IN THE SUPREME COURT OF OHIO

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

BRIEF *AMICUS CURIAE* OF THE OHIO CHAMBER OF COMMERCE IN SUPPORT OF APPELLEE/CROSS-APPELLANT VVF INTERVEST, LLC

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INTRODUCTION

As amicus, the Ohio Chamber of Commerce ("Ohio Chamber) takes a keen interest in this commercial activity tax ("CAT") case affecting several types of Ohio business taxpayers. 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 it is "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 impact on taxpayers who do business in Ohio – many of whom are members of the Ohio Chamber – 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.

As *amicus*, the Ohio Chamber of Commerce ("Ohio Chamber") addresses three rules of law that are important to all taxpayers. First, where previous objections and arguments indicate the presence of an assignment of error or issue of law on appeal, administrative tribunals and the courts should not take an overly-narrow view of argument preservation. *See Sears, Roebuck & Co. v. Franklin Cty. Bd. of Revision*, 144 Ohio St.3d 421, 2015-Ohio-4522, 44 N.E.3d 274, ¶ 13. Second, the Tax 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

[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 April 2, 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 April 2, 2024).

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. Third, the CAT must be applied within the bounds of the United States and Ohio Constitutions, namely, the Commerce and Due Process Clauses, to ensure Ohio remains an attractive place to do business.

This case involves a taxpayer, VVF Intervest, LLC ("VVF"), a global manufacturer of oleochemicals and personal care products 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 VVF alleged were ultimately shipped to customers out of Ohio. VVF's largest customer, High Ridge Brands ("HRB") has a distribution center in Ohio, as does another of its customers, Dollar General. VVF filed its refund claims on the basis that a large percentage of its products were shipped to Ohio on an interim basis only, and the receipts for those products should be sitused outside Ohio. *VVF Intervest, LLC v. Tax Comm'r*, Case No. 2019-1233 (BTA Oct. 13, 2023) (hereinafter "Board Ord.").

After an audit, the Tax Commissioner denied VVF's refund claim, and VVF appealed to the Ohio Board of Tax Appeals ("Board"). VVF argued that R.C. 5751.033(E) should apply to situs the involved receipts outside of Ohio. After a hearing at which VVF presented documentary and testimonial evidence, the Board determined that VVF carried its burden of proof with respect to the HRB receipts and found that they should be sitused outside of Ohio. However, the Board determined that VVF did not meet its burden of proof with respect to the Dollar General receipts. The Board also determined that VVF had not preserved its argument that the receipts should be sitused outside of Ohio under R.C. 5751.033(I) because it did not include that statute in its notice of appeal.

The Tax Commissioner appealed on the basis of the Board's reading and application of the CAT statutes and its interpretation of the evidence presented at the hearing. VVF cross-appealed on the basis that it had preserved all arguments, the application of the CAT on VVF's gross receipts violated the Commerce Clause of the United States Constitution and the Due Process and Equal Protection Clauses of the United States and Ohio Constitutions, and that VVF should be considered an excluded person under R.C. 5751.01(E)(1) and thus not subject to the CAT. For the reasons set forth below, *amicus curiae* urges this Court to hold for VVF.

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 Appellee/Cross-Appellant VVF Intervest, LLC 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. As to issues raised in the Tax Commissioner's appeal, business taxpayers are concerned with curtailing administrative action and interpretation that conflicts with or modifies a statute. In addition to out-of-state manufacturers like VVF, the Tax Commissioner's interpretation of the CAT statutes could also have dramatic impacts on the Ohio Chamber's members who operate qualified distribution centers in Ohio. As to the

constitutional issues raised in VVF's cross-appeal, the outcome here could impact the taxation of businesses more broadly, including out-of-state businesses like VVF, 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 Tax Commissioner's appeal could thus have far-reaching adverse, confusing, and inefficient impacts on business taxpayers.

STATEMENT OF THE CASE AND FACTS

Amicus curiae relies on the background as the Board has recited it. *See generally* Board Ord. at 1-4. However, to contextualize its brief, *amicus curiae* provides a short summary of the facts relevant to the issues *amicus* raises herein.

VVF is a global contract manufacturer of products like bar soap, deodorant, antiperspirant, and similar products. VVF manufactures its products in Kansas, but it has no property or employees in Ohio. VVF manufacturers bar soap by acquiring raw materials and then adding fragrances, preservatives, and color; its customers set the recipe specifications and dictate the packaging. Once the manufacturing process is complete, VVF ships the product to its customers, but it has little information about the ultimate destination for the products and has no control over the products once they leave its docks. Board Ord. at 1-2.

VVF filed a refund claim for CAT paid on bar soap receipts for the period January 1, 2010 through December 31, 2014 ("Refund Period"). The refund claim involved receipts for numerous customers. The Tax Commissioner ultimately denied the claim, and VVF appealed to the Board. The hearing before the Board focused on receipts from two of VVF's customers: HRB and Dollar General. Board Ord. at 3-4.

HRB is VVF's largest customer and placed monthly orders with VVF based on demand forecasts; such information was provided to VVF. HRB used warehouses or distribution centers in Columbus, St. Louis, and California where it holds all products. In the Columbus distribution center, HRB held approximately two-months-worth of inventory, and HRB made no changes to the products while they were at the distribution center. Retailers like Target or Walmart would then place an order with HRB, which would then hire a third-party trucking company to transport the goods from the distribution center to the retailers' distribution center. The Columbus distribution center typically shipped goods to the Eastern United States. HRB did not own the distribution center or the trucks. Board Ord. at 2-3.

Before the Board, VVF provided the testimony of three witnesses. VVF called the COO and CFO of HRB who authenticated and testified to reports of HRB that showed the ultimate destination of the products purchased from VVF. VVF also called its VP of Finance to testify about the refund claim, and who testified about the portion of the refund claim associated with another purchaser, Dollar General; in his testimony, he explained that he had estimated the ultimate destination percentage based on the number of Dollar General stores served by the Columbus distribution center. And, VVF called the president of VVF North America. Board Ord. at 3-4.

The Board limited its review of VVF's refund claim to the application of the situsing provision found in R.C. 5751.033(E), finding that VVF had not included references to other provisions (namely, R.C. 5751.033(I)) in its notice of appeal. Board Ord. at 5. The Board next reviewed a number of corporate franchise tax cases, given the "similarities between the CAT situsing statute and the defunct corporate franchise tax statute." *Id*. at 6. The Board addressed *House of Seagram, Inc. v. Porterfield*, 27 Ohio St.2d 97, 271 N.E.2d 827 (1971); *Dupps Co. v. Lindley*, 62 Ohio St.2d 305, 405 N.E.2d 716 (1980); and *Loral Corp. v. Limbach*, BTA Nos. 85-

C-914, et al., 1988 Ohio Tax LEXIS 218 (Feb. 23, 1988) and stated that these cases generally stood for the proposition that transactions should not be sourced to Ohio merely because Ohio was one stop in a singular delivery process to an ultimate purchaser. Board Ord. at 8. The Board next analyzed cases directly interpreting R.C. 5751.033(E), including *Greenscapes v. Comm'r*, BTA No. 2016-350, 2017 Ohio Tax LEXIS 1810 (July 19, 2017); *Mia Shoes, Inc. v. McClain*, BTA No. 2016-282, 2019 Ohio Tax LEXIS 1864 (Aug. 8, 2019), and *Henry RAC Holding Corp. v. McClain*, BTA No. 2019-787, 2020 Ohio Tax LEXIS 2101 (Nov. 10, 2020). In these cases, the taxpayer lost because it could not show that it knew the products would ultimately be shipped out of Ohio; the Board "recognized the taxpayer could prevail if it had shown 'the goods were then ultimately received elsewhere within the meaning of the statute.'" Board Ord. at 9.

The Board ultimately found that VVF had carried its burden of proof with respect to the HRB receipts, but not the Dollar General receipts. For the Dollar General receipts, the Board found VVF's evidence to be "speculative" with respect to the ultimate destination of the products. For the HRB receipts, however, the Board found that VVF presented sufficient evidence, through testimony and documentation from its customer, that the goods were not ultimately delivered in Ohio and should thus be sitused outside the state. Board Ord. at 11. According to the Board, "Ohio does not become the ultimate delivery point simply because the bars are temporarily held here in a distribution center owned by an entirely unrelated third party." *Id*.

The Board disagreed with the Tax 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 10. 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." *Id*. The Tax Commissioner's 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.

Finally, the Board stated that it had no jurisdiction to consider VVF's constitutional claims, which VVF raises in its cross-appeal, in addition to the preservation argument related to R.C. 5751.033(I).

The Ohio Chamber's interest in this case is three-fold. First, *amicus* submits that the Board and the courts should not take an overly-narrow view of argument preservation in notices of appeal when context indicates that the argument has been previously raised and preserved. 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, with detrimental impact to qualified distribution centers.

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.

In other words, situsing is based on where the purchaser receives the property after all transportation is complete. Board Ord. at 13.

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: Courts and Administrative Tribunals Should Not Take An Overly-Narrow View of Errors Raised on Appeal Where Context Indicates the Argument Has Been Previously Raised and Preserved.

Amicus curiae acknowledge that R.C. 5717.02(C) mandates that the notice of appeal from a final determination of the Tax Commissioner:

> contain a short and plain statement of the claimed errors in the determination or redetermination of the tax commissioner, county auditor, or director showing that the appellant is entitled to relief and a demand for the relief to which the appellant claims to be entitled.

See also OAC 5717-1-05. The law further states that taxpayers have a certain period of time in which to amend the notice of appeal as a matter of right, and after that time, leave of the Board to amend the notice of appeal "shall be freely given when justice so requires." R.C. 5717.02(C). In this case, the Board determined that VVF had failed to preserve its arguments with respect to R.C. 5751.033(I) in its notice of appeal, and thus did not consider those arguments. In its cross-appeal, VVF submits that it gave sufficient notice to the Tax Commissioner and the Board of its intent to raise arguments under R.C. 5751.033(I) because of prior objections and arguments raised before the Tax Commissioner.

Amicus curiae submit that such additional context should be considered when reviewing whether the Board has jurisdiction over an appeal. Taxpayers should not be expected to raise all

objections to the letter, particularly when taxpayers may amend notices of appeal as a matter of right and leave to amend notices of appeal should be freely given. R.C. 5717.02(C). And, the law and administrative rule require only a "short and plain statement of the claimed errors." *Id*. Notably, here, the two specifications of error involve 2 subparts of the *same statute*, which, read as a whole, addresses the situsing provisions for gross receipts under the CAT. Both the Tax Commissioner and the Board were on notice that this appeal would come down to the appropriate method of situsing receipts.

Moreover, this Court has not held taxpayers to such an exacting standard when reviewing its own jurisdiction over appeals. In *Sears, Roebuck*, this Court held that though the "requirement that the errors be set forth in the notice of appeal is jurisdictional" under R.C. 5717.04, errors that were raised below or which have been "sufficiently" raised even if not raised with exact specificity can form the basis for jurisdiction. 2015-Ohio-4522, ¶ 11-13. Therein, this Court cited to *WCI Steel, Inc. v. Testa,* 129 Ohio St.3d 256, 2011-Ohio-3280, 951 N.E.2d 421, ¶ 36, for the proposition that:

> our decisions have not judged the sufficiency of assignments of error in a notice of appeal merely by their form of words. Instead, the words of the notice of appeal must be read in the context of the particular case in which those words are used. An assertion in a notice of appeal should therefore be read in light of the objections and evidence that were presented to the commissioner, with the result that a taxpayer's explicit objection to the commissioner's [determination] will usually suffice to permit the taxpayer to preserve its [] challenge and present new evidence to the BTA.

In other words, where a taxpayer has raised objections or presented evidence to the Tax Commissioner, such context should be considered in reviewing a notice of appeal's assignments of error. *Amicus curiae* submits that neither this Court nor the Board should take an unnecessarily stringent view of assigning error and preserving issues on appeal when such an exacting standard

has no basis in statute, regulation, or case law. Taxpayers' right to challenge final determinations by the Tax Commissioner and raise the arguments required to do so should not be curtailed.

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 Commissioner that the Board erred by finding that "[n]either 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 decisions in *Mia Shoes, Greenscapes,* and *Henry RAC.* and stated that in those cases, "the taxpayer could prevail if it had shown 'the goods were then ultimately received elsewhere within the meaning of the statute.'" Board Ord. at 9 (quoting *Mia Shoes*). 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 reasonably determined that VVF presented sufficient evidence at the hearing of the goods' ultimate destination outside of Ohio, even though it lost sight and control of the products at the time of shipping. *Id.* at 11-12. *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 sitused based 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 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 VVF proved through the information created for HRB and testified to by its CFO and COO, 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 obtain additional documentation to show the precise destination of each sale. While the 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 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.

The Tax Commissioner's position in this respect is particularly detrimental to distribution centers. By their nature, distribution centers act as a brief stop for goods on their way to be shipped elsewhere. While some manufacturers own their own distribution centers or warehouses, many (like HRB) contract with third-party distribution centers to briefly store property before it is shipped to the ultimate customer. If the CAT will be applied to out-of-state businesses who do nothing but ship products to Ohio on behalf of their customers who quickly proceed to ship the product out of the state, the parties to such arrangements may be expected to search for distribution centers in states without a gross receipts tax. VVF is, in essence, a contract manufacturer, but the Tax Commissioner's position subjects it to tax on the commercial activity of another party, merely by dint of the brief presence of the manufactured products in Ohio before shipping to their final destination. If businesses switch distribution centers to avoid coming under the ambit of the CAT, then it will be a domino effect where the distribution centers themselves may also leave the state. *Amicus curiae* thus urges this Court to carefully consider the implications of its decision in this

case, given the potential for far-reaching detrimental impacts on business taxpayers and Ohio businesses.

III. Proposition of Law No. 3: The CAT Laws Must Be Applied Within the Confines of the United States and Ohio Constitutions.

VVF has raised a number of constitutional arguments on appeal under the Commerce Clause of the United States Constitution and the Due Process and Equal Protection clauses of the United States and Ohio Constitutions. In particular, VVF alleges that the CAT on its gross receipts violates the federal Commerce Clause because:

> it is imposed: (1) on an activity without a substantial nexus to Ohio; (2) in a manner that is not fairly apportioned; (3) in a manner that discriminates against interstate commerce; and (4) in a manner that is not fairly related to services provided to the taxpayer by Ohio. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

VVF's Notice of Cross-Appeal ("Cross-Appeal"), Assignment of Error No. 2; see also Assignments of Error Nos. 3-4. VVF further alleges that the application of the CAT to its gross receipts violates the Due Process clause of the United States and Ohio Constitutions because the gross receipts lack a minimum connection to Ohio. Cross-Appeal, Assignment of Error No. 5. Finally, VVF alleges that the application of the CAT to its gross receipts violates the Due Process and Equal Protection clauses of the United States and Ohio Constitutions because similarly-situated taxpayers are treated differently under Chapter 5751 of the Ohio Revised Code. Cross-Appeal, Assignment of Error No. 6.

While VVF is best positioned to make specific constitutional arguments, amicus curiae takes this opportunity to urge the Court to apply the CAT laws within the bounds of the federal and state constitutions. The Commerce Clause, for its part, limits the power of states to pass laws that "discriminate against interstate commerce." *See New Energy Co. of Indiana v. Limbach*, 486

U.S. 269, 273 (holding that Ohio statute discriminated against interstate commerce in violation of the Commerce Clause). According to the U.S. Supreme Court:

> This "negative" aspect of the Commerce Clause prohibits economic protectionism-that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.... Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down ... unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.

Id. at 273-74. Here, the Commissioner's proposed application of the CAT would harm out-of-state businesses who nonetheless direct business to taxpayers with a physical presence in Ohio, *i.e.*, entities like the distribution center and HRB. But, the imposition of the CAT on such transactions may lead companies to direct their business elsewhere. If the CAT is not applied within the limits of the Constitution, Ohio's business environment will suffer as a result. The same holds true for the Due Process and Equal Protection Clauses of the federal and state constitutions. When similarly-situated taxpayers are treated differently under the law, taxpayers will seek out opportunities to move their business out of Ohio and into more tax-friendly environments. Given the existing perception of the CAT among corporate taxpayers, this Court must ensure that its application passes constitutional muster.

CONCLUSION

This case is one that affects all Ohio business taxpayers, and those deciding whether to do business in Ohio. Taxpayers should be given liberal opportunity to preserve arguments on appeal where such arguments have been raised throughout the appeal process. 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. Finally, it is crucial for taxes like the CAT to be applied within the bounds of the federal and state constitutions if this state is to remain attractive to business taxpayers. 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 VVF did not preserve its arguments with respect to R.C. 5751.033(I), 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, and hold that the Commissioner's denial of VVF's refund claim violates the United States and Ohio Constitutions.

Respectfully submitted,

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The undersigned hereby certifies that a copy of the foregoing amicus brief in support of Appellee/Cross-Appellant was served by electronic mail this 2nd day of April, 2024 upon the following counsel:

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