IN THE SUPREME COURT OF OHIO

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

BRIEF *AMICUS CURIAE* OF THE OHIO CHAMBER OF COMMERCE IN SUPPORT OF APPELLANT/CROSS-APPELLEE JONES APPAREL GROUP/NINE WEST HOLDINGS

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INTRODUCTION

As *amicus*, the Ohio Chamber of Commerce ("Ohio Chamber") points out two well settled rules of law that are important to all taxpayers. First, "[T]he burden for rebutting the tax commissioner's findings is simply to prove that the findings were incorrect." *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.3d 345, ¶ 14. Second, the Commissioner cannot administratively amend the tax statutes through a regulation or otherwise, as here via an informal agency position, that is "unreasonable or conflicts with a statute covering the same subject matter." *See Nestle R&D Ctr., Inc. v. Levin*, 122 Ohio St.3d 22, 2009-Ohio-1929, 907 N.E.2d 714, ¶ 40.

This case involves a taxpayer, Jones Apparel Group/Nine West Holdings ("Nine West"), who filed refund claims for Ohio's commercial activity tax ("CAT") paid on gross receipts from products initially sent to Ohio distribution centers but which it alleged were ultimately shipped to customers out of Ohio. *Jones Apparel Group/Nine West Holdings v. Tax Comm'r*, Case Nos. 2020-53, 2020-54 (BTA Sept. 13, 2023) (hereinafter "Board Ord.").

Ohio is one of just seven states that levy a gross receipts tax.[1] According to the Tax Foundation, a gross receipts tax like the CAT is "one of the most economically damaging taxes" in part because they "are applied to a company's gross sales, without deductions for a firm's business expenses, like compensation and cost of goods sold. These taxes are imposed at each stage of the production process, leading to tax pyramiding."[2] Still, the CAT is part of Ohio's tax policy, and remains a legal and economic reality for its taxpayers. Given its often-detrimental

[1] *See* Janelle Fritts, *Does Your State Have a Gross Receipts Tax?,* TAX FOUNDATION (June 7, 2022), https://taxfoundation.org/data/all/state/state-gross-receipts-taxes-2022/ (accessed Jan. 17, 2024).

[2] *Id*. The Tax Foundation is "the world's leading nonpartisan tax policy 501(c)(3) nonprofit" and is dedicated to "advancing the principles of sound tax policy: simplicity, neutrality, transparency, and stability" through education, research, data, and tax modeling. *About Us*, https://taxfoundation.org/about-us/ (accessed Jan. 17, 2024).

impact on taxpayers who do business in Ohio, however, this Court should exercise care in reviewing cases involving the CAT and should be aware of the implications its decisions may have on how the CAT is applied and enforced.

After an audit, the Commissioner determined that Nine West could substantiate certain sales that were shipped out of Ohio, but not others, and granted a partial refund based on those for which Nine West could provide adequate documentation. Nine West appealed to the Ohio Board of Tax Appeals ("Board"). Although the Board "agree[d] that Nine West could show that the goods were received outside of Ohio," [Board Ord. at 10 (emphasis deleted)], the Board upheld the Commissioner in determining that Nine West had not met its burden of proof, though it also found that "subjective knowledge of [the] ultimate destination at the time of shipping [is] not required" because "[n]either the statute nor the case law have imposed a requirement of contemporaneous knowledge of the ultimate destination at the time of transportation", [*id.* at 9-10].

Nine West appealed on the basis that it overcame the burden of proof to substantiate its refund claims and that the Commissioner's position and the Board's decision violate its constitutional rights, and the Commissioner cross-appealed on the basis of the Board's reading and application of the CAT statutes. For the reasons set forth below, *amicus curiae* urges this Court to reverse the Board with respect to the former, and affirm the Board with respect to the latter.

STATEMENT OF INTEREST OF *AMICUS CURIAE* THE OHIO CHAMBER OF COMMERCE

Pursuant to S.Ct.Prac.R. 16.06, the Ohio Chamber submits this brief as *amicus curiae* in support of Appellant/Cross-Appellee Jones Apparel Group/Nine West Holdings in the above-captioned matter.

Founded in 1893, the Ohio Chamber is Ohio's largest and most diverse statewide business advocacy organization, representing businesses ranging in size from small, sole proprietorships to

some of the largest U.S. companies. It works to promote and protect the interests of its more than 8,000 members while building a more favorable business climate in Ohio by advocating for the Ohio business community's interests on matters of statewide importance. By promoting its pro-growth agenda with policymakers and in courts across Ohio, the Ohio Chamber seeks a stable and predictable legal system which fosters a business climate where enterprises and Ohioans prosper.

Amicus has an institutional interest here because this Court's opinion would undoubtedly impact *amicus*' members as business taxpayers. Business taxpayers are concerned with what burden of proof they will be subject to when attempting to prove their entitlement to a refund or attempting to challenge an assessment. Business taxpayers are also concerned with curtailing administrative action and interpretation that conflicts with or modifies a statute. In addition, the outcome here could impact the taxation of businesses more broadly and could make Ohio's application of the CAT even more of an issue for companies considering whether to do business in the state. Further, this Court's opinion may influence other tax jurisdictions across the nation, and may thus significantly impact tax administration affecting taxpayers and *amicus*' business members beyond Ohio. A holding by this Court that agrees with the Commissioner's cross-appeal and requires Nine West to meet an unnecessarily-high burden of proof could thus have far-reaching adverse, confusing, and inefficient impacts.

STATEMENT OF THE CASE AND FACTS

Amicus curiae relies on the background as the Board has recited it. *See generally* Board Ord. at 1-8. However, to contextualize its brief, *amicus curiae* provides a short summary of the facts relevant to the issues *amicus* raises herein.

Nine West is a global designer, marketer, and wholesaler of apparel, footwear, and other items, which sells its goods through its own retail locations, its website, or via other retailers. *Id*.

at 1-2. Nine West ships products to Ohio-based distribution centers of major retailers like DSW, Macy's and others. *Id.* at 2. During the period at issue, Nine West paid CAT on its gross receipts for all the goods it shipped to Ohio distribution centers, even on those items ultimately shipped to customers outside of Ohio. *Id*. Nine West thus filed refund claims with the Ohio Department of Taxation ("Department") on items that were ultimately shipped outside of Ohio. *Id*. As a basis for its refund claims, Nine West "claimed that it knew the proportion of its products that were ultimately shipped outside of Ohio" and that they remained in Ohio for a short time only, and were not altered while in the distribution centers. *Id*.

The Department audited the refund claims, and issued refunds for those sales for which retailers provided "mark-for" addresses on their shipping labels at the time of shipping that showed products were ultimately shipped outside of Ohio. *Id*. However, other retailers' shipping labels provided only Ohio distribution center addresses, though Nine West argued that such sales were ultimately shipped to retail locations across the United States. *Id*. For those sales, the Department sitused the sales to Ohio on the basis that Nine West did not know the actual location where the goods would ultimately be shipped. *Id*. at 2-3.

Before the Board, Nine West provided the testimony of two experts who provided evidence that Nine West knew the proportions of sales which were made outside of Ohio through a variety of internal tracking and data, though the data was related to periods after those involved in the refund claims. *Id*. at 3-5. Thus, Nine West argued, despite the fact that certain retailers did not provide a "mark-for" address outside of Ohio, Nine West could accurately estimate the proportion of its goods that were ultimately shipped to customers out of the state. Nine West also subpoenaed a Department audit manager who testified about how, in the CAT audit of another taxpayer, an apportionment schedule was used to estimate sales made in Ohio versus those shipped outside the

state. *Id*. at 5-6. At a high level, Nine West argued it had sufficiently proven the proportion of receipts that should be sitused outside of Ohio for purposes of substantiating its refund claim, and the Commissioner argued that Nine West was required to have contemporaneous knowledge of where items would be shipped – it could not make such estimations later.

The Board ultimately found for the Commissioner on the merits, finding that Nine West had not met its burden of proof with respect to showing the items that were shipped out of Ohio. As the Board stated, "We agree that Nine West could show that the goods were received outside of Ohio, but we find that they did not do so here." *Id*. at 10 (emphasis deleted). The Board ultimately found that the sampling method used by Nine West "not only related to a time well after the tax period, but is also extremely short in comparison," thus making it "too far removed" to prove Nine West's case. *Id*. Nine West's appeal to this Court argues that it met its burden, and that the Board's decision and Commissioner's determination violate its constitutional rights.

However, the Board also disagreed with the Commissioner's argument that, for purposes of the CAT, "the purchaser receives the property in Ohio when the last destination known by the taxpayer is located within Ohio." *Id*. at 9. As the Board found:

> Neither the statute nor the case law have imposed a requirement of contemporaneous knowledge of the ultimate destination at the time of transportation. Indeed, this Board 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. Thus, we agree with Nine West in this respect.

Id. at 10. The Tax Commissioner's cross-appeal asks this Court to reverse the Board's findings in this paragraph and instead hold that the CAT statutes require contemporaneous documentation of ultimate shipping destination.

The Ohio Chamber's interest in this case is two-fold. First, *amicus* submits that a taxpayer should not be held to the exacting standard of proof described by the Board in substantiating either

the CAT it has paid or its entitlement to a refund. Second, *amicus* submits that the Board was correct in finding that the CAT statutes do not require contemporaneous subjective knowledge of shipping destination, and to hold otherwise would improperly allow the Department to administratively amend the CAT statutes.

ARGUMENT AND LAW

Ohio levies "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." R.C. 5751.02(A). Persons responsible for paying the CAT "include, but are not limited to, persons with substantial nexus with this state." *Id*. The CAT "is imposed on the person receiving the gross receipts and is not a tax imposed directly on a purchaser." *Id*.

R.C. 5751.033 governs the situsing of gross receipts. Under R.C. 5751.033(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.

As the Board explained, "In short, situsing is based on where the purchaser receives the property after all transportation is complete." Board Ord. at 9.

Department guidance states that "In the case of property delivered by common carrier, the place the property is ultimately received after all transportation has been completed is deemed to be the sitused location. *This location must be known by the seller at the time of the sale.*" Ohio Tax Information Release, No. CAT 2005-17 (April 1, 2006) (emphasis in original). However, R.C. 5751.033(I) further provides:

> 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.*

(emphasis added). The Department's CAT guidance also provides "As a general rule, gross receipts are sitused based on the benefit to the purchaser." Ohio Tax Information Release, No. CAT 2005-17 (April 1, 2006). And, "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." R.C. 5751.033(J). In other words, for purposes of the CAT, Ohio's laws and the Department's guidance are chiefly concerned with the physical location of the ultimate purchaser, and Ohio provides taxpayers an opportunity to prove that such a location is outside of Ohio "within a reasonable period of time" after the sale takes place.

I. Proposition of Law No. 1: Taxpayers May Rebut the Correctness of the Commissioner's Assessment with Evidence in the Form of Expert Testimony and Proof in the Form of a Sample.

R.C. 5751.08(A) provides that when filing a refund application for CAT, "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." The type of documentation is not specified. R.C. 5751.09(A) provides, "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." R.C. 5751.09(G) further provides that "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." OAC 5703-29-03 states that the Tax Commissioner may use statistical and non-statistical sampling in estimating CAT liability.

R.C. 5751.09 and OAC 5703-29-03 make clear that the Tax Commissioner is permitted to use any information in her possession to issue an assessment of CAT, and that the Tax Commissioner is permitted to use sampling methodology. The CAT refund statute, for its part, provides only that the taxpayer must document its entitlement to a refund and does not specify that a taxpayer must prove its refund to the penny, just as the Tax Commissioner is not required to audit every dollar of a taxpayer's CAT records and instead may rely on sampling and other information.

Ohio law does not require scalpel-like precision for a taxpayer to successfully challenge a final determination. Instead, "the burden for rebutting the tax commissioner's findings is simply to prove that the findings were incorrect." *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.3d 345, ¶ 14. To be sure, the taxpayer has the burden of proof – but Ohio law requires

only that the taxpayer come forward with evidence that shows "in what manner and to what extent" the commissioner has erred. *See id.* (citing *Krehnbrink v. Testa*, 148 Ohio St.3d 129, 2016-Ohio-3391, 69 N.E.3d 656, ¶ 30).

Nine West submitted the testimony of two experts and a Department auditor, as well as documentation of its entitlement to a refund. Nine West provided a great deal of evidence that it knew, at the time of shipment, that a proportion of its sales would leave Ohio (and conversely, that some proportion would stay in Ohio). Presumably, the Tax Commissioner could use that same evidence to support an assessment; basic fairness to which Ohio business taxpayers are entitled dictates that this same evidence should be sufficient for a taxpayer like, Nine West here, to prove its entitlement to a refund.

II. Proposition of Law No. 2: The CAT Laws Do Not Require Precise, Subjective, and Contemporaneous Knowledge of the Final Destination of a Good at the Time of Shipping.

Also quite troubling to *amicus* is the allegation of the Tax Commissioner that the Board erred by finding that "neither the statute nor the case law have imposed a requirement of contemporaneous knowledge of the ultimate destination at the time of transportation." Board Ord. at 10. In making this finding, the Board reviewed its own decision in *Mia Shoes, Inc. v. McClain*, BTA No. 2016-282, 2019 Ohio Tax LEXIS 1864 (Aug. 8, 2019), and stated that in that case, though the Board found that Mia Shoes did not prove goods were ultimately received out of Ohio, "We did not conclude, however, that it could not have shown they were ultimately received outside of the State through other evidence." Board Ord. at 10. In other words, the Board made a finding particular to the taxpayer in *Mia Shoes*, but did not make a sweeping decision that the CAT statutes require contemporaneous documentation of ultimate destination of goods when the items are shipped. In this case, the Board then reasonably determined that it could imagine a situation where taxpayer could present such evidence obtained after transportation was completed that still

successfully established the goods were received outside of Ohio and thus should not be subject to the CAT. *Id.* at 10. *Amicus* submits that this is the proper reading of the CAT laws as contemplated by the General Assembly.

As explained above, the CAT statutes are primarily concerned with the ultimate location of the goods when it comes to situsing gross receipts. R.C. 5751.033(E) ("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." (emphasis added)); R.C. 5751.033(I) ("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*." (emphasis added)); Ohio Tax Information Release, No. CAT 2005-17 ("As a general rule, gross receipts are situsedbased on the benefit to the purchaser."). The plain language of R.C. 5751.033 does *not* impose a strict requirement of contemporaneous knowledge, and the Board's position is that neither does the prior case law interpreting the CAT. Furthermore, R.C. 5751.033 gives the taxpayer the ability to construct evidence of the location of final shipment "within a reasonable period of time" after a sale takes place.

The Court's primary goal when analyzing a statute is to give effect to the intent of the legislature, which is done by first looking to the plain statutory language. *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, ¶ 20. Phrases and words

should be read in context, and if the language is unambiguous, it should be applied as written. *Mahoning Edn. Assn. of Dev. Disabilities v. State Emp. Relations Bd.*, 137 Ohio St.3d 257, 2013-Ohio-4654, 998 N.E.2d 1124, ¶ 15; *Antoon*, *supra,* at ¶ 20. Here, the CAT statutes lack a strict contemporaneous knowledge requirement. And, the overall context of the CAT statutes indicates that gross receipts are only taxable when the final destination of a good is Ohio, and taxpayers should be permitted to provide evidence of that ultimate destination and to request relief if the CAT cannot be fairly applied to them. R.C. 5751.033(I)-(J).

As the Board recognized, the Tax Commissioner's overly uncompromising interpretation of the situsing rules flies in the face of the plain language of the statutes and upends the current view of Ohio's tribunals when it comes to the knowledge required to properly situs a receipt. Taxpayers cannot have been expected to read a contemporaneous knowledge requirement into the CAT statutes when none exist, either there or in the case law interpreting it. *See TWISM Enterprises, L.L.C. v. State Bd. of Registration for Pro. Engineers & Surveyors*, 172 Ohio St. 3d 225, 2022-Ohio-4677, 223 N.E.3d 371, ¶ 62 ("This court expects a statutory requirement to be 'written * * * into the statute.'.") (quoting *Wheeling Steel Corp. v. Porterfield*, 24 Ohio St.2d 24, 27-28, 263 N.E.2d 249 (1970)). Beyond that, as Nine West attempted to prove through its records and as the Board acknowledged, there are times when a taxpayer may *know* with absolute certainty that a proportion of its sales are destined outside of Ohio but may need to create additional documentation to show the precise destination of each sale. While the Tax Commissioner may promulgate rules reflecting the agency's interpretation of the tax statutes governing the Department, a regulation may not supersede, modify, or restrict a statute enacted by the General Assembly. *See Nestle R&D Ctr.*, 122 Ohio St.3d 22, 2009-Ohio-1929, 907 N.E.2d 714, ¶ 40 ("…an administrative rule that is issued pursuant to statutory authority has the force of law unless it is

unreasonable or conflicts with a statute covering the same subject matter.") (quoting *State ex rel. Celebrezze v. Natl. Lime & Stone Co.*, 68 Ohio St.3d 377, 382, 627 N.E.2d 538, 542 (1994)); *see also Delta Airlines, Inc. v. Tracy*, BTA Nos. 96-T-471, 96-T-472 (Jan. 12, 2001) (finding that the Department's regulations and agency interpretations may not be "an unlawful extension of the power granted to the Commissioner by the General Assembly" and that all administrative interpretation must be "in conformity with the Revised Code.").

This Court should not reverse the Board as requested by the Tax Commissioner's cross-appeal, as such a ruling would read an inflexibility into the CAT statutes that simply is not there, and adversely impact taxpayers who have relied on past decisions of the Board in determining and paying their CAT liability. More concerning, if the Tax Commissioner is successful, this case could open the door for the Department to seek to broaden its interpretation of other tax statutes, not just those involving the CAT. "And therein lies the rub: what the [Tax Commissioner] now presents are simply policy arguments that it tries to dress up as statutory ones…. They are arguments about what the [Tax Commissioner] would like the statute to say, not about what it does say. And for this reason, they are best addressed to the General Assembly." *TWISM*, 172 Ohio St. 3d 225, 2022-Ohio-4677, 223 N.E.3d 371, at ¶ 60. The goal of any revenue-raising measure must be to tax only those transactions which are properly sourced to Ohio - no more, no less, and taxpayers should not be limited in the type of documentation they provide to prove that a tax is or is not owed.

CONCLUSION

This case is one that could alter the landscape for taxpayers, given that it involves an interpretation of the burden of proof taxpayers must meet in challenging a Final Determination of the Tax Commissioner, and a question of how far the Tax Commissioner's rulemaking authority

extends. The standard for taxpayers to successfully challenge a Final Determination has always been to make a showing that the findings were incorrect; a holding for the Tax Commissioner has the potential to make that standard more stringent for taxpayers. Moreover, this Court should not bless the Tax Commissioner's interpretation of a statute if that interpretation conflicts with the plain language of the law and the intent of the General Assembly. This Court must be cautious in issuing decisions that could further expand the tax burden on *amicus*'s members and all corporate taxpayers to the detriment of the business environment in our state. For the foregoing reasons, *amicus* respectfully requests that the Court reverse the Board's decision that Nine West did not meet its burden of proof for its entitlement to a refund of CAT, and affirm the Board's interpretation of the CAT laws to the extent it found that the statutes do not require contemporaneous knowledge of a good's final destination at the time the item is shipped.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing brief in support of Plaintiff-

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