980); and *Loral Corp. v. Limbach*, BTA Nos. 85-C-914, et al., 1988 Ohio Tax LEXIS 218 (Feb. 23, 1988).

We start with *House of Seagram*. There, the Ohio Department of Liquor Control purchased liquor from the House of Seagram, which was located in New York. A common carrier designated by the state of Ohio picked up the liquor in New York and delivered it to a warehouse in Ohio. The liquor would ultimately be distributed in Ohio since the Department would be distributing the liquor to Ohio retailers. The Commissioner assessed House of Seagram, in part, for the sale of liquor to the Department of Liquor Control. *House of Seagram* at syllabus. House of Seagram argued the sales were completed outside of Ohio and should not be included in the "numerator" of the business done fraction used in computing the franchise tax. The Court recognized a statutory "safeguard applicable to a situation where an Ohio purchaser brings goods through Ohio on their way to some ultimate destination outside Ohio * * *." *Id*. at 100-101. In such instances, the Court found "clearly there would be no delivery to the purchaser in Ohio * * *." *Id*.

Nine years later, the Court decided *Dupps*. Dupps was a meat processing equipment

manufacturer with out-of-state and international customers. *Id*. at 305. Dupps' customers were usually responsible for shipping the equipment from Dupps' plant in Ohio. *Id*. When Dupps calculated its formula it excluded "'customer pick-up" sales which "were sales to non-Ohio customers, where the purchaser either used his own vehicles to transport the equipment from" Dupps' plant. *Id*. at 306. The Commissioner assessed Dupps for those sales, finding they should have been included as Ohio sales in the apportionment formula because the equipment was "received in [Ohio] by the purchaser." *Id*. at 307. The Court sided with Dupps, holding the equipment should not have been included in the sales factors because the equipment was "ultimately received" outside of Ohio.

The taxpayer in *Loral* was a manufacturer of electronic radar equipment for aircraft. Its primary domestic customer was the United States Air Force. With regard to the transactions at issue, the planes and radar equipment were manufactured outside of Ohio. Title transferred from Loral to the Department of Defense (on behalf of the Air Force) outside of Ohio. Delivery would occur as follows:

> Delivery of the products is made either by common carrier or the Defense Department arranges for the product to be picked up at appellant's facility. In both cases, the costs of delivery are paid for by the Defense Department. In some instances, at the request of the Defense Department, appellant may ship products directly to the manufacturers of the aircrafts on which the product will be installed. The bills for appellant's products are sometimes invoiced to Wright-Patterson Air Force Base (Wright-Patterson) in Dayton, Ohio.

While there were various transactions at issue in *Loral*, we agreed with Loral that the relevant sales were not Ohio sales. We held the following:

> Again, we expressly find that the plain language of R.C. 5733.05 and the Court's holdings in *House of Seagram*, supra, and *Dupps Co.*, supra, establish the rule that

> where delivery of goods is made outside of Ohio, the sale does not occur in Ohio. Products which merely pass through Ohio or never enter Ohio cannot be said to be sold in Ohio for purposes of Ohio franchise taxation. * * * Here, we expressly find that the record before this Board includes uncontroverted testimony that the assessed property merely entered Ohio in route to non-Ohio destinations. We cannot accept appellee's conclusion that the transportation of the property was completed at the moment it arrived at Wright-Patterson. The testimony before this Board clearly indicates that the property was shipped from Wright-Patterson to points outside of Ohio. Appellee did not produce any evidence which would cause this Board to conclude that the later shipment of the goods from Wright-Patterson was not a continuation of the transportation beginning at appellant's New York facility.

The *Loral* case was clear that the transactions should not be sourced to Ohio simply because Ohio was one stop in a singular delivery process to a purchaser.

Greenscapes*, *Mia Shows*, *Henry RAC

We now return to cases directly interpreting R.C. 5751.033(E). In all three cases, we found the the taxpayer failed to show Ohio was merely a pit stop not the place where property was ultimately delivered after all transportation has been completed. In *Greenscapes*, the taxpayer delivered its goods to big box retailers within Ohio. BTA No. 2016-350, 2017 Ohio Tax LEXIS 1810 (July 19, 2017). The taxpayer claimed some of those goods were then transported out of Ohio to various distribution centers. This Board found all of the receipts should be sitused to Ohio in light of the lack of evidence about the ultimate delivery location. We found that "[w]hile it may be true that goods appellant sells *may* be removed from Ohio, after being shipped from appellant to Ohio, for ultimate sale in one of its customers' retail locations, the lack of information about any such further transportation forecloses appellant's argument." *Id*. at 6. However, we did not

foreclose the possibility that a party could show the goods "were ultimately received elsewhere." *Id*.

We encountered similar fact patterns in *Mia Shoes, Inc. v. McClain*, BTA No. 2016-282, 2019 Ohio Tax LEXIS 1864 (Aug. 8, 2019), and *Henry RAC Holding Corp. v. McClain*, BTA No. 2019-787, 2020 Ohio Tax LEXIS 2101 (Nov. 10, 2020). In *Mia Shoes*, the taxpayer failed to show the goods were ultimately delivered outside of Ohio. The taxpayer "knew it was shipping goods to Ohio, and lost visibility of the goods once they were delivered to the customers in Ohio." *Id*. at 8-9. Again, we recognized the taxpayer could prevail if it had shown "the goods were then ultimately received elsewhere within the meaning of the statute." *Id*. at 9. *Henry* involved similar facts where goods were shipped to distributors in Ohio, but the taxpayer lost visibility in Ohio.

The Parties' Arguments

VVF argues this case requires a straightforward application of R.C. 5751.033(E) because delivery after all transportation did not occur in Ohio. VVF argues that "[s]ince the goods are initially transported by HRB to the Ohio DC only for further shipment, an interim stop within the distribution chain, the Ohio DC is not the location where HRB ultimately received the VVF-manufactured goods after all transportation is complete." VVF Br. at 10. VVF hones in on statements in both *Greenscapes*, *Mia Shoes*, and *Henry RAC* that provide that a taxpayer could prevail upon a showing that transportation ended outside of Ohio. For example, in *Greenscapes*, we stated "the lack of information about any such further transportation forecloses" the argument that the receipts should be sitused elsewhere. VVF Br. at 14, quoting *Greenscapes*. VVF supplements that argument with legislative intent arguments regarding qualified distribution centers. Accordingly, VVF argues 96.84% of its HRB receipts should not be sitused to Ohio, and VVF argues 52% of VVF's receipts to Dollar General should not be sitused to Ohio. In the

alternative, VVF argues we should apply Ohio Adm.Code 5703-29-17(C)(15)(b) and find all of the receipts should be sitused to Kansas because the ultimate destination is unknown. VVF also makes alternative situs method and constitutional arguments.

By contrast, the Commissioner argues the trip from Kansas to Ohio should be treated as a separate taxable event, and the trip from Ohio to another state should be treated as a separate taxable event. TC Br. at 3. The Commissioner believes these should be considered a "second sale transaction" unrelated to VVF. Br. at 8. The Commissioner places great emphasis on VVF's records and VVF's subjective knowledge of the time the bars left Kansas. Those documents show the bars were initially headed to Ohio, so the receipts should be sitused to Ohio under R.C. 5751.033 as explained in cases like *Greenscapes*.

ANALYSIS

VVF's subjective knowledge at the initial shipping point is probative but not dispositive

The Commissioner maintains that the purchaser receives the property in Ohio when the last destination known by the taxpayer is located within Ohio. Neither the statute nor the case law have imposed a requirement of contemporaneous knowledge of the ultimate destination at the time of transportation. Nonetheless, we recognize the Commissioner retains broad authority to assess taxpayers based on the best evidence available. Our cases and Tenth District's decision in *Greenscapes* reaffirm that if the only evidence available shows the products were shipped to Ohio then they may be properly sitused to Ohio.

VVF has carried its burden with regard to some of the receipts

We first reject VVF's argument that none of its receipts should be sitused to Ohio under Ohio Adm.Code 5751-29-17. It is simply untrue that there is no evidence of the location of ultimate delivery. VVF's position is inconsistent with *Greenscapes*, *Mia Shoes*, and *Henry RAC*, because the receipts in those cases would have necessarily been sitused outside of Ohio under VVF's theory.

We also find VVF has not carried its burden with regard to the Dollar General Receipts. We find VVF's evidence to be speculative. The evidence, much of it hearsay, purportedly came from statements by Dollar General, but we have no other credible evidence to corroborate. VVF also used a stores-supplied model, but stores vary in sales, which is one reason we rejected the unsupported theory in *Mia Shoes*.

By contrast, we find VVF has carried its burden with regard to the HRB receipts for bars that were ultimately delivered outside of Ohio. Under R.C. 5751.033(E), VVF meets its burden when it shows through sufficient evidence that the goods were not ultimately delivered to its customer in Ohio. VVF presented the Board with testimony from its customer, showing the bars were not ultimately delivered in Ohio. The testimony from VVF's witnesses was corroborated by reports created for management for purposes of operations.

The Commissioner argues that these are two separate transactions, i.e., the trip from Kansas to Ohio and the trip from Ohio to another state. In one sense, we agree with the Commissioner that there are two transactions: the sale of goods to HRB and the subsequent sale of those goods from HRB to its customers. In that way, the Commissioner is correct that the pertinent transaction relates to HRB's purchase. Thus, the situsing of goods must be based on the ultimate delivery to HRB.

Nevertheless, the ultimate delivery to HRB is not the Columbus distribution center. This destination ends just one leg of HRB's transportation and continuous delivery process. VVF sends the goods from Kansas to a third-party facility in Ohio under the title and control of HRB. From this Ohio facility, HRB again contracts to transport the goods to destinations outside of Ohio based on its customer needs. Ohio does not become the ultimate delivery point simply because the bars are temporarily held here in a distribution center owned by an entirely unrelated third party.

The fact that HRB may later direct drivers to move the bars from Ohio to other specific locations (in other states) based on the needs of customers is wholly irrelevant for purposes of R.C. 5751.033(E).

To be clear, our analysis is appropriately confined to VVF's receipts. We make no findings with regard to receipts realized by HRB, the trucking companies, the warehouse, or any other company. The only question we must answer is if HRB's ultimate delivery occurred in Ohio, but the ultimate delivery did not occur in Ohio. We agree, however, that we should stand back for a full picture. VVF manufactures a substantial number of soaps, and the Ohio distribution center temporarily houses all soaps destined for the entire Eastern United States. If the Commissioner is correct, *all* of those receipts should be sitused to Ohio simply because Ohio is the first stop. We find R.C. 5751.033(E) does not compel such a result.

CONCLUSION

In sum, we reverse the Commissioner's final determination with regard to the sales to HRB for bars that were transported out of this state (96.84%). We affirm the Commissioner in all other aspects. We acknowledge VVF has leveled constitutional claims, but we lack jurisdiction to consider those claims.

Ms. Allison, concurring in part and dissenting in part.

I concur with the majority regarding the receipts from Dollar General and HRB receipts for bars that remain in Ohio. However, I must respectfully dissent from its conclusion that VVF has proven the remaining receipts from HRB should be sitused outside of Ohio.

With respect to the receipts for sales of soap to HRB, the majority considered and rejected two arguments. Initially, I agree with the majority that the Commissioner has imposed too narrow a rule that a seller's subjective knowledge of an ultimate delivery outside of Ohio is necessary to situs receipts outside of Ohio. Neither the statute nor the case law have included such a

requirement. While the seller's knowledge of the ultimate destination is certainly relevant for consideration, I agree it is not dispositive. I concur with the majority that a seller of tangible personal property could demonstrate through other evidence that goods it shipped to Ohio were ultimately delivered to the purchaser outside of the State even if its visibility of such goods ended when the goods reached Ohio.

I dissent from the majority's conclusion that VVF's receipts for sales of soap to HRB should be sitused based on the ultimate destination of the goods at the end of the distribution process – i.e., to the location where HRB's customers ultimately receive the goods. The taxable gross receipts at issue resulted from VVF's sale of soap to HRB. R.C. 5751.033(E) mandates "the place at which such property is ultimately received after all transportation has been completed shall be considered the place where the purchaser receives the property." HRB is the purchaser in the VVF transactions and, in my opinion, a plain reading of the statute requires VVF's receipts to be sitused to the location where delivery was ultimately made to HRB. It should not expand to purchasers further down the supply chain. Accordingly, we must look to where HRB receives the goods and any subsequent sale after the VVF sale is irrelevant for purposes of situsing VVF's gross receipts.

VVF sold soap to HRB. According to the testimony of appellant's witness, Mr. Kirk, VVF's sales to HRB are based upon HRB's sales forecast and projections, not upon current sales orders from HRB's retail customers. HRB maintains approximately two months of inventory at the Ohio distribution facility. Goods may be stored at the distribution facility for as long as one year. HRB then sells the inventory to retail purchasers such as Walmart, Target, and Walgreens. Once HRB sells the goods to the retailer, HRB transports (or contracts to transport) the goods to the retailer's distribution center. Any transportation that takes place following delivery to the Ohio distribution facility occurs only because HRB resells the goods to a new purchaser. I agree with the Commissioner that HRB's sale to its customers constitutes a separate transaction from VVF's

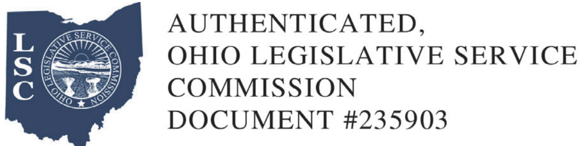
sale to HRB. For purposes of situsing these goods, I would deem them delivered to HRB in Ohio. Any subsequent transportation is related to a separate transaction between HRB and its purchaser and has no bearing on where the goods were delivered to HRB.

In my opinion, *Greenscapes* and *Mia Shoes* are inapplicable herein as those cases involved continuing transportation by the purchaser to a location where the property would be resold by the purchaser. The cases did not involve a second sale by the initial purchaser. For example, in *Greenscapes* the appellant wholesaler sold lawn and garden products to big box retailers. The goods were shipped to a distribution center in Ohio. From there, the purchaser transported goods to its retail locations outside of Ohio. Therein, we held that appellant failed to provide sufficient information regarding the purchaser's subsequent transportation outside of Ohio to meet its burden of proof. Similarly, in *Mia Shoes* we found that appellant failed to provide sufficient evidence to support its claim that the footwear sent to Ohio distribution centers was merely received initially in Ohio but ultimately received by those same customers elsewhere. In this case, VVF sold soap to HRB and HRB received the goods at the Ohio distribution facility. Transportation was complete when the goods were received at the distribution facility. HRB stored the goods at this facility until the goods were resold and HRB's delivery to HRB's retail customers outside of Ohio would be relevant for situsing HRB's taxable gross receipts arising from HRB's sale to its customers. However, in my opinion, HRB's sale to its retail customers is a separate transaction and is irrelevant to the proper situsing of VVF's taxable gross receipts arising from VVF's sale to HRB. Contrary to the majority's finding, I would find R.C. 5751.033(E) requires taxable gross receipts to be sitused where ultimately received by the purchaser in the sale generating the gross receipt, not where received by the ultimate purchaser.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Harbarger	[signature]	
Ms. Clements	[signature]	
Ms. Allison		[signature]

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

____
Kathleen M. Crowley, Board Secretary



Ohio Revised Code

Section 1.47 Presumptions in enactment of statutes.

Effective: January 3, 1972

Legislation: House Bill 607 - 109th General Assembly

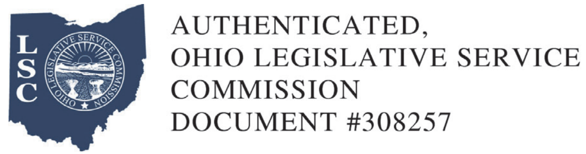
In enacting a statute, it is presumed that:

(A) Compliance with the constitutions of the state and of the United States is intended;

(B) The entire statute is intended to be effective;

(C) A just and reasonable result is intended;

(D) A result feasible of execution is intended.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Ohio Revised Code

Section 5751.01 Definitions.

Effective: October 3, 2023

Legislation: House Bill 33

As used in this chapter:

(A) "Person" means, but is not limited to, individuals, combinations of individuals of any form, receivers, assignees, trustees in bankruptcy, firms, companies, joint-stock companies, business trusts, estates, partnerships, limited liability partnerships, limited liability companies, associations, joint ventures, clubs, societies, for-profit corporations, S corporations, qualified subchapter S subsidiaries, qualified subchapter S trusts, trusts, entities that are disregarded for federal income tax purposes, and any other entities.

(B) "Consolidated elected taxpayer" means a group of two or more persons treated as a single taxpayer for purposes of this chapter as the result of an election made under section 5751.011 of the Revised Code.

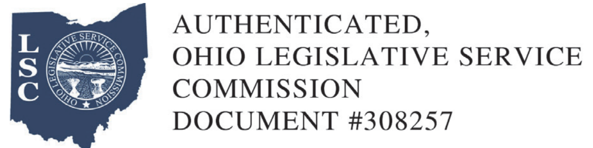
(C) "Combined taxpayer" means a group of two or more persons treated as a single taxpayer for purposes of this chapter under section 5751.012 of the Revised Code.

(D) "Taxpayer" means any person, or any group of persons in the case of a consolidated elected taxpayer or combined taxpayer treated as one taxpayer, required to register or pay tax under this chapter. "Taxpayer" does not include excluded persons.

(E) "Excluded person" means any of the following:

(1) Any person with not more than one hundred fifty thousand dollars of taxable gross receipts during the calendar year. Division (E)(1) of this section does not apply to a person that is a member of a consolidated elected taxpayer.

(2) A public utility that paid the excise tax imposed by section 5727.24 or 5727.30 of the Revised Code based on one or more measurement periods that include the entire tax period under this



chapter, except in the following circumstances:

(a) A public utility that is a combined company is a taxpayer with regard to the following gross receipts:

(i) Taxable gross receipts directly attributed to a public utility activity, but not directly attributed to an activity that is subject to the excise tax imposed by section 5727.24 or 5727.30 of the Revised Code;

(ii) Taxable gross receipts that cannot be directly attributed to any activity, multiplied by a fraction whose numerator is the taxable gross receipts described in division (E)(2)(a)(i) of this section and whose denominator is the total taxable gross receipts that can be directly attributed to any activity;

(iii) Except for any differences resulting from the use of an accrual basis method of accounting for purposes of determining gross receipts under this chapter and the use of the cash basis method of accounting for purposes of determining gross receipts under section 5727.24 of the Revised Code, the gross receipts directly attributed to the activity of a natural gas company shall be determined in a manner consistent with division (D) of section 5727.03 of the Revised Code.

(b) A heating company that became exempt from the excise tax imposed by section 5727.30 of the Revised Code on May 1, 2023, shall not be an excluded person for tax periods beginning on or after July 1, 2023.

As used in division (E)(2) of this section, "combined company" and "public utility" have the same meanings as in section 5727.01 of the Revised Code.

(3) A financial institution, as defined in section 5726.01 of the Revised Code, that paid the tax imposed by section 5726.02 of the Revised Code based on one or more taxable years that include the entire tax period under this chapter;

(4) A person directly or indirectly owned by one or more financial institutions, as defined in section 5726.01 of the Revised Code, that paid the tax imposed by section 5726.02 of the Revised Code based on one or more taxable years that include the entire tax period under this chapter.

For the purposes of division (E)(4) of this section, a person owns another person under the following circumstances:

(a) In the case of corporations issuing capital stock, one corporation owns another corporation if it owns fifty per cent or more of the other corporation's capital stock with current voting rights;

(b) In the case of a limited liability company, one person owns the company if that person's membership interest, as defined in section 1706.01 of the Revised Code, is fifty per cent or more of the combined membership interests of all persons owning such interests in the company;

(c) In the case of a partnership, trust, or other unincorporated business organization other than a limited liability company, one person owns the organization if, under the articles of organization or other instrument governing the affairs of the organization, that person has a beneficial interest in the organization's profits, surpluses, losses, or distributions of fifty per cent or more of the combined beneficial interests of all persons having such an interest in the organization.

(5) A domestic insurance company or foreign insurance company, as defined in section 5725.01 of the Revised Code, that paid the insurance company premiums tax imposed by section 5725.18 or Chapter 5729. of the Revised Code, or an unauthorized insurance company whose gross premiums are subject to tax under section 3905.36 of the Revised Code based on one or more measurement periods that include the entire tax period under this chapter;

(6) A person that solely facilitates or services one or more securitizations of phase-in-recovery property pursuant to a final financing order as those terms are defined in section 4928.23 of the Revised Code. For purposes of this division, "securitization" means transferring one or more assets to one or more persons and then issuing securities backed by the right to receive payment from the asset or assets so transferred.

(7) Except as otherwise provided in this division, a pre-income tax trust as defined in section 5747.01 of the Revised Code and any pass-through entity of which such pre-income tax trust owns or controls, directly, indirectly, or constructively through related interests, more than five per cent of the ownership or equity interests. If the pre-income tax trust has made a qualifying pre-income tax

trust election under division (EE) of section 5747.01 of the Revised Code, then the trust and the pass-through entities of which it owns or controls, directly, indirectly, or constructively through related interests, more than five per cent of the ownership or equity interests, shall not be excluded persons for purposes of the tax imposed under section 5751.02 of the Revised Code.

(8) Nonprofit organizations or the state and its agencies, instrumentalities, or political subdivisions.

(F) Except as otherwise provided in divisions (F)(2), (3), and (4) of this section, "gross receipts" means the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person, including the fair market value of any property and any services received, and any debt transferred or forgiven as consideration.

(1) The following are examples of gross receipts:

(a) Amounts realized from the sale, exchange, or other disposition of the taxpayer's property to or with another;

(b) Amounts realized from the taxpayer's performance of services for another;

(c) Amounts realized from another's use or possession of the taxpayer's property or capital;

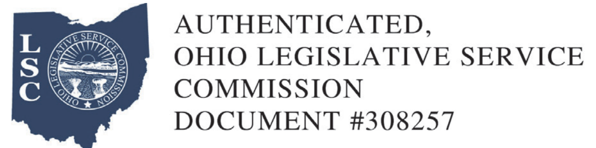
(d) Any combination of the foregoing amounts.

(2) "Gross receipts" excludes the following amounts:

(a) Interest income except interest on credit sales;

(b) Dividends and distributions from corporations, and distributive or proportionate shares of receipts and income from a pass-through entity as defined under section 5733.04 of the Revised Code;

(c) Receipts from the sale, exchange, or other disposition of an asset described in section 1221 or 1231 of the Internal Revenue Code, without regard to the length of time the person held the asset.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Notwithstanding section 1221 of the Internal Revenue Code, receipts from hedging transactions also are excluded to the extent the transactions are entered into primarily to protect a financial position, such as managing the risk of exposure to (i) foreign currency fluctuations that affect assets, liabilities, profits, losses, equity, or investments in foreign operations; (ii) interest rate fluctuations; or (iii) commodity price fluctuations. As used in division (F)(2)(c) of this section, "hedging transaction" has the same meaning as used in section 1221 of the Internal Revenue Code and also includes transactions accorded hedge accounting treatment under statement of financial accounting standards number 133 of the financial accounting standards board. For the purposes of division (F)(2)(c) of this section, the actual transfer of title of real or tangible personal property to another entity is not a hedging transaction.

(d) Proceeds received attributable to the repayment, maturity, or redemption of the principal of a loan, bond, mutual fund, certificate of deposit, or marketable instrument;

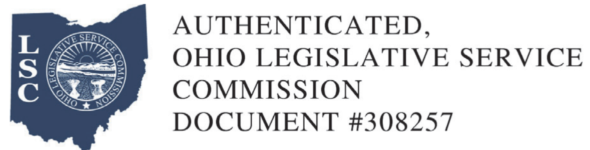
(e) The principal amount received under a repurchase agreement or on account of any transaction properly characterized as a loan to the person;

(f) Contributions received by a trust, plan, or other arrangement, any of which is described in section 501(a) of the Internal Revenue Code, or to which Title 26, Subtitle A, Chapter 1, Subchapter (D) of the Internal Revenue Code applies;

(g) Compensation, whether current or deferred, and whether in cash or in kind, received or to be received by an employee, former employee, or the employee's legal successor for services rendered to or for an employer, including reimbursements received by or for an individual for medical or education expenses, health insurance premiums, or employee expenses, or on account of a dependent care spending account, legal services plan, any cafeteria plan described in section 125 of the Internal Revenue Code, or any similar employee reimbursement;

(h) Proceeds received from the issuance of the taxpayer's own stock, options, warrants, puts, or calls, or from the sale of the taxpayer's treasury stock;

(i) Proceeds received on the account of payments from insurance policies, except those proceeds received for the loss of business revenue;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(j) Gifts or charitable contributions received; membership dues received by trade, professional, homeowners', or condominium associations; payments received for educational courses, meetings, meals, or similar payments to a trade, professional, or other similar association; and fundraising receipts received by any person when any excess receipts are donated or used exclusively for charitable purposes;

(k) Damages received as the result of litigation in excess of amounts that, if received without litigation, would be gross receipts;

(l) Property, money, and other amounts received or acquired by an agent on behalf of another in excess of the agent's commission, fee, or other remuneration;

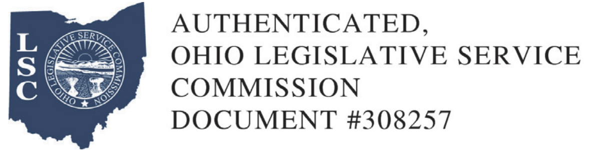
(m) Tax refunds, other tax benefit recoveries, and reimbursements for the tax imposed under this chapter made by entities that are part of the same combined taxpayer or consolidated elected taxpayer group, and reimbursements made by entities that are not members of a combined taxpayer or consolidated elected taxpayer group that are required to be made for economic parity among multiple owners of an entity whose tax obligation under this chapter is required to be reported and paid entirely by one owner, pursuant to the requirements of sections 5751.011 and 5751.012 of the Revised Code;

(n) Pension reversions;

(o) Contributions to capital;

(p) Sales or use taxes collected as a vendor or an out-of-state seller on behalf of the taxing jurisdiction from a consumer or other taxes the taxpayer is required by law to collect directly from a purchaser and remit to a local, state, or federal tax authority;

(q) In the case of receipts from the sale of cigarettes, tobacco products, or vapor products by a wholesale dealer, retail dealer, distributor, manufacturer, vapor distributor, or seller, all as defined in section 5743.01 of the Revised Code, an amount equal to the federal and state excise taxes paid by any person on or for such cigarettes, tobacco products, or vapor products under subtitle E of the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Internal Revenue Code or Chapter 5743. of the Revised Code;

(r) In the case of receipts from the sale, transfer, exchange, or other disposition of motor fuel as "motor fuel" is defined in section 5736.01 of the Revised Code, an amount equal to the value of the motor fuel, including federal and state motor fuel excise taxes and receipts from billing or invoicing the tax imposed under section 5736.02 of the Revised Code to another person;

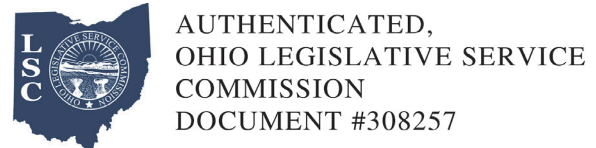
(s) In the case of receipts from the sale of beer or intoxicating liquor, as defined in section 4301.01 of the Revised Code, by a person holding a permit issued under Chapter 4301. or 4303. of the Revised Code, an amount equal to federal and state excise taxes paid by any person on or for such beer or intoxicating liquor under subtitle E of the Internal Revenue Code or Chapter 4301. or 4305. of the Revised Code;

(t) Receipts realized by a new motor vehicle dealer or used motor vehicle dealer, as defined in section 4517.01 of the Revised Code, from the sale or other transfer of a motor vehicle, as defined in that section, to another motor vehicle dealer for the purpose of resale by the transferee motor vehicle dealer, but only if the sale or other transfer was based upon the transferee's need to meet a specific customer's preference for a motor vehicle;

(u) Receipts from a financial institution described in division (E)(3) of this section for services provided to the financial institution in connection with the issuance, processing, servicing, and management of loans or credit accounts, if such financial institution and the recipient of such receipts have at least fifty per cent of their ownership interests owned or controlled, directly or constructively through related interests, by common owners;

(v) Receipts realized from administering anti-neoplastic drugs and other cancer chemotherapy, biologicals, therapeutic agents, and supportive drugs in a physician's office to patients with cancer;

(w) Funds received or used by a mortgage broker that is not a dealer in intangibles, other than fees or other consideration, pursuant to a table-funding mortgage loan or warehouse-lending mortgage loan. Terms used in division (F)(2)(w) of this section have the same meanings as in section 1322.01 of the Revised Code, except "mortgage broker" means a person assisting a buyer in obtaining a mortgage loan for a fee or other consideration paid by the buyer or a lender, or a person engaged in table-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funding or warehouse-lending mortgage loans that are first lien mortgage loans.

(x) Property, money, and other amounts received by a professional employer organization, as defined in section 4125.01 of the Revised Code, or an alternate employer organization, as defined in section 4133.01 of the Revised Code, from a client employer, as defined in either of those sections as applicable, in excess of the administrative fee charged by the professional employer organization or the alternate employer organization to the client employer;

(y) In the case of amounts retained as commissions by a permit holder under Chapter 3769. of the Revised Code, an amount equal to the amounts specified under that chapter that must be paid to or collected by the tax commissioner as a tax and the amounts specified under that chapter to be used as purse money;

(z) Qualifying distribution center receipts as determined under section 5751.40 of the Revised Code;

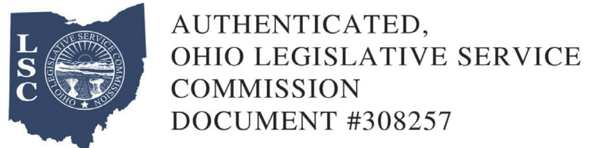
(aa) Receipts of an employer from payroll deductions relating to the reimbursement of the employer for advancing moneys to an unrelated third party on an employee's behalf;

(bb) Cash discounts allowed and taken;

(cc) Returns and allowances;

(dd) Bad debts from receipts on the basis of which the tax imposed by this chapter was paid in a prior quarterly tax payment period. For the purpose of this division, "bad debts" means any debts that have become worthless or uncollectible between the preceding and current quarterly tax payment periods, have been uncollected for at least six months, and that may be claimed as a deduction under section 166 of the Internal Revenue Code and the regulations adopted under that section, or that could be claimed as such if the taxpayer kept its accounts on the accrual basis. "Bad debts" does not include repossessed property, uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid, or expenses in attempting to collect any account receivable or for any portion of the debt recovered.

(ee) Any amount realized from the sale of an account receivable to the extent the receipts from the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underlying transaction giving rise to the account receivable were included in the gross receipts of the taxpayer;

(ff) Any receipts directly attributed to a transfer agreement or to the enterprise transferred under that agreement under section 4313.02 of the Revised Code;

(gg) Qualified uranium receipts as determined under section 5751.41 of the Revised Code;

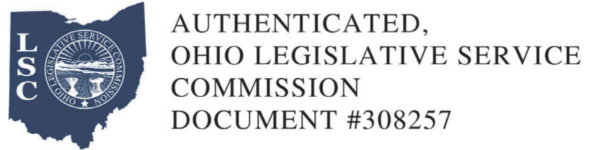
(hh) In the case of amounts collected by a licensed casino operator from casino gaming, amounts in excess of the casino operator's gross casino revenue. In this division, "casino operator" and "casino gaming" have the meanings defined in section 3772.01 of the Revised Code, and "gross casino revenue" has the meaning defined in section 5753.01 of the Revised Code.

(ii) Receipts realized from the sale of agricultural commodities by an agricultural commodity handler, both as defined in section 926.01 of the Revised Code, that is licensed by the director of agriculture to handle agricultural commodities in this state;

(jj) Qualifying integrated supply chain receipts as determined under section 5751.42 of the Revised Code;

(kk) In the case of a railroad company described in division (D)(9) of section 5727.01 of the Revised Code that purchases dyed diesel fuel directly from a supplier as defined by section 5736.01 of the Revised Code, an amount equal to the product of the number of gallons of dyed diesel fuel purchased directly from such a supplier multiplied by the average wholesale price for a gallon of diesel fuel as determined under section 5736.02 of the Revised Code for the period during which the fuel was purchased multiplied by a fraction, the numerator of which equals the rate of tax levied by section 5736.02 of the Revised Code less the rate of tax computed in section 5751.03 of the Revised Code, and the denominator of which equals the rate of tax computed in section 5751.03 of the Revised Code;

(ll) Receipts realized by an out-of-state disaster business from disaster work conducted in this state during a disaster response period pursuant to a qualifying solicitation received by the business. Terms used in division (F)(2)(ll) of this section have the same meanings as in section 5703.94 of the



Revised Code.

(mm) In the case of receipts from the sale or transfer of a mortgage-backed security or a mortgage loan by a mortgage lender holding a valid certificate of registration issued under Chapter 1322. of the Revised Code or by a person that is a member of the mortgage lender's consolidated elected taxpayer group, an amount equal to the principal balance of the mortgage loan;

(nn) Amounts of excess surplus of the state insurance fund received by the taxpayer from the Ohio bureau of workers' compensation pursuant to rules adopted under section 4123.321 of the Revised Code;

(oo) Except as otherwise provided in division (B) of section 5751.091 of the Revised Code, receipts of a megaproject supplier from sales of tangible personal property directly to a megaproject operator in this state for use at the site of the megaproject operator's megaproject, provided that the sale occurs during the period that the megaproject operator has an agreement with the tax credit authority for the megaproject under division (D) of section 122.17 of the Revised Code that remains in effect and has not expired or been terminated, and provided the megaproject supplier holds a certificate for such megaproject issued under section 5751.052 of the Revised Code for the calendar year in which the sales are made and, if the megaproject supplier meets the requirements described in division (A)(13)(b) of section 122.17 of the Revised Code, the megaproject supplier holds a certificate for such megaproject issued under division (D)(11) of section 122.17 of the Revised Code on the first day of that calendar year;

(pp) Receipts from the sale of each new piece of capital equipment that has a cost in excess of one hundred million dollars and that is used at the site of a megaproject that satisfies the criteria described in division (A)(11)(a)(ii) of section 122.17 of the Revised Code, provided that the sale occurs during the period that a megaproject operator has an agreement for that megaproject with the tax credit authority under division (D) of section 122.17 of the Revised Code that remains in effect and has not expired or been terminated;

(qq) In the case of amounts collected by a sports gaming proprietor from sports gaming, amounts in excess of the proprietor's sports gaming receipts. As used in this division, "sports gaming proprietor" has the same meaning as in section 3775.01 of the Revised Code and "sports gaming receipts" has

the same meaning as in section 5753.01 of the Revised Code.

(rr) Amounts received from any federal, state, or local grant, and amounts of indebtedness discharged or forgiven pursuant to federal, state, or local law, for providing or expanding access to broadband service in this state. As used in this division, "broadband service" has the same meaning as in section 188.01 of the Revised Code.

(ss) Receipts provided to a taxpayer to compensate for lost business resulting from the train derailment near the city of East Palestine on February 3, 2023, by any of the following:

(i) A federal, state, or local government agency;

(ii) A railroad company, as that term is defined in section 5727.01 of the Revised Code;

(iii) Any subsidiary, insurer, or agent of a railroad company or any related person.

(tt) An amount equal to the fee imposed by section 3743.22 of the Revised Code billed to the purchaser, collected by the taxpayer, and remitted to the fire marshal during the tax period, provided that the fee is separately stated on the invoice, bill of sale, or similar document given to the purchaser of 1.4G fireworks in this state.

(uu) Any receipts for which the tax imposed by this chapter is prohibited by the constitution or laws of the United States or the constitution of this state;

(vv) Receipts from fees imposed under sections 128.41 and 128.42 of the Revised Code.

(3) In the case of a taxpayer when acting as a real estate broker, "gross receipts" includes only the portion of any fee for the service of a real estate broker, or service of a real estate salesperson associated with that broker, that is retained by the broker and not paid to an associated real estate salesperson or another real estate broker. For the purposes of this division, "real estate broker" and "real estate salesperson" have the same meanings as in section 4735.01 of the Revised Code.

(4) A taxpayer's method of accounting for gross receipts for a tax period shall be the same as the

taxpayer's method of accounting for federal income tax purposes for the taxpayer's federal taxable year that includes the tax period. If a taxpayer's method of accounting for federal income tax purposes changes, its method of accounting for gross receipts under this chapter shall be changed accordingly.

(G) "Taxable gross receipts" means gross receipts sitused to this state under section 5751.033 of the Revised Code.

(H) A person has "substantial nexus with this state" if any of the following applies. The person:

(1) Owns or uses a part or all of its capital in this state;

(2) Holds a certificate of compliance with the laws of this state authorizing the person to do business in this state;

(3) Has bright-line presence in this state;

(4) Otherwise has nexus with this state to an extent that the person can be required to remit the tax imposed under this chapter under the Constitution of the United States.

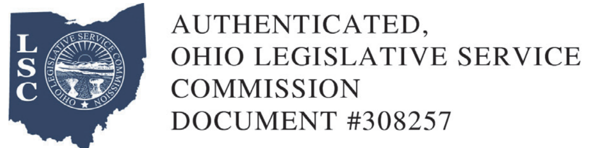
(I) A person has "bright-line presence" in this state for a reporting period and for the remaining portion of the calendar year if any of the following applies. The person:

(1) Has at any time during the calendar year property in this state with an aggregate value of at least fifty thousand dollars. For the purpose of division (I)(1) of this section, owned property is valued at original cost and rented property is valued at eight times the net annual rental charge.

(2) Has during the calendar year payroll in this state of at least fifty thousand dollars. Payroll in this state includes all of the following:

(a) Any amount subject to withholding by the person under section 5747.06 of the Revised Code;

(b) Any other amount the person pays as compensation to an individual under the supervision or



control of the person for work done in this state; and

(c) Any amount the person pays for services performed in this state on its behalf by another.

(3) Has during the calendar year taxable gross receipts of at least five hundred thousand dollars;

(4) Has at any time during the calendar year within this state at least twenty-five per cent of the person's total property, total payroll, or total gross receipts;

(5) Is domiciled in this state as an individual or for corporate, commercial, or other business purposes.

(J) "Tangible personal property" has the same meaning as in section 5739.01 of the Revised Code.

(K) "Internal Revenue Code" means the Internal Revenue Code of 1986, 100 Stat. 2085, 26 U.S.C. 1, as amended. Any term used in this chapter that is not otherwise defined has the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes unless a different meaning is clearly required. Any reference in this chapter to the Internal Revenue Code includes other laws of the United States relating to federal income taxes.

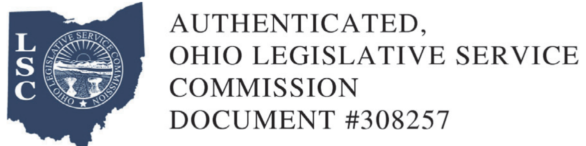
(L) "Calendar quarter" means a three-month period ending on the thirty-first day of March, the thirtieth day of June, the thirtieth day of September, or the thirty-first day of December.

(M) "Tax period" means the calendar quarter on the basis of which a taxpayer is required to pay the tax imposed under this chapter.

(N) "Agent" means a person authorized by another person to act on its behalf to undertake a transaction for the other, including any of the following:

(1) A person receiving a fee to sell financial instruments;

(2) A person retaining only a commission from a transaction with the other proceeds from the transaction being remitted to another person;



(3) A person issuing licenses and permits under section 1533.13 of the Revised Code;

(4) A lottery sales agent holding a valid license issued under section 3770.05 of the Revised Code;

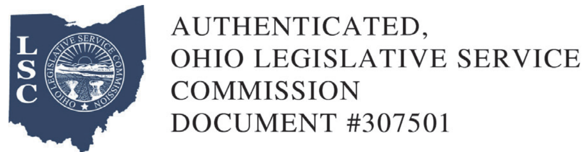
(5) A person acting as an agent of the division of liquor control under section 4301.17 of the Revised Code.

(O) "Received" includes amounts accrued under the accrual method of accounting.

(P) "Reporting person" means a person in a consolidated elected taxpayer or combined taxpayer group that is designated by that group to legally bind the group for all filings and tax liabilities and to receive all legal notices with respect to matters under this chapter, or, for the purposes of section 5751.04 of the Revised Code, a separate taxpayer that is not a member of such a group.

(Q) "Megaproject," "megaproject operator," and "megaproject supplier" have the same meanings as in section 122.17 of the Revised Code.

(R) "Exclusion amount" means three million dollars beginning in 2024 and six million dollars beginning in 2025.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Ohio Revised Code
Section 5751.02 Commercial activity tax levied on taxable gross receipts.

Effective: July 4, 2023
Legislation: House Bill 33

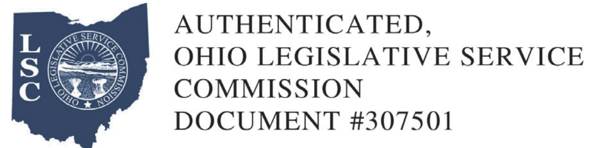
(A) For the purpose of funding the needs of this state and its local governments, there is hereby levied a commercial activity tax on each person with taxable gross receipts for the privilege of doing business in this state. For the purposes of this chapter, "doing business" means engaging in any activity, whether legal or illegal, that is conducted for, or results in, gain, profit, or income, at any time during a calendar year. Persons on which the commercial activity tax is levied include, but are not limited to, persons with substantial nexus with this state. The tax imposed under this section is not a transactional tax and is not subject to Public Law No. 86-272, 73 Stat. 555. The tax imposed under this section is in addition to any other taxes or fees imposed under the Revised Code. The tax levied under this section is imposed on the person receiving the gross receipts and is not a tax imposed directly on a purchaser. The tax imposed by this section is an annual privilege tax for the calendar year that contains all tax periods in the calendar year. A taxpayer is subject to the annual privilege tax for doing business during any portion of such calendar year.

(B) The tax imposed by this section is a tax on the taxpayer and shall not be billed or invoiced to another person. Even if the tax or any portion thereof is billed or invoiced and separately stated, such amounts remain part of the price for purposes of the sales and use taxes levied under Chapters 5739. and 5741. of the Revised Code. Nothing in division (B) of this section prohibits:

(1) A person from including in the price charged for a good or service an amount sufficient to recover the tax imposed by this section; or

(2) A lessor from including an amount sufficient to recover the tax imposed by this section in a lease payment charged, or from including such an amount on a billing or invoice pursuant to the terms of a written lease agreement providing for the recovery of the lessor's tax costs. The recovery of such costs shall be based on an estimate of the total tax cost of the lessor during the tax period, as the tax liability of the lessor cannot be calculated until the end of that period.

(C)(1) The commercial activities tax receipts fund is hereby created in the state treasury and shall



consist of money arising from the tax imposed under this chapter. Sixty-five one-hundredths of one per cent of the money credited to that fund shall be credited to the revenue enhancement fund and shall be used to defray the costs incurred by the department of taxation in administering the tax imposed by this chapter and in implementing tax reform measures. The remainder of the money in the commercial activities tax receipts fund shall first be credited to the funds described in division (C)(2) of this section, as provided in that division, and the remainder shall be credited to the general revenue fund.

(2) Not later than the twentieth day of February, May, August, and November of each year, the commissioner shall provide for payment of the following amounts from the commercial activities tax receipts fund:

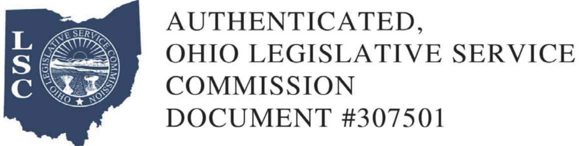
(a) To the commercial activity tax motor fuel receipts fund, an amount that bears the same ratio to the balance in the commercial activities tax receipts fund that (a) the taxable gross receipts attributed to motor fuel used for propelling vehicles on public highways as indicated by returns filed by the tenth day of that month for a liability that is due and payable on or after July 1, 2013, for a tax period ending before July 1, 2014, bears to (b) all taxable gross receipts as indicated by those returns for such liabilities;

(b) To the school district tangible property tax replacement fund, which is hereby created in the state treasury for the purpose of making the payments described in section 5709.92 of the Revised Code, an amount necessary to make those payments;

(c) To the local government tangible property tax replacement fund, which is hereby created in the state treasury for the purpose of making the payments described in section 5709.93 of the Revised Code, an amount necessary to make those payments.

(D)(1) On or after the first day of June of each year, the director of budget and management may transfer any balance in the school district tangible property tax replacement fund to the general revenue fund.

(2) On or after the first day of June of each year, the director of budget and management may transfer any balance in the local government tangible property tax replacement fund to the general



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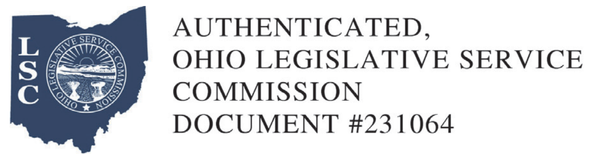
revenue fund.

(E)(1) There is hereby created in the state treasury the commercial activity tax motor fuel receipts fund.

(2) On or before the fifteenth day of June of each fiscal year beginning with fiscal year 2015, the director of the Ohio public works commission shall certify to the director of budget and management the amount of debt service paid from the general revenue fund in the current fiscal year on bonds issued to finance or assist in the financing of the cost of local subdivision public infrastructure capital improvement projects, as provided for in Sections 2k, 2m, 2p, and 2s of Article VIII, Ohio Constitution, that are attributable to costs for construction, reconstruction, maintenance, or repair of public highways and bridges and other statutory highway purposes. That certification shall allocate the total amount of debt service paid from the general revenue fund and attributable to those costs in the current fiscal year according to the applicable section of the Ohio Constitution under which the bonds were originally issued.

(3) On or before the thirtieth day of June of each fiscal year beginning with fiscal year 2015, the director of budget and management shall determine an amount up to but not exceeding the amount certified under division (E)(2) of this section and shall reserve that amount from the cash balance in the petroleum activity tax public highways fund or the commercial activity tax motor fuel receipts fund for transfer to the general revenue fund at times and in amounts to be determined by the director. The director shall transfer the cash balance in the petroleum activity tax public highways fund or the commercial activity tax motor fuel receipts fund in excess of the amount so reserved to the highway operating fund on or before the thirtieth day of June of the current fiscal year.



Ohio Revised Code

Section 5751.033 Situsing of gross receipts to Ohio.

Effective: June 11, 2012
Legislation: House Bill 487 - 129th General Assembly

For the purposes of this chapter, gross receipts shall be sitused to this state as follows:

(A) Gross rents and royalties from real property located in this state shall be sitused to this state.

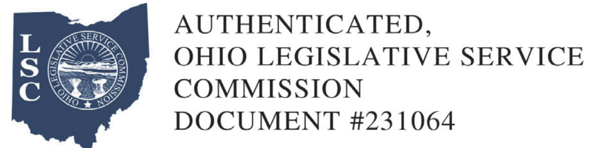
(B) Gross rents and royalties from tangible personal property shall be sitused to this state to the extent the tangible personal property is located or used in this state.

(C) Gross receipts from the sale of electricity and electric transmission and distribution services shall be sitused to this state in the manner provided under section 5733.059 of the Revised Code.

(D) Gross receipts from the sale of real property located in this state shall be sitused to this state.

(E) Gross receipts from the sale of tangible personal property shall be sitused to this state if the property is received in this state by the purchaser. In the case of delivery of tangible personal property by motor carrier or by other means of transportation, the place at which such property is ultimately received after all transportation has been completed shall be considered the place where the purchaser receives the property. For purposes of this section, the phrase "delivery of tangible personal property by motor carrier or by other means of transportation" includes the situation in which a purchaser accepts the property in this state and then transports the property directly or by other means to a location outside this state. Direct delivery in this state, other than for purposes of transportation, to a person or firm designated by a purchaser constitutes delivery to the purchaser in this state, and direct delivery outside this state to a person or firm designated by a purchaser does not constitute delivery to the purchaser in this state, regardless of where title passes or other conditions of sale.

(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

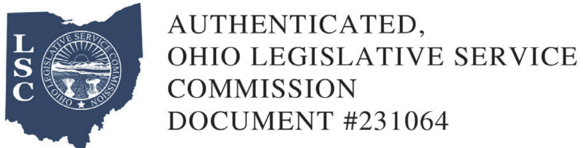


not based on the amount of use of the property, but rather on the right to use the property, and the payor has the right to use the property in this state, then the receipts from the sale, exchange, disposition, or other grant of the right to use such property shall be sitused to this state to the extent the receipts are based on the right to use the property in this state.

(G) Gross receipts from the sale of transportation services by a motor carrier shall be sitused to this state in proportion to the mileage traveled by the carrier during the tax period on roadways, waterways, airways, and railways in this state to the mileage traveled by the carrier during the tax period on roadways, waterways, airways, and railways everywhere. With prior written approval of the tax commissioner, a motor carrier may use an alternative situsing procedure for transportation services.

(H) Gross receipts from dividends, interest, and other sources of income from financial instruments described in divisions (F)(4), (5), (6), (7), (8), (9), (10), (11), and (13) of section 5733.056 of the Revised Code shall be sitused to this state in accordance with the situsing provisions set forth in those divisions. When applying the provisions of divisions (F)(6), (8), and (13) of section 5733.056 of the Revised Code, "gross receipts" shall be substituted for "net gains" wherever "net gains" appears in those divisions. Nothing in this division limits or modifies the exclusions enumerated in divisions (E) and (F)(2) of section 5751.01 of the Revised Code. The tax commissioner may promulgate rules to further specify the manner in which to situs gross receipts subject to this division.

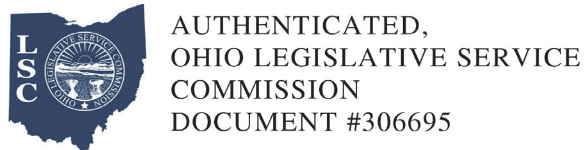
(I) Gross receipts from the sale of all other services, and all other gross receipts not otherwise sitused under this section, shall be sitused to this state in the proportion that the purchaser's benefit in this state with respect to what was purchased bears to the purchaser's benefit everywhere with 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.



(J) If the situsing provisions of divisions (A) to (H) of this section do not fairly represent the extent of a person's activity in this state, the person may request, or the tax commissioner may require or permit, an alternative method. Such request by a person must be made within the applicable statute of limitations set forth in this chapter.

(K) The tax commissioner may adopt rules to provide additional guidance to the application of this section, and provide alternative methods of situsing gross receipts that apply to all persons, or subset of persons, that are engaged in similar business or trade activities.

(L) As used in this section, "motor carrier" has the same meaning as in section 4923.01 of the Revised Code.



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Ohio Revised Code

Section 5751.08 Application for refund to taxpayer.

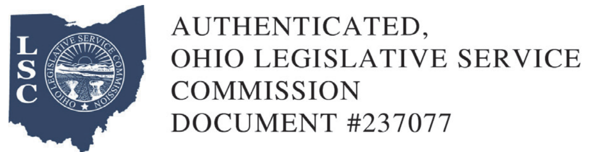
Effective: October 3, 2023
Legislation: House Bill 33

(A) An application for refund to the taxpayer of amounts imposed under this chapter that are overpaid, paid illegally or erroneously, or paid on any illegal or erroneous assessment shall be filed by the reporting person with the tax commissioner, on the form prescribed by the commissioner, within four years after the date of the illegal or erroneous payment, or within any additional period allowed under division (F) of section 5751.09 of the Revised Code. The applicant shall provide the amount of the requested refund along with the claimed reasons for, and documentation to support, the issuance of a refund.

(B) On the filing of the refund application, the tax commissioner shall determine the amount of refund to which the applicant is entitled. If the amount is not less than that claimed, the commissioner shall certify the amount to the director of budget and management and treasurer of state for payment from the tax refund fund created under section 5703.052 of the Revised Code. If the amount is less than that claimed, the commissioner shall proceed in accordance with section 5703.70 of the Revised Code.

(C) Interest on a refund applied for under this section, computed at the rate provided for in section 5703.47 of the Revised Code, shall be allowed from the later of the date the amount was paid or when the amount was due.

(D) Except as provided in section 5751.081 of the Revised Code, the tax commissioner may, with the consent of the taxpayer, provide for the crediting against tax due for a tax period the amount of any refund due the taxpayer under this chapter for a preceding tax period.



Ohio Revised Code

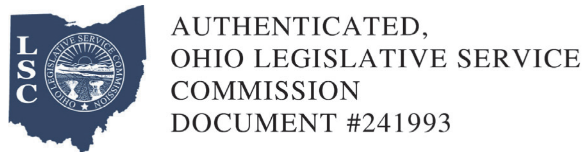
Section 5751.12 Records, federal returns, and federal-state reconciliation computations.

Effective: September 10, 2012
Legislation: House Bill 508, House Bill 487 - 129th General Assembly

The tax commissioner may prescribe requirements for the keeping of records and other pertinent documents, the filing of copies of federal income tax returns and determinations, and computations reconciling federal income tax returns with the returns and reports required by section 5751.051 of the Revised Code. The commissioner may require any person, by rule or notice served on that person, to keep those records that the commissioner considers necessary to show whether, and the extent to which, a person is subject to this chapter. Those records and other documents shall be open during business hours to the inspection of the commissioner, and shall be preserved for a period of four years unless the commissioner, in writing, consents to their destruction within that period, or by order requires that they be kept longer. If such records are normally kept by the person electronically, the person shall provide such records to the commissioner electronically at the commissioner's request.

Any information required by the commissioner under this chapter is confidential as provided for in section 5703.21 of the Revised Code. However, the commissioner shall make public an electronic list of all actively registered persons required to remit the tax under this chapter, including legal names, trade names, addresses, and account numbers. In addition, such list shall include all persons that cancelled their registration at any time during the preceding four calendar years, including the effective date of the cancellation.

The Legislative Service Commission presents the text of this section as a composite of the section as amended by multiple acts of the General Assembly. This presentation recognizes the principle stated in R.C. 1.52(B) that amendments are to be harmonized if reasonably capable of simultaneous operation.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DOCUMENT #241993

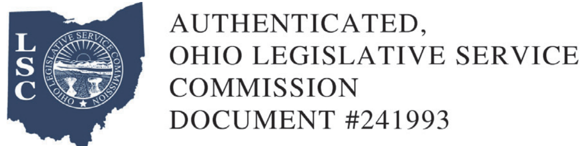
Ohio Administrative Code
Rule 5703-29-18 Records retention requirements.
Effective: June 20, 2019

(A) Pursuant to the authority granted under section 5751.12 of the Revised Code, the tax commissioner hereby promulgates a rule that establishes a record retention policy for purposes of the commercial activity tax. Under that section, the commissioner may identify certain records that are necessary for a person to maintain in order to show whether, and the extent to which, that person is subject to the tax imposed by Chapter 5751. of the Revised Code.

(B) For purposes of determining gross receipts under division (F) of section 5751.01 of the Revised Code, all persons subject to the tax imposed under section 5751.02 of the Revised Code shall keep and maintain primary and supporting records including but not limited to the following: sales journals, financial statements, charts of accounts, cash journals, annual reports, general ledgers, income statements and tax returns, and invoices. In addition, all persons must maintain organizational structures that reflect ownership and control percentages as they exist in each filing period.

(1) With regard to records concerning net operating loss credits available under section 5751.53 of the Revised Code, persons must retain records relating to such credit until June 30, 2010. Since companies may generate net operating losses long before being able to claim a deduction for the loss, records relating to the calculation of the corporation franchise tax reports for all years between the year the Ohio net operating loss was generated and each year in which the loss is being applied against Ohio taxable income must be maintained until June 30, 2010. Further, the statute of limitations does not prohibit either the commissioner or the taxpayer from adjusting the net operating loss carried forward from a tax year closed to assessment to a year still open to assessment or refund. See Consumer Direct v. Limbach (1991), 62 Ohio St. 3d 180.

(2) For example, company A generated a net operating loss in Ohio corporate franchise tax year 1989 (taxable year ending in 1988). Because of previous losses and correlating loss carryforward amounts, company A does not begin to claim the loss generated in the taxable year ending in 1988 until Ohio corporate franchise tax year 2005 (taxable year ending in 2004). For purposes of claiming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any credit for commercial activity tax purposes, company A is required to retain all records relating to the calculation of the credit, including all Ohio corporate franchise tax returns for the tax years 1989 through 2005 until June 30, 2010.

(D) All persons making purchases must maintain the purchase records and make them available to the commissioner for inspection in accordance with the provisions in section 5751.12 of the Revised Code. Such records must be maintained for at least four years from the later of the filing of or the due date of the return covering the period in which the purchases were made.

(E) For purposes of divisions (E) and (I) of section 5751.033 of the Revised Code, any invoices or documents relating to the situsing of receipts from the sale of tangible personal property or from the sale of services must be maintained for at least four years from the later of the filing of or the due date of the return covering the period in which the sales were made.

(F) This rule also applies to all records discussed in information releases and/or administrative rules relating to the commercial activity tax. Pursuant to section 5751.12 of the Revised Code, all records must be maintained for a period of four years from the later of the filing of or the due date of the return covering the period to which the records relate unless the commissioner either consents in writing to their earlier destruction or, by written order, extends the time period required for retention.