Supreme Court of Ohio Clerk of Court - Filed March 19, 2024 - Case No. 2023-1288

In the
Supreme Court of Ohio

JONES APPAREL GROUP/ NINE WEST HOLDINGS,	:	
	:	Case No. 2023-1288
Appellant/Cross-Appellee,	:	
	:	On appeal from the
v.	:	Ohio Board of Tax Appeals
	:	
PATRICIA HARRIS, TAX COMMISSIONER OF OHIO,	:	BTA Case Nos. 2020-53 & -54
	:	
Appellee/Cross-Appellant.	:	

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

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INTRODUCTION

Appellant/cross-appellee, Jones Apparel Group USA/Nine West Holdings f/k/a Jones Retail Corporation ("Jones"), has engaged in substantial commercial activity within Ohio – by selling millions of dollars' worth of footwear, apparel, and related items, and their being shipped to distribution centers located in Ohio. Those products at issue in this matter sit for an indefinite period of time in Ohio. And only when – and if – Jones's purchasers later decide to move those products do they potentially move outside Ohio. Jones has zero involvement in and knowledge of those decisions. The only contemporaneous business records that Jones possesses regarding these sales show but one destination arising from those transactions – Ohio. As a result, because of these Ohio-only sales, Jones has availed itself of the privilege of doing business in Ohio. Accordingly, Jones has been subject to Ohio's commercial activity tax ("CAT") and has paid tax accordingly under that framework.

Now, Jones seeks a refund of some of those taxes – despite having previously 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 Jones consciously and willingly fulfilled countless purchase orders, knowing fully – at the time of those orders – that those products would be shipped to Ohio. In fact, Jones possesses no contemporaneous business records evidencing that the goods in question were shipped anywhere other than Ohio. As such, pursuant to their transactions with Jones, Jones's purchasers ultimately received the products in Ohio. In turn, the Commissioner correctly determined that those transactions should be sitused to Ohio. *See* R.C. 5751.033(E). Jones's gross receipts at issue are thus properly subject to the CAT. The Commissioner correctly determined

that the CAT paid in relation to those taxable gross receipts were not "erroneously" paid – and thus Jones was not entitled to the full refunds that it had requested.

It bears noting that *the Commissioner has already granted a partial refund to Jones here*. The distinction (and difference) between what was granted and what was denied is in the supporting evidence that Jones supplied. With respect to some of its purchasers, Jones presented shipping documentation (*e.g.*, bills of lading, invoices, etc.) showing that the sold goods were to be shipped to a non-Ohio location. For those transactions, the Commissioner granted a CAT refund inasmuch as those receipts were not properly sitused to Ohio. However, for the remaining refund amounts at issue, Jones shows *no such documentation* – but instead seeks to estimate what percentage of its sales were eventually shipped outside Ohio. Put aside temporarily that problems exist, on multiple levels, with the way in which Jones devised those estimates. At its core, Jones's refund request is one that lacks any supporting documentation whatsoever regarding the receipts in question – at least, any documentation that would support a CAT situsing other than Ohio. As such, it is these transactions for which the Commissioner has correctly denied Jones a CAT refund.

In rendering its decision, the Board of Tax Appeals ("BTA") erred in how it construed the CAT situsing statute, R.C. 5751.033(E). As detailed below, as part of the Commissioner's cross-appeal, the BTA erred in determining that R.C. 5751.033(E) does not impose "a requirement of contemporaneous knowledge of the ultimate destination at the time of transportation." To be clear, regardless of how this Court addresses that question of contemporaneous knowledge, it should affirm the decision to deny Jones's refund claims – as that is a question of sufficiency of evidence (which Jones lacks). Still, the correct construction of R.C. 5751.033(E) necessarily incorporates a requirement that the taxpayer support its CAT situsing determinations with contemporaneous corroborating evidence.

Accordingly, this Court should affirm the BTA's September 13, 2023 Decision and Order – except with respect to the above-referenced question of law, over which this Court should reverse the BTA's decision. Also, this Court should determine that the decisions to deny Jones's refund claims violate no provisions within the U.S. Constitution. And in the end, this Court should determine that the Commissioner's instant final determinations should be affirmed in their entirety.

STATEMENT OF THE CASE AND FACTS

Jones is a "global designer, marketer, and wholesaler of apparel, footwear, jeans, jewelry, and handbags." *See* BTA Statutory Transcript, No. 2020-53, Feb. 19, 2019 ("ST53"), at 1; BTA Statutory Transcript, No. 2020-54, Feb. 19, 2019 ("ST54"), at 1.[1] Jones is headquartered in Pennsylvania and has locations throughout the United States. *See* Audit Remarks, at p. 2.[2] Jones sells its products to various national retailers, such as DSW, Macy's, BonTon, Dressbarn, Kohl's, and Sears, among others. ST53, at 1. Pertinent to this matter, Jones ships the sold products to those retailers' distributions centers that are located in Ohio. *Id.*

As observed in exemplar invoices previously submitted to the Department of Taxation ("Department"), Jones's products at issue were sold to two purchasers (DSW and Dressbarn) and shipped to distribution centers located in Ohio. *See* Ex. A;[3] ST53, at 114-16 (invoices reflecting Ohio shipping destinations). Jones's documentation regarding those sales included no

[1] The Commissioner certified two statutory transcripts – one for each individual appeal in this consolidated matter. Citations to "ST__" relate to the BTA case caption ("53" or "54") for the individual BTA appeal.

[2] As part of the certified BTA statutory transcripts, the Commissioner transmitted a series of documents electronically alongside the paginated statutory transcript PDFs (*e.g.*, Audit Remarks referenced above). These documents were properly included within the BTA record.

[3] During the BTA hearing, Jones introduced Exhibits 1-42, and the Commissioner introduced Exhibit A (selected excerpts from the statutory transcript). Tr. 163-65.

information, however, regarding any subsequent destinations for those items. *Id.* As such, the only specific destination known to Jones at the time of the sales was Ohio. In contrast, other Jones sales, to other purchasers, expressly did include secondary destination information in the documentation. *See* BTA Hearing Transcript, June 7, 2022 ("Tr."), at 142-44. (Gross receipts arising from those sales were deemed eligible for refund, as having been sitused outside Ohio.) As to the sales to DSW and Dressbarn, however, those purchasers decided – unilaterally – when and where to distribute their purchased items. As to those sales, Jones's involvement and knowledge was limited to the information filled out in bills of lading and other required shipping documentation – again, showing only the one destination of an Ohio distribution center. Beyond knowing that those shipments were destined for an Ohio distribution center, Jones had no knowledge as to where or to whom those products may be shipped in the future. *See* Tr. 34-50.

Jones's refund requests

Jones submitted a refund request to the Department, for $2.4 million in CAT paid during the period January 1, 2010 through December 31, 2013. ST53, at 120. Similarly, for the period January 1, 2014 through December 31, 2016, Jones submitted a refund request for $1,420,254 in CAT paid. ST54, at 20. As to each of these amounts, the Department granted partial refunds, for $557,093 and $282,469, respectively. ST53, at 120; ST54, at 20. Jones requested a hearing before the Department. Whereas the initial refund requests related to Jones's sales to numerous retailers, Jones pared down the amount in dispute to relate only to sales to two of those retailers (DSW and Dressbarn). *Id.*

The Commissioner's final determinations and BTA proceedings

In two separate final determinations, each dated November 19, 2019, the Commissioner affirmed the denial of Jones's refund requests beyond what had been initially granted.[4] ST53, at 1-8. In so doing, the Commissioner determined that the sales at issue here are properly situsedto Ohio for CAT purposes, and thus rejected Jones's contentions that they should be sitused elsewhere. ST53, at 3-7; R.C. 5751.01(G); R.C. 5751.033(E). The Commissioner determined that Jones's available contemporaneous documentation – *e.g.*, bills of lading, invoices, etc. – were wholly consistent with the sales at issue being situsedto Ohio. ST53, at 7-8. Indeed, "[a]t the time of sale, [Jones] did not have records that showed where their purchasers distributed their products to retail locations." *Id.* at 5. In turn, the Commissioner rejected Jones's contention that one could use, as a proxy, a ratio of the number of stores in Ohio relative to the United States (for sales to Dressbarn). *Id.* As to DSW, the Commissioner rejected Jones's proposal to situs based upon unverified secondary sales data – namely, DSW's sales data – that purported to show how DSW's purchases were later distributed. *Id.* The Commissioner also noted that, even had it concluded that such secondary data could be sufficient to ascertain situsing, Jones provided such data for only one year, 2013 (out of six years in the refund periods). *Id.*

After the Commissioner issued his final determinations, Jones timely filed notices of appeal with the BTA. At a June 7, 2022 hearing before the BTA, Jones presented evidence and testimony from three witnesses: (1) George Neeman, vice-president for an entity formerly known as Nine West Holdings, Inc.; (2) Jonathan Oeler, an assistant director of digital solutions development for Reed Smith (the firm that employs Jones's counsel), whom Jones called as an expert witness; and

[4] Though the two instant final determinations refer to distinct refund claims filed by Jones, they contain substantially identical language. For citation ease, this brief will refer only to one of the final determinations, except as otherwise noted.

(3) Jeffry Hartlage, an audit manager with the Department, who appeared pursuant to a subpoena, over the Commissioner's objection and motion to quash. The Commissioner presented testimony from Allison Johnson, an auditor with the Department.

Jones later filed a post-hearing motion, seeking to compel the appearance of an additional witness in response to the earlier-granted subpoena, and also to strike Mr. Hartlage's testimony. In an August 30, 2022 order, the BTA denied Jones' motion, and ordered that the parties proceed to post-hearing briefing.[5]

The BTA's decision

In a September 13, 2023 Decision and Order ("BTA Decision"), the BTA unanimously affirmed the instant final determinations, denying any additional refunds beyond what had been initially granted. As an initial matter, the BTA determined that "[n]either the [CAT situsing] statute nor the case law have imposed a requirement of contemporaneous knowledge of the ultimate destination at the time of transportation" of the sold goods in question. BTA Decision, at 10. As such, the BTA noted that it "can contemplate circumstances in which a taxpayer could present evidence that it obtained after transportation was complete that would successfully demonstrate that the goods were ultimately received outside of Ohio." *Id.* Nevertheless, the BTA affirmed the denial of additional refunds, as the BTA determined that Jones failed to "meet its burden." *Id.* For its refund claims, Jones relied upon what it had characterized as a "representative sample" of data – but as the BTA noted, that data related to a period entirely outside the refund claim period, and was "extremely short in comparison." *Id.* As such, the BTA determined that Jones's data "was too far removed and reflected too narrow of a time frame to establish the goods shipped to Ohio during the tax period were ultimately received outside Ohio." *Id.* The BTA

[5] Jones's notice of appeal to this Court did not allege error regarding this interim BTA order.

concluded that while the methodology used by Jones in the instant refund claims "may be sufficient in other circumstances, we find that it falls short in this case." *Id.* Lastly, while acknowledging the constitutional claims that Jones raised, the BTA made no findings regarding them, leaving those claims for adjudication by "a court which has the authority to decide constitutional challenges." *Id.* at 11.[6]

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.")

[6] Though Jones's notice of appeal to this Court included allegations of constitutional violations, Jones makes no mention of those claims in its initial brief here. *See generally* Brief For Appellant ("Jones Br."). As such, even if they were included in the assignment of errors before this Court, "[e]rrors not treated in the [appellant's] brief . . . will ordinarily be regarded as having been abandoned." *Riss & Co. v. Bowers*, 114 Ohio App. 429, 438 (10th Dist. 1961) (citing *Uncapher v. Baltimore & Ohio Rd. Co.*, 127 Ohio St. 351 (1933)).

ISSUES ON APPEAL

Proposition of Law No. 1: *Where a taxpayer submits a refund claim pursuant to R.C. 5751.08, but fails to provide sufficient documentary evidence to show that the gross receipts giving rise to the claimed overpayments should be sitused outside Ohio, that taxpayer is not entitled to such a refund.*

In its decision, the BTA correctly determined that Jones was not entitled to any additional refunds beyond the refund amounts initially granted. In so doing, the BTA concluded that the Commissioner too narrowly construed the CAT situsing statute, R.C. 5751.033(E), by imposing "a requirement of contemporaneous knowledge of the ultimate destination at the time of transportation" of the sold goods in question. *See* BTA Decision, at 10. The Commissioner will address the error of this determination below, as part of her cross-appeal. But first, the Commissioner will focus on the BTA's correct determination that Jones failed to sufficiently demonstrate that the goods in question "were ultimately received outside of Ohio." *Id.*

I. CAT situsing background

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.

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 the instant final determinations, this Court and other Ohio courts have decisively ruled on issues surrounding the CAT, and the BTA – until now – had similarly followed suit. *See* ST53, at 3-7 (citing, e.g., *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; *House of Seagram, Inc. v. Porterfield*, 27 Ohio St.2d 97 (1971); *Dupps Co. v. Lindley*, 62 Ohio St.2d 305 (1980)); *see also, e.g.*, *Crutchfield Corp. v. Testa*, 151 Ohio St.3d 278 (2016). Using these and other cases as guidance, the Commissioner correctly determined that the gross receipts at issue are properly sitused to Ohio – and thus properly subject to tax, and not appropriate for refund.

II. The BTA correctly denied any additional refund amounts for Jones, as Jones failed to sufficiently demonstrate that the receipts at issue are properly sitused outside Ohio.

Here, the BTA's decision can be broken down into two primary categories: (1) what sort of information and evidence does the CAT statute require in order to substantiate a particular situsing determination; and (2) whether Jones could demonstrate, based upon the information that it presented, that the gross receipts are properly sitused outside Ohio. As the former comprises the Commissioner's cross-appeal, the Commissioner now addresses the latter.

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.*

A. As to the receipts in question, all the evidentiary documentation compels the determination that those receipts should be sitused to Ohio.

Before addressing the information upon which Jones relied, it bears noting all the evidence in the record upon which Jones did *not* rely. As confirmed through BTA hearing testimony, all the gross receipts at issue involved Jones's sales of property (to DSW and Dressbarn) that were shipped to distribution centers in Ohio. For context and comparison, consider those gross receipts for which the Department granted a refund. As discussed by the Department's auditor, Allison Johnson, the record contained exemplars of sales whose gross receipts were properly sitused to Ohio and thus eligible for refund. *See* Tr. 142-44; Ex. A; ST53, at 114-16. In the case of these examples – which pertained to Jones's sales to such retailers as Sears, BonTon, and Kohl's – Jones's *own* contemporaneous documentation (*i.e.*, bills of lading, invoices, shipping labels, etc.) showed that those gross receipts related to sold items that were shipped outside Ohio. *Id.* In fact,

for these transactions, *all* the pertinent documentation – contemporaneous or otherwise – pointed to an Ohio situsing.

In stark contrast, as to Jones's sales to DSW and Dressbarn, the record also showed similar contemporaneous documentation showing shipment of goods to Ohio distribution centers – but there was *no indication whatsoever* as to where, when, or even *if* those purchasers would later ship those items outside Ohio. Tr. 145-46. As Ms. Johnson testified, this difference marked the "dividing line" between receipts that qualified for refund and those that did not. *Id.* Ms. Johnson added that she had conversations with Jones to discuss this point – and Jones confirmed that, other than having information about "percentages of Ohio stores versus [elsewhere] that they could use to *estimate*," Jones "did not know anything further, did not have any evidence of anything further." Tr. 146-47 (emphasis added). *See also, e.g.*, Tr. 155 (Jones's contemporaneous documentation relating to sales to DSW and Dressbarn is consistent with "where the location of the shipment was known at the time of sale"). Similarly, Jones's fact witness, Mr. Neeman, acknowledged at hearing that "different purchasers provided different information at different times to [Jones]" – with one clear example being that, at the time of sale, DSW and Dressbarn did *not* provide Jones with any information relating to any possible product shipments beyond the transacted shipment to Ohio. Tr. 34-36.

It is thus indisputable that *all* the shipping labels, invoices, and any available contemporaneous documentation relating to Jones's sales evidenced orders with an Ohio address identified as the location where the products were to be ultimately received by the purchaser. Accordingly, the purchasers at issue – DSW and Dressbarn – 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, a

purchaser may subsequently ship some of the goods out of Ohio, that event, by itself, has no bearing on the proper situsing of *Jones's* gross receipts. As Mr. Neeman confirmed that Jones would have had *no knowledge*, at the time of sale, regarding how long a product might stay in a purchaser's Ohio distribution center, let alone when or where it might go. *Id.; see also* Tr. 49-50. To take it even further, when it comes to sales to DSW and Dressbarn, Jones's own internal data systems had no information regarding any subsequent destinations for those sold goods – whereas it had such information with regard to goods sold to other purchasers. Tr. 37-40. *See also, e.g.*, Tr. 43 (Jones did not participate in, nor have knowledge regarding, DSW's or Dressbarn's internal marketing/advertising/sales meetings).

Indeed, the key trigger for the goods moving out of the Ohio distribution center (and potentially leaving Ohio) is the *purchaser* (here, DSW or Dressbarn) – who does so unilaterally. That decision is separate and apart from the original transaction involving Jones and the purchaser – and beyond Jones's knowledge or control. As such, for purposes of situsing under R.C. 5751.033(E), the only relevant transportation involved in the sales at issue is the shipment of the sold items to Ohio. Under Jones's theory of how situsing should work, the Department would effectively need to examine every sale of property shipped anywhere to determine if any of the goods sold by Jones and shipped to another state was later shipped into Ohio by one of its customers. For example, suppose Jones sold and shipped property to a purchaser with a warehouse in Indiana. If Jones's situsing method were accepted, then the Department would need to examine that Indiana purchaser's subsequent shipping records to determine if any of Jones's sold goods end up being shipped back to Ohio. That is unreasonable and unworkable.

As the Commissioner noted in the instant final determinations, the BTA's decision in *Greenscapes* is instructive here, for multiple reasons. *See* ST53, at 3-4. First, *Greenscapes*

presented a similar factual predicate, wherein the taxpayer (like Jones here) had sold products to be shipped to warehouses and distribution centers located in Ohio. The possibility that those products later "may be removed from Ohio [by the purchaser], after being shipped from appellant to Ohio," did nothing to sway the BTA in concluding that the taxpayer was properly subject to CAT – given that at the time that appellant sold products to its customers, the available contemporaneous records (*i.e.*, customer orders, invoices, bills of lading, etc.) all evidenced an *Ohio destination only*. *See* 2017 Ohio Tax LEXIS 1810, at *6-7.

Greenscapes also serves as a useful guide for examining applicable precedent from this Court. *See* ST53, at 3-4. For example, the BTA in *Greenscapes* compared the taxpayer's situation to that of the taxpayer in *Dupps*. Though *Dupps* involved a technically different tax – the now-defunct corporation franchise tax – that tax offered virtually identical situsing criteria as that found today in the CAT. And *Dupps* actually presented the opposite scenario as here – a taxpayer who sold products that were transported out of Ohio, and thus those products were "ultimately received" (and thus sitused) outside Ohio. 2017 Ohio Tax LEXIS 1810, at *5 (citing 62 Ohio St.2d at 308). Nevertheless, the result in *Dupps* served to further confirm the correctness of the Commissioner's situsing determination in *Greenscapes*, and it similarly confirms the correctness of the Commissioner's situsing determination here relative to Jones.

The BTA similarly has drawn upon this Court's decision in *House of Seagram* – yet another factually similar case as here, despite also involving the corporation franchise tax. As the BTA in *Greenscapes* noted about *Seagram*, "sales of tangible personal property to an Ohio buyer, delivered by the seller to a common carrier outside Ohio and ultimately received in Ohio after all transportation has been completed, *are deemed business done in Ohio.*" 2017 Ohio Tax LEXIS 1810, at *5-6 (emphasis added) (citing 27 Ohio St.2d at 101).

The BTA's decision in *Mia Shoes, Inc. v. McClain*, BTA No. 2016-282, 2019 Ohio Tax LEXIS 1864 (Aug. 8, 2019), is equally instructive here. In *Mia Shoes*, some of the taxpayer's sales were to customers that owned or used distribution centers in Ohio, and so the taxpayer was assessed for gross receipts arising from shipments thereto. *Id.* at *1-2. Like Jones contends here, the taxpayer in *Mia Shoes* contended that most of its Ohio shipments were later shipped to other states, through later distribution by and through its various retail locations – and that Ohio was the *initial*, but not *ultimate*, destination. *Id.* at *3. The BTA, however, rejected that contention and affirmed the assessment, as:

> [T]he 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*. The sale of these goods resulted in the taxable gross receipts upon which the CAT was assessed [against Mia Shoes], and Mia Shoes did not affirmatively prove that the goods were then ultimately received elsewhere within the meaning of [R.C. 5751.033(E)].

Id. at *9 (emphasis added). Here, just as was essentially the case in *Mia Shoes*, Jones is asking this Court to ignore its own contemporaneous records (and, frankly, all contemporaneous records) – all of which show an *Ohio destination only* – and instead supplant those records with those of Jones's purchasers (*i.e.*, DSW and Dressbarn). However, the records of *Jones's purchasers* do not reflect *Jones's commercial activities* – as Jones was *not* involved in the purchasers' decisions to move goods from their Ohio distribution centers. *See generally* Tr. 34-50. Thus, the facts presented here reflect activity that is too attenuated from Jones's commercial activity to warrant a situsing anywhere other than Ohio.

Jones's interpretation of R.C. 5751.033(E) simply ignores the nature of sales that give rise to the gross receipts at issue here. To determine situsing, Jones would prefer to focus not on its own activities – *i.e.*, selling to its customers – but, rather, focus on its customers' activities that occur after its own sales are complete. Here, as the contemporaneous business records show (and,

it cannot be forgotten, as Jones itself acknowledged, through its original CAT return filings), the gross receipts at issue were sitused to Ohio. In other words, consistent with R.C. 5751.033(E), Jones's sales to DSW were complete when DSW received that property at its Ohio distributions centers. All the transportation envisioned by and related to Jones's sales is complete at that point. Ohio is not a mere waypoint on a longer journey from Jones to DSW. Once the goods reach the Ohio distribution center, they cease to be freight in common carriage; the goods are no longer in transit between Jones and DSW; and DSW presumably then adds the goods to its inventory. DSW is no longer awaiting the arrival of its purchases; they have arrived, *in Ohio*. As between Jones and DSW, the goods' journey is complete. As such, Jones's relationship to those goods ends here. The delivery point evidenced by Jones's sales and shipping records has been reached. DSW's subsequent decisions regarding the property – including any decisions to move its inventory in and out of Ohio – have no bearing on *Jones's commercial activities* or the application of R.C. 5751.033(E). In other words, because the statute ends its inquiry with the receipt of the property by DSW, there is effectively no need to explore what happens thereafter.

The purpose of the CAT situsing statute is to quantify the amount of privilege (through commercial activities) that one exercises in Ohio. Jones earned the gross receipts in question by selling goods to purchasers like DSW. All the gross receipts in question were derived from sales of property that were received by purchasers in Ohio. Those purchasers are Jones's customers – the persons with whom Jones is "doing business" within the meaning of R.C. 5751.02(A) ("[T]here 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…that is conducted for, or results in, gain, profit, or income." (emphasis added)). Jones's "gain, profit, or income" results from the business it does with its customers –

not from the business *its customers do with their customers*. The amount of CAT levied on a person should be a reflection of that person's (and no others') Ohio commercial activities.

As the Commissioner noted in the instant final determinations, though Jones has not so requested, Jones appears to be seeking to qualify its purchasers as having Qualified Distribution Centers ("QDCs"), and derive the benefits (without incurring the costs) from such a classification. *See* ST53, at 6 (citing R.C. 5751.01(F)(2)(z)). As the Commissioner noted, the General Assembly recognized some of the logistical complexities in managing situsing determinations for goods that flow through an Ohio distribution center. *Id.* As a result, the QDC statute enables a supplier to exclude from its gross receipts a certain percentage of gross receipts from the sale of any tangible personal property that is shipped to a QDC. But to gain this benefit for its suppliers, a QDC must meet several stringent requirements, including paying an annual fee and undergoing an independent audit to examine that entity's business records. So, this provision serves as evidence that the General Assembly acknowledged that property shipped to an Ohio distribution center is considered received in Ohio unless that distribution center is a QDC. Yet, here, Jones hopes to effectively bypass the QDC process, obtain the same benefits, and avoid having to generate any contemporaneous business records to substantiate its refund claims. And in fact, Jones wants instead to be able to rely upon a proxy – *i.e.*, the number of DSW stores in and out of Ohio – as proof that its customers received products outside Ohio (and, in turn, to estimate taxable gross receipts for CAT purposes). There is simply no support – either in the statute or the factual record – to support such a departure for Jones.

B. Jones fails to satisfy its burden to establish that the receipts from the sold goods should be sitused outside Ohio.

Rather than rely upon any of the above-referenced evidence in the record, Jones sought to present a variety of different sources in hopes of supporting its position of a non-Ohio situsing.

And after all, at or near the time of the sales at issue here, Jones "did not have records that showed where their purchasers distributed their products to retail locations." ST53, at 5. As a result, in the case of sales to Dressbarn, Jones resorted to using, as a proxy, a ratio of the number of stores in Ohio relative to the United States. *Id.* Jones then sought to situs its sales to DSW based upon unverified secondary sales data – namely, DSW's sales data – that purported to show how DSW's purchases were later distributed. *Id.* As the Commissioner noted in her final determinations, even had she determined that such unverified secondary data could be sufficient to ascertain situsing, Jones provided such data for only one year, 2013 (out of six years in the refund periods). *Id.*

1. Jones presents no documentary evidence regarding the actual gross receipts at issue.

Indeed, in its brief, Jones describes how it presented "documentary evidence concerning the nature of its sales to DSW." *See* Jones Br. at 15. Tellingly, though, that discussion includes *nothing* to document where any particular products traveled – whether to Ohio or some other location, or perhaps multiple other locations – and *nothing* about any of its specific gross receipts. To wit, Jones focuses its discussion on metrics like the number of suppliers that sold goods to DSW; the number of retail stores located around the nation; the ability for customers to view DSW's nationwide inventories online at any time; and so on. *Id.* at 15-17. But none of that provides any *documentary* evidence as to where those sold goods were *shipped* (or where they may be later shipped). Rather, Jones seeks to make assumptions regarding the transportation of those goods – and then demand that the Department accept those assumptions as proven fact.

In fact, the heading for this particular section in Jones's brief is telling – Jones's "evidence demonstrates that less than 100% of its sales were ultimately received by DSW outside Ohio." *Id.* at 15. Jones would have the Department – and this Court – believe that it is a *fait accompli* that because all the sold goods could not have possibly stayed in Ohio, then Jones must be entitled to

a refund. And not only that, the Department must also apparently accept Jones's own contrived computation as to what that refund amount should be – regardless of whether Jones can actually corroborate that computation with any documentary evidence regarding Jones's gross receipts.

Rather, the relevant inquiry before the BTA – and now before this Court – is whether Jones can prove that the gross receipts at issue should be sitused outside Ohio. Neither the BTA nor the Department has ever suggested that Jones's refund claims fail because all the sold items remained in Ohio forever. Rather, Jones's claims failed because Jones lacked the documentary proof to corroborate that certain gross receipts should be sitused elsewhere. And here – just as it futilely did before the BTA – Jones really makes no attempt to present *documentary* evidence to support its refund claims. (Contrast this with the documentary evidence that Jones was able to provide in order to obtain a partial refund – demonstrating, through shipping records, that certain items were explicitly earmarked for shipment to non-Ohio destinations.)

Jones also points out that it proffered an expert witness – Mr. Oeler – for the purpose of "demonstrating the extent to which [Jones] products are available in DSW locations around the country, not just in Ohio." Tr. 7; *see* Jones Br. at 16-18. However, just as the Commissioner pointed out to the BTA, this Court should lend no weight to Mr. Oeler's testimony –, as Mr. Oeler offered no testimony pertinent to the actual issue before the BTA: whether Jones's gross receipts at issue were properly sitused to Ohio, per R.C. 5751.033(E).[7]

[7] In an amicus brief, the Chamber contends that taxpayers may rebut the correctness of a final determination through, among other things, the use of expert testimony. *See* Brief Amicus Curiae of The Ohio Chamber of Commerce ("Chamber Br."), at 8. Of course, the Commissioner takes no issue with the per se use of expert witness testimony. What the Chamber neglects to say, however, is that as detailed above, the BTA identified multiple flaws in *this expert's* methodology. And the Commissioner took issue with *this expert's* lack of independence or qualifications; lack of reliance upon shipping or transportation data; and a general lack of insight into how to analyze the situsing of Jones's gross receipts.

The purpose of expert testimony is "to aid and assist the trier of fact in understanding the evidence presented and in arriving at a correct determination of the litigated issues." *E.g., Waste Mgmt. of Ohio, Inc. v. Cincinnati Bd. of Health*, 159 Ohio App.3d 806, 2005-Ohio-1153, ¶ 55. While the BTA "give[s] an expert's testimony appropriate weight, we will not abdicate our duty as the trier of fact to an expert witness." *The Auto Place, LLC v. McClain*, BTA No. 2015-474 et al., 2022 Ohio Tax LEXIS 1992, at *14-15 (July 25, 2022).

As an initial matter, Mr. Oeler testified that he received no compensation for acting as an expert in this matter, separate and apart from his "normal pay." Tr. 71. Nevertheless, it cannot be ignored that Mr. Oeler is employed by Reed Smith – the very law firm that employs Jones's counsel in this matter. Compensation issues aside, Mr. Oeler shares the same professional objectives as his firm and as Jones's counsel in prevailing here. As such, it is questionable (at best) as to whether Mr. Oeler could truly be "an independent, neutral, impartial or indifferent expert witness." *See Willis Day Storage Co. v. Lucas Cnty. Bd. of Revision*, BTA No. 87-F-1196, 1992 Ohio Tax LEXIS 724, at *18 (June 26, 1992) (minimal weight to purported expert testimony of individual who was permanently employed by appellee county auditor); *see also, e.g., Zurkowski v. Cuyahoga Cnty. Bd. of Revision*, BTA No. 81-F-260, 1982 Ohio Tax LEXIS 456, at *7 (Mar. 19, 1982) (rejecting expert testimony that does not come from individual with "degrees of objectivity, freedom from bias, lack of an interest in the outcome of the controversy").

In a similar vein, it is questionable at best whether Mr. Oeler is an individual who has been shown to have "training that would normally be associated with an independent expert witness qualified to testify" as to the pertinent facts in this matter. *See Zurkowski*, 1982 Ohio Tax LEXIS 456, at *7. It is telling that, at hearing, Jones's counsel neglected to offer Mr. Oeler as an expert in *any* particular capacity – and only did so when asked by the Commissioner's counsel. Tr. 72.

Mr. Oeler was then proffered as an expert in "the development of software and business analytics tools." *Id.* Nowhere does Mr. Oeler profess to have any expertise in tax generally (or, more specifically, any aspect of the CAT), accounting, statistics, sampling, or the like. Nor did Mr. Oeler ever suggest that he had expertise in understanding Jones's sales; Jones's knowledge regarding those sales at or near the time that they occurred; or even Jones's documentation regarding those sales.

But even if putting aside questions about Mr. Oeler's impartiality or qualifications, Mr. Oeler simply offered no testimony that could assist the BTA in determining whether Jones's gross receipts in question were properly sitused per R.C. 5751.033(E). Mr. Oeler made no suggestion that he ever reviewed any Jones documentation. Rather, his work focused entirely upon *DSW's* data. Put aside (temporarily) the fact that Jones manufactured and presented its "data" to the Commissioner (and, in turn, the BTA) only after the instant final determinations were issued. Also put aside (temporarily) that the Department never had an opportunity to review – let alone audit, for its reliability and accuracy – the data that Mr. Oeler compiled. Even if putting those fatal flaws aside, Mr. Oeler's work focused on data that reflected unilateral decision-making by *DSW*, about which Jones admitted that it had *no knowledge*. Opining on the distributions of products on DSW's website offers no insight whatsoever into what Jones knew (or could substantiate) at the time of sale, nor any insight into what Jones contemplated about where those products would be shipped when selling them to DSW. Indeed, as Mr. Oeler acknowledged, he had no way of knowing, based upon the information that he reviewed, whether any particular item had even been shipped to or from an Ohio distribution center. Tr. 85-86. In fact, tellingly, he testified that "we don't make any assumptions on shipping chain, all I can tell is that a product is available in that store." *Id.*

Ironically, this is the very assumption that Jones asked the BTA (and now asks this Court) to make when analyzing how Jones's gross receipts should be sitused.

Jones points out that it "entered over 40 documents in the BTA's record [that] show the volume of [its] sales to DSW and DSW's sales activity and retail presence across all 50 states." Jones Br. at 18. To be clear, these documents do *not* include any primary (or even secondary) business record showing shipments of Jones products to DSW. Rather, these 40+ documents include such things as: Jones's SEC filings and annual reports,[8] *summary* annual sales roll-up compilations (without any of the primary documents upon which they presumably were based); and documents accompanying Mr. Oeler's expert report. *See* Appellant's Exhibit List. These documents may well show, as Jones contends, "DSW's sales activity and retail presence across all 50 states" – but as is a common theme throughout this matter, they offer nothing to document the gross receipts at issue in the refund claims or the shipping movements of the products associated with Jones's gross receipts.

The Chamber similarly tries to bolster the nature of Jones' evidence, describing it as "the testimony of two experts and a Department auditor, as well as . . . a great deal of evidence." Chamber Br. at 9. First, let us characterize the witness testimony correctly: Jones elicited testimony from one employee; a non-independent expert, who was employed by Jones's counsel firm; and a Department auditor (Mr. Hartlage) whose testimony Jones found so helpful that Jones

[8] Jones makes a point in its brief to cite its SEC 10-K filings and annual reports. *See, e.g.*, Jones Br. at 18. Yet, these documents were so critical to Jones's case that Jones did not bother to discuss them at the BTA hearing, and instead simply sought to add them to the BTA record, without comment. Tr. 164-65. The Commissioner objected to admission of these documents as irrelevant, inasmuch as they were not even opened (let alone discussed) during the BTA hearing. *Id.* Though the BTA admitted these particular exhibits, it does not change that these exhibits include *no* discussion about how the gross receipts at issue should be sitused – and at no point does Jones even try to argue otherwise.

filed a motion to strike that testimony, plus a motion to compel testimony from another Department witness (both motions were denied). And as has been already discussed at length, Jones's "evidence" had nothing to do with shipping information – but rather inventory amounts and DSW store listings. The Chamber opines that the Commissioner "could use that same evidence to support an assessment" and that "basic fairness" would compel it. *Id.* Yet, the Chamber makes no attempt to analyze the credibility of the evidence that Jones presented – as if such an analysis would be a more formality. The Chamber fails to recognize that where, as here, there was no inconsistency in the already existing contemporaneous shipping records (and those records uniformly showed an Ohio destination only), there would be no reason ever to resort to alternative evidence such as this – whether for assessment or refund.

2. Jones seeks to create a series of straw men of "uncontroverted testimony and evidence" that the BTA supposedly ignored.

In discussing the portion of the BTA's decision wherein the BTA determined that Jones "failed to meet its burden" to show entitlement to a refund, Jones proceeds to list various bits of testimony that the BTA allegedly "ignored" or "rejected," so as to create a parade of straw men that it then can knock down. Jones Br. at 19-24. Of course, even as it quoted language from the BTA's decision, Jones buried the lede:

> The evidence presented was based on data collected from August through October 2018. However, the refund claims relate to receipts from January 1, 2010 through December 31, 2016. The representative sample is not only related to a time well after the tax period, but is also extremely short in comparison. . . . The data submitted by [Jones] was too far removed and reflected too narrow of a time frame to establish the goods shipped to Ohio during the tax period were ultimately received outside Ohio.

BTA Decision, at 10. Put another way: (1) the BTA observed that Mr. Oeler's report relied upon data collected from periods *outside* the refund claim periods; and (2) despite having used the phrase "representative sample," the BTA highlighted that Jones never demonstrated why a 3-month

sampling of data from a period of time *outside* the refund claim period is somehow sufficiently representative of the entire 7-year refund claim period. Jones never addressed those concerns before the BTA. Jones could have addressed them in its initial brief here – but tellingly did not.

For its part, the Chamber makes a blanket claim that taxpayers should be permitted to present proof towards challenging a final determination, "in the form of a sample." *See* Chamber Br. at 8. Of course, this statement appears to presume that either the Commissioner or the BTA took issue with the very fact that Jones even bothered to employ some kind of sampling. That is far from the case. Rather, both the Commissioner and BTA identified the numerous infirmities in what Jones presented as a so-called "representative sample." Coincidentally, the Chamber cited the statute that authorizes the Commissioner to employ sampling as a way to determine tax liability. *Id.* (citing R.C. 5751.09(G)). With no hint of irony, the Chamber neglects the reality that Jones made no effort to identify a mutually agreeable sample, nor explain why its self-selected sample was of questionable size and representativeness.

Instead of addressing these infirmities in the evidence upon which it relied, Jones tries to change the subject. To wit, Jones cites testimony from Mr. Neeman that he had "'absolute certainty' that 80% of the goods [Jones] sold to DSW were ultimately received by DSW outside Ohio." Jones Br. at 22. According to Jones, because that testimony was "uncontroverted," then the BTA erred in failing to accept that testimony. Never mind that Jones offered *no* documentary evidence to show that any specific Jones goods sold to DSW were shipped to Ohio and then shipped out of Ohio. Never mind that *all* the available evidence in the record showing where specific goods were shipped show *only* that such goods were shipped to Ohio. And, as noted above, never mind that the BTA took serious issue with the flawed methodology employed in Mr. Oeler's expert report. Jones cites *Rowe-Reilly Corp. v. Tracy*, 85 Ohio St.3d 625 (1999), for the

proposition that this Court should not defer to BTA determinations that "reject[ ] or ignore[ ] uncontroverted evidence." Jones Br. at 22. In *Rowe-Reilly*, this Court found error in a BTA determination that failed to account for certain testimony, where there was "no direct evidence in the record" to controvert that testimony. 85 Ohio St.3d at 697-98. Here, however, as described above, there is a wealth of evidence consistent with gross receipts that are sitused to Ohio. That Jones proffered a witness to say that, instead, a bunch of gross receipts should be sitused outside Ohio does not make it so – especially when Jones fails to back up those statements with any documentary evidence showing what happened to the goods tied to those gross receipts.

It bears noting that notwithstanding Jones's presentation of how this Court should address BTA determinations, this Court "defer[s] to the BTA's factual findings 'it they are supported by reliable and probative evidence, and we afford deference to the BTA's determination of the credibility of witnesses and its weighing of evidence *subject only to an abuse-of-discretion review* on appeal." *E.g., Chagrin Realty, Inc. v. Testa*, 154 Ohio St.3d 352, 2018-Ohio-4751, ¶ 10 (citations omitted) (emphasis added). The BTA clearly determined that, after weighing all the evidence and testimony presented by Jones and considering the credibility of its witnesses, Jones still failed to meet its burden of proof with respect to its refund claims.

Jones repeatedly uses the phrase "corroborates" in its brief. But time and again, what is being "corroborated" is the notion that items have been shipped into Ohio, and that some of them are later shipped elsewhere. What Jones *cannot* corroborate, however, is anything with respect to the particular gross receipts at issue in its refund claims. Accordingly, this Court should conclude that the BTA reasonably and lawfully determined that Jones failed to support its refund claims with credible evidence – and thus affirm that portion of the BTA's decision.

ISSUES ON CROSS-APPEAL

Proposition of Law No. 2: *Where a taxpayer sells items of tangible personal property, and the records contemporaneous to the taxpayer's 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).*

As discussed above, separate and apart from whether Jones could satisfy its burden of proof here (it cannot), there is the question of whether R.C. 5751.033(E) necessarily contemplates a requirement that a taxpayer have knowledge – such as through the support of contemporaneous business records – at or near the time that the transactions in question occurred. To that end, 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.

This is a nuanced issue. It is not merely a question of whose records should be permitted to demonstrate the taxability of an activity (*e.g.*, taxpayer vs. third-party). It also involves inquiries like: when can those records be prepared; should the standard require inherently trustworthy records; and does the destination location need to be known at the time of the sale. At its core, though, the inquiry deals with what sort of information can be used to support a taxpayer's situsing determinations per R.C. 5751.033(E).

Before delving into this issue, three points merit noting:

First, as the BTA has noted elsewhere, a taxpayer's subjective knowledge at or near the time of the sale in question is "probative," even if not "dispositive." *VVF Intervest, LLC v. Harris*, BTA No. 2019-1233, 2023 Ohio Tax LEXIS 1424, at *10, 12 (Sept. 13, 2023), *appeal pending*, No. 2023-1296 (filed Oct. 13, 2023). *Id.* at 10, 12.

Second, this Court need not conclude that such a requirement is necessary in order for the Commissioner to prevail overall in this matter. As detailed above, the prevailing case law all point

to the receipts in question being correctly sitused to Ohio – and regardless, Jones fails to meet its burden to demonstrate otherwise.

Third, as discussed above when addressing the direct appeal issues, when ascertaining the situsing of Jones's gross receipts, the only evidence relevant to where those goods in question were ultimately received is documentation showing the transportation that occurred pursuant to *Jones's sale of goods to DSW*. To wit, the only transportation involving Jones was for the transportation of goods from Jones to DSW's Ohio distribution center. Any subsequent transportation (involving unilateral decisions by DSW) occurred *after* that transportation, and was thus unrelated to the *Jones's* activities. R.C. 5751.033(E) must be read in context with the gross receipts that are generated from *Jones's* sales of goods; any activity beyond that scope is, for purposes here, irrelevant. The first sentence of division (E) lays out the context for the sentences that follow within that division: "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." Here, the sale refers to Jones's sales of goods. Per the terms of those sales, DSW received the goods in Ohio. That concludes the necessary inquiry. (To this end, the BTA also erred in determining that there exist "circumstances in which a taxpayer could present evidence that it obtained *after transportation was complete* that would successfully demonstrate that the goods were ultimately received outside of Ohio" (emphasis added).)

I. Taxpayers cannot competently make situsing determinations without exercising their knowledge.

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? Put more simply, contemporaneous documentation and ordinary business

records must be used to corroborate what the taxpayer contemplated with the sales in question. This is no different than for any scenario, frankly, in which a contractual uncertainty or dispute arises from a transaction, the preferred (if not necessary) method to carry the day is to be able to point to contemporaneous evidence.

Indeed, 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. In this same vein, the Rules of Evidence mandate certain indicia of reliability in order for evidence or testimony to be admissible (*e.g.*, hearsay bar, personal knowledge requirement, etc.). 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.

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 based upon the actions of third-parties. Though a taxpayer may occasionally need to file an amended return based on the discovery of errors due to accounting or a misapplication of the law, 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 to comply with Ohio's tax laws. It is also illogical because the CAT statutes neither require nor intend that.

In its initial brief, Jones contends that "nothing in [R.C. 5751.033(E)] imposes any sort of knowledge requirement on the taxpayer – at the time of the initial sale or otherwise." Jones Br. at 13.[9] While it is true that words like "knowledge" or "requirement" do not appear in the CAT situsing statute, there would be a great deal of absurdity if the taxpayer did not possess "knowledge" of the facts pertinent to situsing – whether by virtue of personal knowledge or through memorialization of contemporaneous documents. After all, every provision requiring that taxpayers file returns, say, involves those taxpayers referring to their knowledge of the information necessary to correctly complete those returns; and documents serve as one critical form of a taxpayer's subjective knowledge. It is practically impossible to divorce a knowledge component for the taxpayer in order to fully comply with Ohio's tax laws.

Jones also contends that R.C. 5751.033(E) also contends no "limitation on the type of evidence or documentation that can be used to determine the ultimate destination of property." Jones Br. at 13. This contention distracts, however, from the main point here – which is that in order for taxpayers to be able to successfully corroborate a particular situsing determination, then that requires as credible as documentation as possible. This need for credible documentation becomes even more heightened here, wherein Jones seeks to rebut a situsing determination that is consistent with *all* its pertinent business records. The issue is not necessarily that documentation

[9] Jones's Proposition of Law No. 1 overlaps with the discussion of Commissioner's cross-appeal. As such, for continuity's sake, the Commissioner hereby responds to that portion of Jones's initial brief here.

need be of one particular "type of evidence" – but rather, that it need be of a particular indicium of credibility and reliability. As a practical matter, if a taxpayer were to try to rely upon evidence that was not contemporaneous to the time of transactions, then one of two results occur: either that evidence is (1) consistent with the contemporaneous information; or (2) inconsistent with the contemporaneous information, in which case the contemporaneous information almost undoubtedly trumps all else. And finally, the scenarios or circumstances under which non-contemporaneous evidence will be relevant is limited: as discussed above, R.C. 5751.033(E) necessarily limits the situsing question to a consideration of the taxpayer's activities, pursuant to the sales giving rise to the gross receipts at issue. After all, the CAT here is intended to capture Jones's commercial activity – and not that of DSW (or other purchasers that are acting unilaterally from Jones).

II. From a policy standpoint, absurdities would ensue if R.C. 5751.033(E) is construed *not* to contemplate taxpayers' contemporaneous knowledge.

If affirmed, the BTA's decision could essentially preclude taxpayers like Jones 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 a taxpayer who tries 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.

Jones contends that the BTA's determination here makes policy sense, in that "[o]therwise [ ] a taxpayer could avoid Ohio CAT on receipts from goods ultimately destined for Ohio by turning a blind eye to its customer's subsequent transportation activities." Jones Br. at 14. This argument is flawed, on multiple levels. First, any tax law could be thwarted if one assumes a bad-faith actor who deliberately turns a "blind eye." Second, even in the case cited by Jones – a final determination involving a taxpayer named Moose Toys Pty Ltd ("Moose Toys") – the notion that Moose Toys "lacked specific knowledge" of Ohio situsing was an example of selective ignorance. As the Commissioner noted in that final determination, Moose Toys's "own records reflect that it was aware of sales activity apportionable to Ohio and, further, that its major customer operated distribution centers and retail locations in Ohio." *See Moose Toys* Final Determination, at 7. Then in *Moose Toys*, just as now here, the Commissioner submits that the situsing determinations must be achieved through the taxpayer's knowledge – *as evidenced and/or corroborated by contemporaneous documentation*. Third, Jones incorrectly presumes that its situsing

determinations must account for "a customer who initially receives goods in Ohio but subsequently transports the goods outside the state." Jones Br. at 14. As alluded to multiple times within this brief, the unilateral actions of DSW – after the completion of its purchases that result in Jones's goods landing in Ohio – are irrelevant for purposes of situsing determinations.[10]

Lastly, the instant matter presents an example of one other very real and practical problem for the Department. Here, Jones endeavors – at least in part – to rely upon information maintained by a third-party (*i.e.*, DSW's sales data, Dressbarn store lists, etc.). As confirmed through hearing testimony, at the time of the sales at issue here, Jones had *no information or knowledge* as to how/whether/when its purchasers would take subsequent action on the goods that were being stored in the Ohio distribution center. 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

[10] As if in passing, Jones casually drops a reference to the Moose Toys final determination. See Jones Br. at 12. In so doing, Jones ostensibly hopes that this Court would similarly endorse the use of something other than primary contemporaneous records (*i.e.*, an estimate of goods received outside Ohio) to substantiate a refund claim. Jones neglects, however, that one of the Department's BTA witnesses (Mr. Hartlage) conclusively testified as to the differences between this case and Moose Toys. Most notably, nothing in Jones's own business records suggests any inconsistency or other reason to warrant having to use another source. As Mr. Hartlage testified, there would not be any scenario under which "the Department would devise an estimate or try to use some sort of estimate that is inconsistent with the taxpayer's own records." Tr. 130-31.

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 business records or the like. Indeed, the "evidence" compiled by Jones and its expert, Mr. Oeler, precisely illustrates why it is so critical (and practical) to require contemporaneous records to support the determination of tax. That said, 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.

III. Acknowledging the need for contemporaneous knowledge would not appreciably change construction or application of R.C. 5751.033(E).

Lastly, the Chamber warns that if the Commissioner's cross-appeal prevails, then the result would be CAT situsing statute that would be overly restrictive; adversely impactful on taxpayers who have grown accustomed to current case law; and an invitation for future overreach by the Commissioner. *See generally* Chamber Br. at 7-12. Yet, the reality is that none of those concerns is valid.

As an initial matter, it bears noting that the Chamber cites a longstanding Department Information Release, No. CAT 2005-17 (Apr. 1, 2006), which states that the "sitused location" – *i.e.*, where property is "ultimately received after all transportation has been completed" – "*must be known by the seller at the time of the sale*" (emphasis added). The Commissioner acknowledges that this Court has held that information releases by themselves "have no force of law." *See Renacci v. Testa*, 148 Ohio St.3d 470, 2016-Ohio-3394, ¶ 37. Still, take note that this particular release was in 2006 – *i.e.*, less than one year after the CAT was first enacted (in 2005). Whatever

may be said about its binding nature, this information release has been in effect for virtually the entirety of the CAT's lifespan, and has long been available for taxpayers to rely upon its guidance.

The Chamber goes further, then, to contend that "Ohio's laws and the Department's guidance are chiefly concerned with the physical location of the ultimate purchaser." Chamber Br. at 7. That, however, is not correct. Rather, the CAT statutes are concerned with enabling taxpayers to competently and easily make situsing determinations. The CAT statutes are also concerned with accurately measuring one taxpayer's Ohio commercial activity (say, Jones's) – as distinct from others (say, Jones's purchasers like DSW). Tying the situsing statute to contemporaneous knowledge will, if anything, make situsing determinations easier and more predictable.

The Chamber also analogizes to the CAT situsing statute for services, R.C. 5751.033(I), which contemplates that the records being used to support a situsing determination "must exist within a reasonable period of time after the service is provided or within a reasonable period of time thereafter." *Id.* Though the Chamber ostensibly cites this language to allude to the notion that the Commissioner is attempting to overstep her administrative authority, this language also demonstrates something else: that it is the taxpayer's records – and not the records of a purchaser or other entity – that are to be used to establish situsing. Under R.C. 5751.033(I), even if an alternative situsing method is selected, it must be supported *by the taxpayer's records* – and contemporaneous records, kept in the ordinary course of business, to boot.

At its core, the Chamber's concern appears to be that the Commissioner's construction of R.C. 5751.033(E) will prevent taxpayers from being able "to construct evidence of the location of final shipment 'within a reasonable period of time' after a sale takes place." Chamber Br. at 10. There are multiple flaws with that statement, however. First, as mentioned often before, in order

to accurately assess Jones's commercial activity pursuant to sales of tangible personal property to DSW and others, one needs to properly focus only upon the destination associated with those transactions – *i.e.*, Ohio – and any subsequent destination inquiries are, frankly, irrelevant, for they speak to the purchasers' commercial activity instead. Second, while the Chamber (and Jones) would not so acknowledge, there is a fundamental misassumption here: regardless of any new, non-Ohio destinations that may emerge over time, it remains unchanged that, Jones's originally-existing shipping documentation already shows the correct situsing determination *for Jones*.

Tying the situsing statute to contemporaneous knowledge is not intended to be a trap for the unwary: the idea is certainly not to punish taxpayers for failing to immediately make situsing determinations. Certainly, exceptions exist, and certainly records need to be amended or updated. But beyond that, incorporating the notion of contemporaneous knowledge to situsing determinations actually serves to standardize that analysis. Put another way, if the flexibility that Jones and the Chamber prefer is endorsed, then that becomes the short path to personalized (*i.e.*, non-uniform) situsing determinations.

The Chamber warns that this case "could alter the landscape for taxpayers." Chamber Br. at 12. The Commissioner would submit that the opposite is true. Especially given the longstanding information release that has been guiding CAT taxpayers for almost 20 years, tying the notion of contemporaneous knowledge to situsing is wholly consistent with how many taxpayers are already acting – by relying upon their contemporaneous business records (and only those) to make their situsing determinations.

Accordingly, this Court should conclude that 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.

CONCLUSION

For the foregoing reasons, the Commissioner respectfully requests that this Court:

(1) Reverse and modify the BTA's September 13, 2023 Decision and Order, to the extent that the BTA erred in the manners described above in Proposition of Law No. 2;

(2) Otherwise affirm the BTA's September 13, 2023 Decision and Order, as Jones failed to meet its burden of proof to demonstrate that the goods at issue were ultimately received outside Ohio (and, in so doing, affirm the denial of Jones's refund claims beyond the partial refunds already granted prior to the instant final determinations being issued);

(3) Remand this matter to the BTA with instructions to affirm the Commissioner's instant final determinations in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Second Brief: Initial Merit Brief of Appellee/Cross-Appellant, Patricia Harris, Tax Commissioner of Ohio" (along with the accompanying "Appendix") was served by e-mail on March 19, 2024, upon the following:

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APPENDIX

AUTHENTICATED,
OHIO LEGISLATIVE SERVICE
COMMISSION
DOCUMENT #235903

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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AUTHENTICATED,
OHIO LEGISLATIVE SERVICE
COMMISSION
DOCUMENT #308257

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

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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.

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;

(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

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-

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

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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COMMISSION
DOCUMENT #307501

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

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.

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DOCUMENT #231064

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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DOCUMENT #306695

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.

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DOCUMENT #237056

Ohio Revised Code

Section 5751.09 Assessment against person not filing return or paying tax.

Effective: March 27, 2020
Legislation: House Bill 197 - 133rd General Assembly

(A) The tax commissioner may make an assessment, based on any information in the commissioner's possession, against any person that fails to file a return or pay any tax as required by this chapter. The commissioner shall give the person assessed written notice of the assessment as provided in section 5703.37 of the Revised Code. With the notice, the commissioner shall provide instructions on the manner in which to petition for reassessment and request a hearing with respect to the petition. The commissioner shall send any assessments against consolidated elected taxpayer and combined taxpayer groups under section 5751.011 or 5751.012 of the Revised Code to the taxpayer's reporting person. The reporting person shall notify all members of the group of the assessment and all outstanding taxes, interest, and penalties for which the assessment is issued.

(B) Unless the person assessed, within sixty days after service of the notice of assessment, files with the tax commissioner, either personally or by certified mail, a written petition signed by the person or the person's authorized agent having knowledge of the facts, the assessment becomes final, and the amount of the assessment is due and payable from the person assessed to the treasurer of state. The petition shall indicate the objections of the person assessed, but additional objections may be raised in writing if received by the commissioner prior to the date shown on the final determination.

If a petition for reassessment has been properly filed, the commissioner shall proceed under section 5703.60 of the Revised Code.

(C)(1) After an assessment becomes final, if any portion of the assessment, including accrued interest, remains unpaid, a certified copy of the tax commissioner's entry making the assessment final may be filed in the office of the clerk of the court of common pleas in the county in which the person resides or has its principal place of business in this state, or in the office of the clerk of court of common pleas of Franklin county.

(2) Immediately upon the filing of the entry, the clerk shall enter judgment for the state against the person assessed in the amount shown on the entry. The judgment may be filed by the clerk in a

loose-leaf book entitled, "special judgments for the commercial activity tax" and shall have the same effect as other judgments. Execution shall issue upon the judgment at the request of the tax commissioner, and all laws applicable to sales on execution shall apply to sales made under the judgment.

(3) If the assessment is not paid in its entirety within sixty days after the day the assessment was issued, the portion of the assessment consisting of tax due shall bear interest at the rate per annum prescribed by section 5703.47 of the Revised Code from the day the tax commissioner issues the assessment until it is paid or until it is certified to the attorney general for collection under section 131.02 of the Revised Code, whichever comes first. If the unpaid portion of the assessment is certified to the attorney general for collection, the entire unpaid portion of the assessment shall bear interest at the rate per annum prescribed by section 5703.47 of the Revised Code from the date of certification until the date it is paid in its entirety. Interest shall be paid in the same manner as the tax and may be collected by the issuance of an assessment under this section.

(D) If the tax commissioner believes that collection of the tax will be jeopardized unless proceedings to collect or secure collection of the tax are instituted without delay, the commissioner may issue a jeopardy assessment against the person liable for the tax. Immediately upon the issuance of the jeopardy assessment, the commissioner shall file an entry with the clerk of the court of common pleas in the manner prescribed by division (C) of this section. Notice of the jeopardy assessment shall be served on the person assessed or the person's authorized agent in the manner provided in section 5703.37 of the Revised Code within five days of the filing of the entry with the clerk. The total amount assessed is immediately due and payable, unless the person assessed files a petition for reassessment in accordance with division (B) of this section and provides security in a form satisfactory to the commissioner and in an amount sufficient to satisfy the unpaid balance of the assessment. Full or partial payment of the assessment does not prejudice the commissioner's consideration of the petition for reassessment.

(E) The tax commissioner shall immediately forward to the treasurer of state all amounts the commissioner receives under this section, and such amounts shall be considered as revenue arising from the tax imposed under this chapter.

(F) Except as otherwise provided in this division, no assessment shall be made or issued against a

taxpayer for the tax imposed under this chapter more than four years after the due date for the filing of the return for the tax period for which the tax was reported, or more than four years after the return for the tax period was filed, whichever is later. The time limit may be extended if both the taxpayer and the commissioner consent in writing to the extension or enter into an agreement waiving or extending the time limit. Any such extension shall extend the four-year time limit in division (A) of section 5751.08 of the Revised Code for the same period of time. Nothing in this division bars an assessment against a taxpayer that fails to file a return required by this chapter or that files a fraudulent return.

(G) If the tax commissioner possesses information that indicates that the amount of tax a taxpayer is required to pay under this chapter exceeds the amount the taxpayer paid, the tax commissioner may audit a sample of the taxpayer's gross receipts over a representative period of time to ascertain the amount of tax due, and may issue an assessment based on the audit. The tax commissioner shall make a good faith effort to reach agreement with the taxpayer in selecting a representative sample. The tax commissioner may apply a sampling method only if the commissioner has prescribed the method by rule.

(H) If the whereabouts of a person subject to this chapter is not known to the tax commissioner, the commissioner shall follow the procedures under section 5703.37 of the Revised Code.

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DOCUMENT #237077

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

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.