IN THE SUPREME COURT OF OHIO

PATRICIA HARRIS, TAX COMMISSIONER OF OHIO, Appellant, v. STRAUB NISSAN, LLC, Appellee.	)))))))))	Case No. 2024-1637 Appeal from the Ohio Board of Tax Appeals Board of Tax Appeals Case No. 2022-422

BRIEF AMICUS CURIAE OF THE WEST VIRGINIA AUTOMOTIVE DEALERS ASSOCIATION AND PENNSYLVANIA AUTOMOTIVE ASSOCIATION IN SUPPORT OF APPELLEE STRAUB NISSAN, LLC

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I. INTRODUCTION

Ohio commercial activity tax ("CAT") is imposed on the privilege of doing business in Ohio measured by taxable gross receipts. The Ohio Tax Commissioner ("Tax Commissioner") and Ohio Automotive Dealer's Association ("OADA") urge this Court to ignore the literal application of the situsing provision (R.C. 5751.033) to subject foreign motor vehicle vendors to Ohio tax when the dealers have conducted no Ohio business, completed all sales outside Ohio, and took no purposeful action to develop an Ohio market for its products. Moreover, even though the CAT has existed for 20 years, the Tax Commissioner is now asserting a novel position to tax foreign dealers for prior periods that are still open for assessment (and those dealers that did not file returns could be assessed for up to 10 years plus penalties and interest). Under the Tax Commissioner's position, non-Ohio dealers will be subjected to double taxation since the neighboring states do not provide a credit for gross receipts taxes like the CAT. As a result, dealers subject to Ohio's gross receipt tax will not receive a credit in their home state against income tax. Application of Ohio's tax in this manner is unconstitutional since it is not fairly apportioned and not fairly related to benefits and protections provided by Ohio to non-Ohio dealers.

The BTA correctly recognized Straub Nissan, LLC ("Straub Nissan") completely performed automobile sales outside Ohio with delivery to the purchaser being completed at the dealership in West Virginia without transportation. Thus, it would be unfair and contrary to the statute to situs the Staub Nissan's gross receipts to Ohio.

The situsing statute does take into consideration movement of property after the seller's performance, but only when such movement involves "transportation" as part of the "delivery" of the property. In this case, there is no transportation of the vehicle, which is delivered to the purchaser and immediately used outside Ohio. The Board of Tax Appeals correctly concluded that

property is sitused to the seller's location when the property is immediately used and consumption commences upon delivery to the purchaser outside Ohio because the purchaser receives the property at the dealer's location.

II. STATEMENT OF INTEREST OF *AMICUS CURIAE*

The West Virginia Automobile Dealers Association ("WVADA") and Pennsylvania Automotive Association ("PAA", and collectively with WVADA, the "Associations") submit this brief as *amicus curie* in support of Appellee, Straub Nissan pursuant to S.Ct. Prac.R. 16.06.

WVADA represents 140 car dealerships across the State of West Virginia, including 29 dealerships in the eight counties that border the state of Ohio: Brooke, Hancock, Marshall, Ohio, Pleasants, Tyler, Wetzel, and Wood. WVADA weighs in on this appeal out of its concern that adoption of Appellant's position would impermissibly expose its members — especially those in border counties — to taxation of the same gross receipts in multiple states. Straub Nissan and its affiliates are members of WVADA.

PAA represents nearly 1,000 automobile dealers located in Pennsylvania, many of which operate dealerships near the Ohio border. Similarly to WVADA, PAA participates in this matter out of its concern that Appellant's advocated position will result in the impermissible taxation of its members for a significant look-back period of up to 10 years.

The Associations' mission includes advocating on behalf of its members to encourage sound business policies and promote confidence amongst those directly and indirectly engaged in the motor vehicle industry. Additionally, the Associations provide training and resources to help ensure its membership understands and complies with their legal obligations, including state and local taxes.

The Associations' membership will be significantly impacted by the Court's decision in this case, as many could become subject to the Ohio CAT for the first time if the Ohio Board of Tax Appeals' decision is reversed. Doing so would subject many out-of-state dealers to a direct tax on their gross receipts for the privilege of doing business in Ohio, despite having no operations in the state, receiving no benefits or protections provided by Ohio, and not delivery automobiles to purchasers in Ohio. Most importantly, however, is that the rule advocated for the Tax Commissioner OADA is contrary to the plain language of the CAT situsing statute, R.C. 5751.033(E), as explained more fully below.

III. STATEMENT OF FACTS

As the Board found, this case involves gross receipts from sales of automobiles where "customers come to the dealership, speak with a salesperson, take a test drive, and purchase a new or used vehicle." *Straub Nissan, LLC v. Harris,* BTA Case No. 2022-422 (Decision and Order, Oct. 23, 2024) ("BTA Decision"), at p. 5. The dealership did not transport vehicles or deliver vehicles to purchasers in Ohio. *Id.* The dealership never used a motor carrier or other means of transportation to transport vehicles to purchasers in Ohio. *Id.* The purchasers immediately took possession and control of, **and began actually using**, the vehicles at the dealership as they could drive the vehicles anywhere after leaving the dealership. *Id.*

The Tax Commissioner contends that Straub Nissan consciously engaged in Ohio business activity with Ohio residents by purposefully marketing vehicles to Ohio residents, facilitating receipt of an Ohio automobile title or registration, and collecting and remitting Ohio sales tax. Merit Brief of Appellant, Particia Harris, Tax Commissioner of Ohio ("Tax Commissioner Brief"), at p. 9. Other members of the Associations engage in these same activities conducted entirely outside Ohio. With regard to promotion and marketing, businesses purchasing television

commercials or other advertisements are confined to the broadcast or distribution areas of the advertiser, which are not always drawn neatly along state lines. For instance, a business purchasing television advertisement areas may not be able to limit broadcast of the commercial by state lines, meaning a dealership may purchase advertising targeting Pennsylvania or West Virigina customers that is also viewed by Ohio households. There is no evidence that Straub Nissan purposely directed its activities towards or purposefully directed marketing to Ohio residents.

Non-Ohio dealerships facilitate receipt of an Ohio car title / registration and collection of Ohio sales tax as good customer service practices. Likewise, non-Ohio dealerships collect and remit Ohio sales tax – which is imposed on the consumer, not the vendor – according to a multistate agreement entered into as part of the Streamline Sales and Use Tax Agreement (SSUTA). Obviously, dealerships wish to provide a seamless process for their customers to legally title vehicles and remit tax due on vehicles purchased from the dealership – which the State of Ohio benefits from. However, these activities provided as a convenience to their customers are not reflective of sales delivered to Ohio by the dealerships.

IV. LAW & ARGUMENT

Legal issues from decisions of the BTA are reviewed de novo "without any deference to the legal determinations of the BTA or the tax commissioner." *Stingray Pressure Pumping, LLC v. Harris*, 172 Ohio St. 3d 130, 2023-Ohio-2598, ¶18. When interpreting and applying tax statutes, this Court applies the fair and plain meaning of the statute without favoring tax collection. *Id.* at ¶¶19-23. On the other hand, factual determinations made by the BTA are entitled to deference. *Cincinnati City School Dist. Bd. of Edn. v. Testa*, 142 Ohio St.3d 138, 2014-Ohio-4647, ¶15.

TAX COMMISSIONER'S PROPOSITION OF LAW NO 1:

Where an out-of-state vehicle dealer purposely markets its vehicles for sale to Ohio residents, and its business records conclusively corroborate that those vehicles were purchased by Ohio residents, for use in Ohio, and were destined for Ohio "after all transportation has been completed," then pursuant to the then-in-effect R.C. 5751.033(E), the gross receipts relating to these sales are properly sourced to Ohio.

Ohio CAT is imposed on the privilege of doing business in Ohio measured by a person's taxable gross receipts situsued to Ohio. R.C. 5751.02(A). This case is the Supreme Court's first opportunity to interpret the CAT situsing provision as applied to motor vehicle dealers. OADA states that the BTA Decision upends 20 years of "consistent CAT policy" and "industry practice." Merit Brief of *Amicus Curiae* Ohio Automobile Dealers Association in Support of Appellant, pp. 1 and 3. However, this is misleading as the first year at issue in this appeal is 2010 – five years after the CAT became effective and the first year it was fully phased-in. BTA Decision, p. 2. And OADA cites only a single Final Determination issued by the Tax Commissioner articulating this position. *Id.*, p. 10. The Tax Commissioner's position does not represent a well-established, consistent position that has gone unchallenged for decades; rather, this appeal is simply the first opportunity that an out-of-state dealer has challenged the Tax Commissioner's unfair and novel application of the statute.

Two pending appeals before this Court also involve situsing gross receipts from sales of tangible personal property under R.C. 5751.033(E), although these cases involve determining the location of the ultimate destination when transportation is involved in delivery of the purchased products. *See VVF Intervest, LLC v. Harris*, S. Ct. Case No. 2023-1296; and *Jones Apparel Group / Nine West Holdings v. Harris,* S.Ct. Case No. 2023-1288.

A. The BTA correctly concluded that delivery of the vehicles sold by Straub Nissan did not involve transportation and, thus, the "Transportation Clause" in R.C. 5751.033(E) did not apply to situsing Straub Nissan's gross receipts.

Under R.C. 5751.033 (E), gross receipts from the sale of tangible personal property are sourced to Ohio "if the property is received in this state by the purchaser." This first sentence of R.C. 5751.033 (E) provides the general rule, while the remaining sentences explain how the rule applies under certain circumstances. *Dupps Co. v. Lindley,* 62 Ohio St.2d 305, 307, 405 N.E. 2d 716 (1980). The second and third sentences of R.C. 5751.033(E) only apply when delivery of the goods is completed by motor carrier or other means of transportation – i.e., gross receipts are only situsing to the ultimate destination when transportation is involved in delivery of the product to the purchaser.

The Board found that "the unrebutted evidence provides that the entire vehicle sales transaction (i.e., purchase, receipt, and delivery) occurs in West Virginia." BTA Decision, p. 13. Therefore, the second sentence of R.C. 5751.033(E), referred to as the Transportation Clause or ultimate destination rule, did not apply. *Id. See also,* Merit Brief of *Amicus Curiae* Ohio Automobile Dealers Association in Support of Appellant, p. 4. "The second sentence provides an exception to the general rule expressed in the first sentence" and only "applies when 'delivery' is accomplished by transporting tangible property into Ohio…" BTA Decision, p. 13.

The Tax Commissioner erroneously contends that the situs of Straub Nissan's gross receipts is the same "[w]hether Straub arranges to transport the car for the purchaser or the purchaser drives it away." Tax Commission Brief, p. 12. This ignores the statutory directive that transportation of the vehicle must be part of delivery to the purchaser to trigger the Transportation Clause or ultimate destination rule. Therefore, the Court should hold that "transportation by motor

carrier or other means of transportation" does not include situations when the purchaser immediately uses or consumes the purchased goods upon receipt from the seller.

B. The Tax Commissioner's proposed rule is contrary to the situsing statute and unworkable.

The Tax Commissioner and OADA argue that the purchaser's own use and initial consumption of the purchased vehicle, which they assume is driven to Ohio, constitutes delivery via other means of transportation. This ignores the literal application of the situsing statute, which considers the property's continued movement after the sale and transfer of possession to the purchaser (i.e., the purchaser receives the property so that it is accepted) only when there is transportation of the property for purposes of delivery such as via flatbed truck. *Stingray Pressure Pumping*, at ¶37; and *Great Lakes Bar Control, Inc. v. Testa*, 156 Ohio St.3d 199, 2018-Ohio-5207, ¶9. This does not occur in this case because delivery is completed by Straub Nissan without transportation, such that the purchaser immediately uses and begins consumption of the vehicle upon receipt in West Virginia.

According to the Tax Commissioner's Proposition of Law No. 1, gross receipts from the sale of tangible personal property would be sitused to Ohio anytime the taxpayer has knowledge that the purchaser intends to move the goods to Ohio for use. Tax Commissioner Brief, pp. 9 and 11. However, knowledge cannot be the applicable test for situsing gross receipts since the U.S. Supreme Court has ruled that mere knowledge that one's products will end up in a state is insufficient to establish the minimum connection required by the Due Process Clause of the United States Constitution. *Asahi Metal Industry Co. v. Superior Court of California,* 480 U.S. 102, 112-13, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). It is well-established that a statute must be interpreted to avoid "a construction that will raise serious questions as to its constitutionality." *Co-operattive*

Legislative Committee of Transp. Bortherhoods and Brotherhood of Maintenance Way Employees v. Public Util. Comm'n, 177 Ohio St. 101, 104 (1964).

The Tax Commissioner's rule would also create absurd results in terms of valuing out-of-state business' privilege of doing business in Ohio. For example, what if a home good store in Pennsylvania sold goods to a purchaser that it knew was an Ohio resident? Perhaps the purchaser enters his/her zip code to validate the credit card transaction or has provided his/her address as part of the store's reward program. Under the Tax Commissioner's proposed rule, if the Ohioan purchased home goods in Pennsylvania, the store would have Ohio gross receipts because of its knowledge that the purchaser was presumably taking the goods back to his/her home in Ohio.

Likewise, what if an Ohio resident near the border goes grocery shopping at a store in West Virginia and the store knows the customer lives in Ohio? Let's assume the store has information concerning the customer's residence from information provided during the transaction – perhaps the customer purchases a six-pack of beer and the store clerk asks for his/her identification, which is an Ohio driver's license, just like the vehicle purchaser provides his/her Ohio driver's license to Straub Nissan. This sale would result in Ohio gross receipts under the Tax Commissioner's proposed rule. Adding to the absurdity, perhaps the purchaser is taking the beverages to a location (e.g., family member's house) in West Virginia or is hungry and eats some of the groceries while in West Virginia. Should the store ask whether the purchaser plans to consume some or all of the groceries before returning to Ohio to determine the correct situs of its gross receipts?

Additionally, an Ohio resident may purchase clothing in Pennsylvania while attending an amusement park or at a baseball game and provides his/her Ohio zip code during the purchase. The purchaser immediately wears the clothing, thereby using the goods in Pennsylvania before returning to Ohio. Yet, under the Tax Commissioner's proposed rule, these would be Ohio gross

receipts if the Ohio resident wears (i.e., transports) the clothing home after using them in Pennsylvania.

Of course, these are not Ohio gross receipts despite the seller's knowledge that the purchaser is presumably going to take the home goods, groceries, or clothing back to Ohio. Why? Because, as the Board correctly determined, the Transportation Clause of R.C. 5751.033(E) only applies when transportation is provided as part of delivery of the goods to the purchaser. The difference in these circumstances is that there is immediate use or consumption outside Ohio by the purchaser which is not part of the delivery to the purchaser. Even OADA's counsel has given credence to the BTA Decision in recognizing that "[p]erhaps a clearer distinguishing factor would be that in the purchase of an automobile, the item purchased is utilized as it is driven home versus being used as transportation for another purchased item." Deborah D. McGraw, *Dream Decision or Situsing Quagmire?*, Nov. 4 2024, https://zhftaxlaw.com/dream-decision-or-situsing-quagmire/ (last visited July 13, 2025).

C. R.C. 5751.033(E) does not provide that gross receipts from the sale of products accepted outside Ohio and transported by the purchaser into Ohio are sitused to Ohio.

The third sentence of R.C. 5751.033(E) provides that "the phrase 'delivery of tangible personal property by motor carrier or by other means of transportation' [in the second sentence of R.C. 5751.033(E)] 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." The Tax Commissioner and OADA interpret this sentence as applying to the inverse situation – that property accepted outside Ohio and transported by the purchaser into Ohio is received by the purchaser in Ohio under R.C. 5751.033(E). Yet, the third sentence of R.C. 5751.033(E) only expressly applies to acceptance in Ohio for transportation outside the state and not vice versa.

Aramark Corp. v. Harris, 2025-Ohio-2114 (statutes must be interpreted according to the actual words used).

The General Assembly knows how to provide for reciprocal application of a situsing rule as it prescribed in the fourth sentence of R.C. 5751.033(E). The fourth sentence states that direct delivery to the purchaser's designee in Ohio constitutes delivery in Ohio ***and*** direct delivery to a designee outside the state does not constitute delivery in Ohio. R.C. 5751.033(E).

One may ask why the General Assembly would only deem the purchaser's transportation relevant following acceptance in Ohio for transportation outside Ohio. First, this would benefit Ohio vendors since they would not be taxed on gross receipts from sales where the purchaser immediately removes the property from the state. Moreover, such an application recognizes the constitutional uncertainty of taxing non-Ohio businesses based upon the purchaser's actions which do not contribute to the value of the non-Ohio vendor's privilege of doing business in Ohio. Therefore, the plain language used by the General Assembly provides a benefit to Ohio vendors selling to non-Ohio purchasers, but does not also impose tax on non-Ohio vendors selling to Ohio purchasers.

D. Gross receipts are not sitused to Ohio when the purchaser immediately uses property upon receipt outside the state since delivery is completed without transportation.

This interpretation of R.C. 5751.033(E) does not contradict this Court's interpretations of the previous corporation franchise situsing statute or the Board's decisions applying the situsing statute. In *Dupps Co. v. Lindley*, this Court considered the sourcing of receipts for Ohio corporate franchise tax which involved a statute similar to R.C. 5751.033(E), but excluding the third sentence. 62 Ohio St.2d 305. This Court held that sales to a purchaser picking up equipment in Ohio and transporting it outside the state was not an Ohio sale. *Id.,* at syllabus. This was the result regardless of whether transportation was performed by a carrier or the purchaser's own vehicles.

Id., at 307-08. The difference from this current appeal, however, is that the purchaser could not have used or consumed the equipment in Ohio before transporting it outside Ohio. In *Dupps Co.*, the taxpayer manufactured heavy machinery. This machinery was delivered using large trucks, not the purchaser's car. It was impossible for the purchaser to use the heavy equipment until it was transported to the purchaser's meat processing facility. Therefore, transportation was a necessary part of delivery prior to the purchaser being able to use the purchased equipment. Conversely, in this case, purchasers of motor vehicles from Straub Nissan immediately used the vehicles upon receipt in West Virigina.

Further, as noted above, in codifying the holding in *Dupps Co.*, the General Assembly did not specify that the third sentence of R.C. 5751.033(E) applies to situations where the purchaser accepts property outside Ohio and transports it to Ohio – especially after first using the property outside the state.

Moreover, in *House of Seagram v. Porterhouse*, the seller delivered goods to a common carrier for delivery to Ohio. This Court concluded the purchaser received the goods in Ohio, even though the purchaser arranged for delivery via common carrier. 27 Ohio St.2d 97 (1971). The same situation was encountered by the Board in *Greenscapes Home & Garden Prods. v. Testa*, *Mia Shoes, Inc. v. McClain*, *VVF Intervest, LLC v. Harris,* and *Jones Apparel Group / Nine West Holdings v. Harris*, as all of these cases involved delivery via motor carrier arranged by the purchaser. *Greenscapes Home and Garden Products, Inc. v. Testa,* BTA No. 2016-350, 2017 WL 3183334, Decision and Order (July 19, 2017). *Mia Shoes, Inc. v. McClain*, BTA No. 2016-282, 2019 WL 4013504, Decision and Order (Aug. 8, 2019); *VVF Intervest, LLC v. Harris*, BTA No. 2019-1233, 2023 WL 6066664, Decision and Order (Sept. 13, 2023). *Jones Apparel Group / Nine West Holdings v. McClain*, BTA No. 2020-53 and 2020-54, Decision and Order (Sept. 13, 2023).

Clearly, when the seller transports the goods itself to the purchaser or delivers goods to a carrier for transportation, the Transportation Clause or ultimate destination rule applies, even when the purchaser contracts with the carrier or otherwise arranges for the transportation of the goods. This is because the transportation of the goods is part of the delivery to the purchaser regardless of which party is contractually responsible for the transportation.

In this case, there is no transportation conducted as part of delivery of the vehicle to the purchaser. The purchaser immediately uses the vehicle purchased outside Ohio before it can bring the vehicle to Ohio. Perhaps the purchaser fills up the vehicle with gas. The purchaser may take the vehicle directly on a trip to New York or Florida, keep it there for weeks or months, and then return to Ohio- or maybe never returns to Ohio with the vehicle. Straub Nissan does not know what the purchaser will do with the vehicle after leaving the dealership. BTA Decision, p. 5. And its privilege of doing business in Ohio cannot be valued based upon these presumptive actions of the purchaser (i.e., not the taxpayer) after delivery has been fully completed.

Therefore, the third sentence of R.C. 5751.033(E) does not apply to vehicle sales by non-Ohio dealership where the vehicle is immediately used by the purchaser because: (1) the third sentence does not involve situations where property is accepted outside Ohio and then transported by the purchase into Ohio; and (2) the Transportation Clause / ultimate destination rule does not apply when the property is immediately consumed or used by the purchaser before transportation occurs.

E. Out-of-state motor vehicle dealers remit Ohio sales tax according to the Streamline Sales & Use Tax Agreement, which expressly prohibits using tax remittance as a factor for attributing nexus for any tax.

The Tax Commissioner and OADA make much of the fact that Straub Nissan knew certain of its customers were Ohio residents and "made all the requisite logistic arrangements for its

customers to receive an Ohio car title and/or registration as part of these transactions" and "collect Ohio sales tax" on such sales. Tax Commissioner Brief, pp. 9, 11. Indeed, Ohio acknowledges that Straub was targeted for an audit in the first place because of its sales tax returns. Tax Commissioner Brief, p. 4.

On the one hand, the Tax Commissioner argues that Straub Nissan's collection and remittance of sales tax should be interpreted as some sort of implicit acknowledgment of nexus with Ohio for CAT purposes. On the other hand, when it comes to interpreting ambiguous terms in the CAT statute, the Tax Commissioner and OADA reverse course claiming that Ohio's sales and use tax is completely irrelevant to the CAT for purposes of sourcing Straub's gross receipts for sales to Ohio residents.[1]

Leaving aside the contradictory and situational nature of reliance on sales and use tax for purposes of applying the CAT, the Tax Commissioner overlooks the fact that both West Virginia and Ohio are signatories to the Streamlined Sales and Use Tax Agreement ("SSUTA").[2] Both states have formalized their participation in the SSUTA in their respective state codes. Under the SSUTA, the vendor or seller of a motor vehicle required to be titled in Ohio collects both the state's sales or use tax and the county tax for the consumer's county of residence and remits the same. *See* R.C. 5741.05(C); *see also* W.Va. Code St. R. 110-15-65 (exempting sales of motor vehicles titled in another state from West Virginia's sales and use tax).

[1] "Yet, the BTA's reliance on this case – or, any case, for that matter involving sales tax – is deeply flawed." Tax Commissioner Brief, p. 20.

[2] Ohio has been a full member to the Streamlined Sales and Use Tax Agreement since 2014. https://tax.ohio.gov/business/ohio-business-taxes/sales-and-use/streamlined-sales-tax. West Virginia has been a full member since 2005. https://tax.wv.gov/business/salesandusetax/streamlinedsalesandusetax/pages/streamlinedsalesandusetax.aspx.

Importantly, West Virginia's Streamlined Sales and Use Tax Administration Act expressly proscribes the use of sales tax remittance to member states as a factor in determining nexus for any other tax:

> (4) No nexus attribution. -- The agreement must provide that registration with the central registration system and the collection of sales and use taxes in the signatory states will not be used as a factor in determining whether the seller has nexus with a state for any tax.

W.Va. Code § 11-15B-7(4). Likewise, R.C. 5740.05(D) provides that "registration with the central registration system and the collection of sales and use taxes in the member states will not be used as a factor in determining whether the seller has nexus with a state for any tax…." If Straub Nissan's gross receipts from the sales at issue were not sitused to Ohio, presumably it would have no Ohio gross receipts and would not have "substantial nexus with this state" under R.C. 5751.01(H)(3) and (I). Thus, far from being an implicit acknowledgement of nexus with Ohio for CAT purposes, Straub Nissan's collection of sales and use tax was done to comply with West Virginia's Streamlined Sales and Use Tax Act.

Ohio's decision to target West Virginia dealerships who comply with the SSUTA for CAT audits already violates the *spirit* of the SSUTA. This Court must certainly reject Ohio's invitation to violate the letter of the SSUTA by reading Straub's compliance with West Virginia's Streamlined Sales and Use Tax Act as any sort of acknowledgement of nexus for CAT purposes.

In conclusion, when applying R.C. 5751.033(E), the goods are received by the purchaser where the purchaser takes possession of the goods if there is no transportation as part of delivery to the purchaser. In these circumstances, the second and third sentences of R.C. 5751.033(E) do not apply. However, where transportation is involved in delivery of the goods to the purchaser, then the gross receipts from the sale of the goods is sitused to the ultimate destination after all transportation (including transportation by the purchaser) is completed. This is precisely how the

Board analyzed the current case concluding that transportation did not occur as part of delivery since the purchasers of vehicles from Straub Nissan immediately began using the vehicles outside Ohio. Therefore, this Court should affirm the BTA Decision.

TAX COMMISSIONER'S PROPOSITION OF LAW NO 2:

A statute is permitted to be applied retroactively where the General Assembly has expressly indicated such an intent when enacting the statute, where the statute is remedial in nature.

Following the BTA decision, the General Assembly amended R.C. 5751.033 to add division (M) which states:

> Gross receipts from the sale or lease of a motor vehicle… shall ***only*** be sitused to this state if the motor vehicle is issued a certificate of title evidencing the owner's or lessee's address in this state.

(emphasis added). Additionally, division (E) was amended by referencing "[e]xcept as otherwise provided in division (M) of this section." Following this amendment, gross receipts from the sale of motor vehicles are sitused to Ohio if two conditions are met: (1) the purchaser receives the vehicle in Ohio as determined under division (E); and (2) the vehicle is titled in Ohio. R.C. 5751.033.

A. Amended R.C. 5751.033(E) did not negate the BTA Decision.

The Tax Commissioner and OADA misconstrue amended R.C. 5751.033(E) to mean that gross receipts from motor vehicle sales are always sitused to Ohio if the vehicle is titled in Ohio. Tax Commissioner Brief, p. 27. However, the General Assembly did not impose such a rule. Instead, the General Assembly made it such that gross receipts from vehicle sales are ***only*** sitused to Ohio if the vehicle is titled in Ohio. By using the term "only," the General Assembly made clear that other requirement(s) are necessary for such gross receipts to be sitused to Ohio. The additional requirement is the vehicle must be received by the purchaser in Ohio under division (E).

If the General Assembly intended for all such receipts to be sitused to Ohio, the statute would read: "Gross receipts from the sale or lease of a motor vehicle … shall be sitused to Ohio" if titled in Ohio – there would be no need for the word "only." This Court's role "is to evaluate a statute 'as a whole and give such interpretation as will give effect to every word or clause in it." *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, ¶21. To give effect to all the words used by the General Assembly, division (M) must be read as complimenting, not overriding, division (E). *Total Renal Care, Inc. v. Harris,* 177 Ohio St.3d 521, 2024-Ohio-5685, ¶13 ("we do not ask 'what did the general assembly intend to enact, but what is the meaning of that which it did enact.'") *quoting Maple Hts. V. Netflix, Inc.*, 171 Ohio St. 3d 53, 2022-Ohio-4174, ¶17.

The meaning of the amendment is also evidenced by the addition to division (E) – "Except as ***otherwise*** provided in division (M)." By including "otherwise," it is clear that division (E) still has applicability to situsing gross receipts from motor vehicle sales. If it did not, the General Assembly would simply have said "Except as provided in division (M)."

The language used by the General Assembly makes it unambiguous that divisions (E) and (M) work together in determining the situsing of gross receipts from motor vehicle sales. If the vehicle is received by the purchaser in Ohio under division (E), then division (M) applies as a second requirement that the vehicle must be titled in Ohio for the gross receipts to be taxable. Conversely, if the vehicle is not received by the purchaser in Ohio under division (E), then division (M) does not apply. This is the only interpretation that gives effect to all words used by General Assembly – i.e., "only" in division (M) and "otherwise" in division (E).

B. Requiring dual requirements for situsing gross receipts from vehicle sales to Ohio protects OADA's members.

In discussing how the BTA Decision upends the CAT situsing rule for sales of tangible personal property, OADA states that its members face "risk that the Department will assert CAT liability, plus interest and penalties, on sales made to non-Ohio residents during tax periods for which the statute of limitations remains open." OADA Brief, p. 2. However, this is not the case when divisions (E) and (M) of R.C. 5751.033 are read together. Such an interpretation protects Ohio automotive dealers by specifying their gross receipts are not subject to CAT when vehicles sold by an Ohio dealership are titled outside Ohio.

Accordingly, the General Assembly's amendment to R.C. 5751.033 following the BTA Decision was guarding against the potential risk of double taxation which OADA now complains of. OADA Brief, p. 27. Ohio dealers have no risk of double taxation because they would only be taxed on gross receipts for vehicles received by the purchaser in Ohio and titled in Ohio. OADA's interpretation of R.C. 5751.033 is not one protecting Ohio dealers, but rather penalizing non-Ohio dealers that conduct no business in Ohio and receive no benefits or protections from Ohio.

It is the Associations' members that risk double taxation if R.C. 5751.033 is interpreted as the Tax Commissioner and OADA propose.

C. The Associations' members would be subjected to unconstitutional double taxation under the Tax Commissioner's and OADA's application of R.C. 5751.033(M).

The Tax Commissioner's position in this appeal would impermissibly result in double taxation of receipts from the sale of vehicles in West Virginia and Pennsylvania to Ohio residents, in violation of the U.S. Constitution's prohibition on interference with interstate commerce. In cases involving interstate commerce, the apportionment of gross receipts taxes must be fair and

not result in multiple taxation. *See, e.g., Mich.-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 170, 74 S. Ct. 396, 403 (1954).

In West Virginia, municipalities are authorized to impose their own gross receipts tax in the form of a business and occupation tax ("B&O Tax"). W.Va. Code 8-13-5. Sales of tangible personal property are sourced, for purposes of the municipal B&O Tax, to the physical location where the sale is consummated:

> Whenever a customer physically enters a store within a municipality and makes a purchase or signs a contract for the purchase of tangible personal property such sales are subject to that municipality's business and occupation tax regardless of where that tangible personal property is delivered.

W.Va. Code St. R. § 110-26-12.3.3.

Approximately half of West Virginia's 234 municipalities impose the B&O Tax. The vast majority of the WVADA's members operate in municipalities that impose the B&O Tax. These dealerships have paid the B&O Tax to every municipality in which they are physically located for all sales consummated within West Virginia—regardless of where the vehicle is ultimately titled.[3]

While the legislative rules governing the municipal B&O Tax provides for apportionment of sales that could be subject to the B&O Tax in multiple West Virginia localities,[4] there is no exemption of gross revenues that could be subject to another state's gross receipts tax. Likewise, Ohio CAT does not provide such an exemption, nor has Ohio addressed apportionment of revenues that have already been subject to West Virginia's municipal B&O Tax.

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[3] The B&O Tax on the sale of new automobiles has been eliminated, effective July 1, 2025. *See* W.Va. Code § 8-13-5(d)(2). However, the recent phase-out of the B&O Tax for new motor vehicle sales does not eliminate the double taxation concern for sales occurring prior to July 2025 or for sales of used motor vehicles.

[4] *See* W.Va. Code St. R. § 110-26-13.2.

If Ohio is allowed to impose the CAT on revenues that have already been subject to West Virginia's municipal B&O Tax, then there's nothing stopping over 100 West Virginia municipalities from reviewing the sales tax returns of Ohio dealerships and/or subpoenaing sales records to ascertain gross receipts related to sales of motor vehicles from Ohio dealerships to West Virginia residents. Ohio's automobile dealers would then face municipal B&O Tax assessments on every dollar of revenue realized from the sale of automobiles to West Virginia residents, regardless of whether those dealerships have already paid the CAT on those transactions.

Ultimately, the Tax Commissioner's position in this appeal results in unconstitutional multiple taxation, with no provision for fair apportionment. Moreover, adopting the Tax Commissioner's interpretation would invite West Virginia municipalities to assess their own gross receipts taxes on Ohio dealerships, thereby imposing a significant additional administrative and monetary burden on Ohio's automobile dealers.

Finally, WVADA is not aware of any of its members filing CAT returns in Ohio because, up until Ohio's attempt to impose the CAT on Straub Nissan, West Virginia's auto dealers were never put on notice that the CAT would apply to sales consummated entirely in West Virginia for vehicles titled in Ohio. Assuming that both West Virginia and Pennsylvania auto dealers have never filed returns, these entities would accordingly be subject to audits (and corresponding assessments, penalties, and interest) for up to 10 years. R.C. 5703.58(A). Moreover, the West Virginia dealers were generally subject to West Virginia's municipal B&O Tax during that same time frame without credit for such taxes paid.

V. CONCLUSION

Based upon the foregoing, the Associations respectfully request that the Court affirm the BTA Decision that Straub Nissan's gross receipts from vehicle sales completed in West Virgina are not sitused to Ohio for commercial activity tax purposes.

Respectfully submitted,

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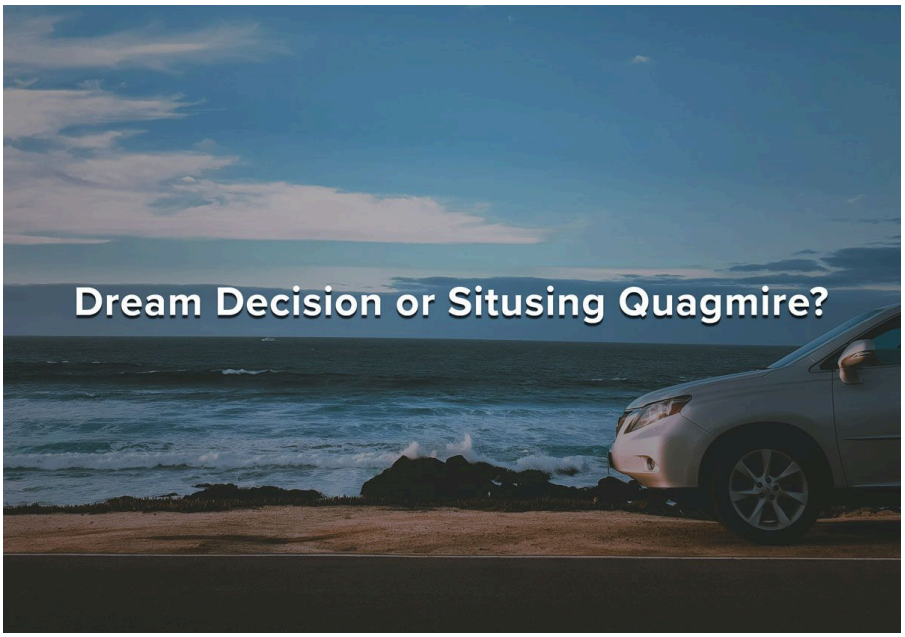
4897-2481-2885, v. 2

APPENDIX

4897-2481-2885, v. 2

Dream Decision or Situsing Quagmire?

PDF/Printer Friendly Version



The Ohio Board of Tax Appeals ("Board") decision in ***Straub Nissan LLC v. Harris***, BTA No. 2022-422 (Oct. 23, 2024), could have an impact on how certain gross receipts are sitused for commercial activity tax ("CAT") purposes. The case (and other similar dealership cases) considers whether sales to an out-of-state customer are sitused to the location where the customer obtained possession (at the West Virginia dealership) or at the customer's home in Ohio.

In our previous buzz titled, "Dream Cars, But Not Dream Audits" dated December 18, 2023, we described an increase in audits of automobile dealerships. The ***Straub*** appeal was covered in the

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second half of that buzz. While several constitutional arguments were raised and are described in that previous buzz, the Board's decision focuses on its interpretation of the CAT situsing statute. As with other situsing of sales of tangible personal property cases, the Board reviewed the various franchise tax decisions that consider the prior franchise tax situsing provision, which had similar situsing language (*House of Seagram*, 27 Ohio St.2d at 97; *Dupps Co.*, 62 Ohio St.2d at 305; and *Loral Corp. v. Limbach*, BTA Nos. 86-C-914, et al., 1988 Ohio Tax LEXIS 218 (Feb. 23, 1988)). Those cases generally interpreted the statute as situsing based on ultimate destination under the second sentence of the situsing of tangible personal property sales, which is also in R.C. 5751.033(E) (referred to by the Board as the "Transportation Clause," described below). The Board then considered four of the CAT situsing decisions (*Greenscapes Home & Garden Prods., Inc. v. Testa,* 2019-Ohio-384 (10th Dist.)*, Mia Shoes, Inc. v. McClain,* BTA No. 2016-282, 2019 Ohio Tax LEXIS 1864 (Aug. 8, 2019)*, Henry RAC Holding Corp. v. McClain,* BTA No. 2019-787, 2020 Ohio Tax LEXIS 2101 (Nov. 10, 2020)*, and VVF Intervest v. Harris,* BTA No. 2019-1233, 2023 Ohio Tax LEXIS 1424 (Sept. 13, 2023)), but found all four of the cases to be distinguishable based on the statutory interpretation as applied to the facts.

R.C. 5751.033(E) provides that gross receipts from the sale of tangible personal property shall be sitused to Ohio if the property is "received" in Ohio by the purchaser. Since the CAT chapter doesn't define "receive," the Board applied a sales tax definition of "receive" in R.C. 5739.033(C)(6) "taking possession of tangible personal property or making first use of a service." The Board determined that the Blacks' Law Dictionary and other dictionary definitions provided consistent definitions based on taking possession. The Board also noted that the Supreme Court interprets "receive" to include the taking of delivery. The Board determined that delivery to the customer took place at the West Virginia dealership.

In comparing the case to the other franchise and CAT situsing cases, the Board determined that the sales should not be sitused based on ultimate destination as the Tax Commissioner argued. The Board concluded: " * * * this case is distinguishable because the tangible property is not delivered from an out-of-state company to Ohio nor picked up in Ohio and transported

out of state. Instead, the unrebutted evidence provides that the entire vehicle sales transaction (i.e., purchase, receipt, and delivery) occurs in West Virginia. **Thus, we find that Ohio customers (i.e., Ohio residents) received their vehicles in West Virginia, and Straub delivered them to those customers in West Virginia.** Accordingly, the gross receipts from these sales cannot statutorily be situsedto Ohio." (Emphasis added).

Since delivery and receipt occurred at the West Virginia dealership, the Board determined that the Transportation Clause (i.e., the second sentence in R.C. 5751.033(E)) did not apply. The Transportation Clause provides: "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." The Board determined that not all "transportation" in Ohio triggered the Transportation Clause, stating that the second sentence applied when the transportation's sole purpose was delivery of possession of the property. Since delivery and receipt occurred in West Virginia, there was no additional delivery of possession of the property.

The situsing language in R.C. 5751.033(E), however, continues: "* * * 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 the state." The Board did not discuss or try to distinguish the situsing of "customer pick-ups," in which the customer or the customer's agent picks up sales at the seller's dock and delivers the goods to a buyer-designated location as described in this third sentence of the situsing statute. Customer pick-ups have long been situsedbased on ultimate destination. Like the automobile example, the customer would typically, on its own or through its agent, have purchase, receipt, and delivery of the product at the seller's dock. Perhaps a clearer distinguishing factor would be that in the purchase of an automobile, the item purchased is utilized as it is driven home versus being used as transportation for another purchased item.

ZHF Thoughts: The Tax Commissioner has 30 days from the date the decision was issued to appeal to the Ohio Supreme Court. The *VVF Intervest* decision and the *Jones Apparel Group/Nine West Holdings et al. v. McClain,* BTA No. 2020-53 and 2020-54 (October 12, 2023) decision, which is not discussed in *Straub*, both consider the situsing of sales of goods and are both pending at the Ohio Supreme Court. It seems likely that the Tax Commissioner will appeal the *Straub* decision to resolve whether the Transportation Clause (and ultimate destination situsing) applies to automobile dealership sales. Either way, the case raises an interesting question on whether Ohio automobile dealerships can continue to situs sales of automobiles to non-Ohio residents to the resident's home (i.e., outside of Ohio).

If you would like to further discuss the contents of this post, please reach out to Deb McGraw, or any of our ZHF professionals.

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