**OHIO BOARD OF TAX APPEALS**

| | | |
|---|---|---|
| STRAUB NISSAN LLC, (et. al.),<br><br>Appellant(s),<br><br>vs.<br><br>PATRICIA HARRIS, TAX COMMISSIONER OF OHIO, (et. al.),<br><br>Appellee(s). | ) | CASE NO(S). 2022-422<br><br>(COMMERCIAL ACTIVITY TAX)<br><br>DECISION AND ORDER |

APPEARANCES:

For the Appellant(s) - STRAUB NISSAN LLC
Represented by:
RICK ASHTON
ALLEN STOVALL NEUMAN FISHER & ASHTON LLP
10 WEST BROAD STREET
SUITE 2400
COLUMBUS, OH 43215

For the Appellee(s) - PATRICIA HARRIS, TAX COMMISSIONER OF OHIO
Represented by:
DANIEL G. KIM
ASSISTANT ATTORNEY GENERAL
OFFICE OF OHIO ATTORNEY GENERAL
30 EAST BROAD STREET, 25TH FLOOR
COLUMBUS, OH 43215

Entered Wednesday, October 23, 2024

Ms. Clements and Ms. Allison concur.

Straub Nissan, LLC appeals from a final determination of the Tax Commissioner affirming a commercial activity tax ("CAT") assessment. Straub Nissan asks us to overturn the Commissioner's decision, arguing that the Commissioner misinterpreted R.C. 5751.033(E). We agree and reverse the Commissioner's decision.

## FACTS AND PROCEDURAL POSTURE

Highlands Automotive Holdings Group, LLC is the parent company of a group of automotive dealerships – Straub Nissan, Straub Honda, Straub Hyundai, Straub Chrysler Dodge

Jeep Ram, Straub Ford, and Elm Grove Chrysler Dodge Jeep Ram. These dealerships are located in Wheeling, West Virginia, selling new and used motor vehicles. Straub Nissan (from now on, "Straub") is the reporting entity for CAT.

**Audit and Initial Assessment**

The Department of Taxation audited Straub from 2010 through the first quarter of 2020 to determine whether it was subject to the CAT. The Department found that Straub was selling motor vehicles to Ohio buyers but was not registered for the CAT and was not filing CAT returns. The Department estimated CAT, interest, and penalties owed for the assessment periods using the best information available because Straub was allegedly uncooperative during the audit process, refusing to provide its sales data for all related entities.

After the audit, the Department determined that Straub's sales of motor vehicles to Ohio purchasers were taxable gross receipts under R.C. 5751.033(E), requiring situsing to Ohio. Consequently, the Department assessed Straub $2,025,240.99, including taxes, interest, and penalties.

**Reassessment and Final Determination**

Straub filed a petition for reassessment, electing to have an in-person hearing, and advanced multiple arguments.

*Commissioner's situsing determination*

First, Straub asserted that the vehicles it sells to Ohio buyers are purchased and possessed in West Virginia. Thus, Straub claims these gross receipts should be sitused to West Virginia, not Ohio. The Commissioner disagreed. The Commissioner began her analysis by examining R.C. 5751.033(E), the CAT statute that governs the situsing of taxable gross receipts from the sale of tangible personal property. R.C. 5751.033(E) states:

> 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.

The Commissioner concluded that Straub's first argument misconstrued the statute. She reasoned that "the transportation for the vehicle is not completed until the buyer drives the vehicle to Ohio." Statutory Transcript ("S.T.") at 5. The Commissioner articulated that "it is irrelevant to situsing that the buyer purchased and took possession of the vehicle in West Virginia . . . [because] '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 another state and then transports the property directly or by other means to a location within Ohio." *Id.* In support of this conclusion, the Commissioner cited four cases: *House of Seagram, Inc. v. Porterfield*, 27 Ohio St.2d 97 (1971); *Dupps Co. v. Lindley*, 62 Ohio St.2d 305 (1980), *Greenscapes Home & Garden Prods., Inc. v. Testa*, 2019-Ohio-384 (10th Dist.), and *Mia Shoes, Inc. v. McClain*, BTA No. 2016-282, 2019 Ohio Tax LEXIS 1864 (Aug. 8, 2019). The Commissioner found that Straub's records evidenced that many gross receipts were vehicle sales to Ohio residents who drove those vehicles back to Ohio. She summarized her findings by stating, "regardless of where title passes,

the seller has the responsibility to properly situs a sale to Ohio when knowledge of the destination is understood to be Ohio." S.T. at 5.

*The Department's use of estimated figures for the assessment*

Second, Straub argued that the assessments were based on estimates that overstated Straub's actual taxable gross receipts for the audit period. Further, Straub contended that the assessments contained estimated gross receipts for certain dealerships for periods those dealerships were not in existence. The Commissioner found these arguments well taken and adjusted the assessment to reflect $569,781.70, including taxes, interest, and penalties. *Id*. at 6.

*Argument to abate the assessed penalties and interest*

Third, Straub argued for the Commissioner to abate the assessed penalties and interest. The Commissioner noted that the imposition of interest is mandatory under R.C. 5751.06(0) and cannot be abated. Next, the Commissioner exercised her discretion not to reduce the penalties because of Straub's "lack of cooperation during the audit, its initial refusal to provide its records, and poor filing, payment, and compliance history with regard to the CAT." *Id*.

*Constitutional arguments*

Lastly, Straub contends that the assessments violate the Dormant Commerce Clause and the Due Process Clause of the U.S. and Ohio Constitutions. The Commissioner explained that she lacks jurisdiction to determine the constitutionality of a statute. *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 231 (1988). Thus, the Commissioner did not decide Straub's final argument.

In sum, the Commissioner reduced the initial assessment. Straub appealed.

**Board Hearing**

On appeal, Straub presented the same arguments it advanced below. In addition, Straub called Thomas Bryan Fato as its sole witness. Fato has served as the executive manager of Straub's parent company for eleven years. Hearing Record ("H.R.") at 9. Fato testified that all of Straub's dealerships are located in West Virginia. *Id*. at 10 and 12. Next, he explained that all sales

transactions occur in West Virginia – customers come to the dealership, speak with a salesperson, take a test drive, and purchase a new or used vehicle. *Id*. at 11-13. After that, Fato answered the following questions:

> Q: Do the dealerships ever transport vehicles to any purchasers in the State of Ohio?
>
> A: We do not.
>
> Q: Does the dealership ever deliver vehicles to any purchasers in the State of Ohio?
>
> A: No.
>
> Q: Do you ever use a motor carrier – do the dealerships ever use a motor carrier to transport vehicles to any purchasers in the State of Ohio?
>
> A: No, we do not.
>
> Q: Does the dealership ever use any other means of transportation to transport vehicles to any purchasers in the State of Ohio?
>
> A: No, we do not.
>
> * * *
>
> Q: And so going back to the customers coming to West Virginia and buying the vehicles and they drive off the lot, once the customer leaves your lot, do you know where they are taking the vehicles?
>
> A: No.
>
> Q: And so is it fair to state even - even if they come in from Ohio, buy the vehicle, leave your lot, they could go anywhere—New York, Ohio, Florida, correct?
>
> A: That is correct, yes.

*Id*. at 14-15. In addition to Fato's testimony, Straub submitted an unexecuted copy of one of its vehicle purchase agreements to support its position. H.R., Ex. A. The Commissioner cross-examined Fato but did not present any witnesses. After the hearing, the parties filed briefs

supporting their positions.

## STANDARD OF REVIEW

We review the Commissioner's findings de novo, which are presumptively valid but subject to rebuttal. *Accel, Inc. v. Testa*, 2017-Ohio-8798, ¶ 14 (finding the taxpayer's burden for rebutting findings "is simply to prove that the findings were incorrect."). Tax statutes should be interpreted neutrally and not as "favoring tax collection." *Stingray Pressure Pumping v. Harris*, 2023-Ohio-2598, ¶ 22. We consider the matter on the notice of appeal, the statutory transcript, this Board's hearing transcript, and the parties' briefs.

## ANALYSIS

### The CAT

The General Assembly enacted the CAT in 2005. Am.Sub.H.B. No. 66, 151 Ohio Laws, Part II, 2868. "The idea was to make Ohio a more attractive place to do business by replacing the existing business-tax regime." *NASCAR Holdings, Inc. v. McClain*, 2022-Ohio-4131, ¶ 4. The CAT is imposed on "taxable gross receipts for the privilege of doing business in this state." R.C. 5751.02(A). "Gross receipts" are "the total amount realized . . . without deduction for cost of goods sold or expenses incurred, that contributes to the production of gross income." R.C. 5751.01(F). In other words, the CAT is applied to all funds received from business transactions instead of being imposed on a net income. *See* R.C. 5751.03.

The Supreme Court has recognized that "[b]ecause business is conducted across state and international boundaries, imposing the tax often raises the thorny issue of how to properly allocate receipts to Ohio for taxation." *Defender Sec. Co. v. McClain*, 2020-Ohio-4594, ¶ 18. Thus, the CAT is imposed on those "persons with substantial nexus with this state." R.C. 5751.02(A). The Supreme Court has held that R.C. 5751.033 establishes "taxable categories" that govern where a particular kind of receipt should be sitused. *NASCAR* at 7. Accordingly, we limit our review to R.C. 5751.033(E).

The Board and the Tenth District Court of Appeals have previously interpreted R.C. 5751.033(E). Before addressing those cases, we review three older corporate franchise cases that help analyze R.C. 5751.033(E) because of their similarities with the older corporate franchise sourcing statute. *See VVF Intervest v. Harris*, BTA No. 2019-1233, 2023 Ohio Tax LEXIS 1424 (Sep. 13, 2023).

**Corporate Franchise Tax Cases**

Because of the similarities between the CAT situsing statute and the defunct corporate franchise tax statute, the Commissioner, the Board, and the court of appeals have drawn insight from older corporate franchise tax case law. The seminal cases are *House of Seagram*, 27 Ohio St.2d at 97; *Dupps Co.*, 62 Ohio St.2d at 305; and *Loral Corp. v. Limbach*, BTA Nos. 85-C-914, et al., 1988 Ohio Tax LEXIS 218 (Feb. 23, 1988).

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

Almost a decade later, the Court decided *Dupps*. Dupps was a meat processing equipment manufacturer with out-of-state and international customers. *Dupps* at 305. Dupps' customers were usually responsible for shipping the equipment from its plant in Ohio. *Id.* When Dupps calculated

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

Lastly, we consider *Loral*. There, the taxpayer was a manufacturer of electronic radar equipment for aircraft. Its primary domestic customer was the United States Air Force. Concerning the transactions at issue, the planes and radar equipment were manufactured outside of Ohio. Title transferred from Loral to the Department of Defense (on behalf of the Air Force) outside of Ohio. Delivery occurred as follows:

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

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

> Again, we expressly find that the plain language of R.C. 5733.05 and the Court's holdings in *House of Seagram*, supra, and *Dupps Co.*, supra, establish[es] the rule that where delivery of goods is made outside of Ohio, the sale does not occur in Ohio. Products which merely pass through Ohio or never enter Ohio cannot be said

> to be sold in Ohio for purposes of Ohio franchise taxation . . . Here, we expressly find that the record before this Board includes uncontroverted testimony that the assessed property merely entered Ohio in route to non-Ohio destinations. We cannot accept appellee's conclusion that the transportation of the property was completed at the moment it arrived at Wright-Patterson. The testimony before this Board clearly indicates that the property was shipped from Wright-Patterson to points outside of Ohio. Appellee did not produce any evidence which would cause this Board to conclude that the later shipment of the goods from Wright-Patterson was not a continuation of the transportation beginning at appellant's New York facility.

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

**Cases interpreting R.C. 5751.033(E)**

We now turn to cases directly interpreting R.C. 5751.033(E). In three of the four cases, the Board found the taxpayer failed to show that Ohio was merely a pit stop, not the place where the property was ultimately delivered after all transportation was completed. In *Greenscapes*, the taxpayer delivered its goods to big box retailers within Ohio. 2017 Ohio Tax LEXIS 1810. The taxpayer claimed some of those goods were then transported out of Ohio to various distribution centers. We found that all receipts should be sitused to Ohio in light of the lack of evidence about the ultimate delivery location. We found that "[w]hile it may be true that goods appellant sells may be removed from Ohio, after being shipped from appellant to Ohio, for ultimate sale in one of its customers' retail locations, the lack of information about any such further transportation forecloses appellant's argument." *Id*. at *6. However, we did not foreclose the possibility that a party could show the goods "were ultimately received elsewhere." *Id*.

We encountered similar fact patterns in *Mia Shoes* and *Henry RAC Holding Corp. v.*

*McClain*, BTA No. 2019-787, 2020 Ohio Tax LEXIS 2101 (Nov. 10, 2020). In *Mia Shoes*, the taxpayer failed to show that the goods were ultimately delivered outside of Ohio. The taxpayer "knew it was shipping goods to Ohio, and lost visibility of the goods once they were delivered to the customers in Ohio." 2020 Ohio Tax LEXIS 2101 at *8-*9. Again, we recognized that the taxpayer could prevail if it had shown "the goods were then ultimately received elsewhere within the meaning of the statute." *Id*. at *9. *Henry RAC* involved similar facts, such as goods being shipped to distributors in Ohio, but the taxpayer lost visibility in Ohio. In *VVF Intervest*, the Board found the taxpayer proved that certain sales (not all) were transported out of Ohio and thus not subject to the CAT. 2023 Ohio Tax LEXIS 1424 at *18. However, for the following reasons, we find that this case is distinguishable from *Greenscapes*, *Mia Shoes*, *Henry RAC*, and *VVF Intervest*.

**Statutory Interpretation of R.C. 5751.033(E)**

To resolve the issue before the Board, we return to a familiar place: statutory interpretation. Statutory interpretation is a legal issue requiring de novo review. *State v. Straley*, 2014-Ohio-2139, ¶ 9. As the Supreme Court and we have explained, "[w]hen the statutory language is plain and unambiguous, and conveys a clear and definite meaning, we must rely on what the General Assembly has said and apply it as written." (Cleaned up.) *Look Ahead Am. v. Stark Cty. Bd. of Elections*, Slip Opinion No. 2024-Ohio-2691, ¶ 18; *accord Drummond Fin. Servs. v. Harris*, BTA No. 2020-700, 2024 Ohio Tax LEXIS 702, *11-12 (May 13, 2024). "In determining whether a statute is ambiguous, we objectively and thoroughly examine the statute, consider each provision in context, and apply ordinary rules of grammar." *Ohio Neighborhood Fin., Inc. v. Scott*, 2014-Ohio-2440, ¶ 25. Here, we are again asked to analyze R.C. 5751.033(E). Both sides argue that the other misinterprets or misconstrues the statute's meaning.

*The vehicles were not "received" in Ohio*

Under R.C. 5751.033(E), "Gross receipts from the sale of tangible personal property shall

be sitused to [Ohio] if the property is *received* in [Ohio] by the purchaser." (Emphasis added.) To determine what "receive" means, we begin by examining the statute. *See Rockies Express Pipeline, L.L.C. v. McClain*, 2020-Ohio-410, ¶ 11 (The interpretation of statutes begins with the words chosen by the General Assembly.). Here, the statute does not define "receive." Even so, there is a longstanding tenet of statutory interpretation that requires a tribunal to "interpret the text of one statute in the light of text of surrounding statutes . . ." *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, n.17 (2000); *see also Great Lakes Bar Control, Inc. v. Testa*, 2018-Ohio-5207, ¶ 9. Accordingly, R.C. 5739.033(C)(6), an analogous statute describing the situsing of a sale for purposes of Ohio sales tax, defines "receive" as "taking possession of tangible personal property or making first use of a service."

In addition, if a word is not defined in the statute, a tribunal uses the word's "common, ordinary, and accepted meaning" derived from the "particular statutory language at issue, as well as the language and design of the statute as a whole." *Rancho Cincinnati Rivers, L.L.C. v. Warren Cty. Bd. of Revisions*, 2021-Ohio-2798, ¶ 21 (internal quotations omitted); *see also* R.C. 1.42. To discern the plain meaning of a word in a statute, the Supreme Court informs tribunals to consider lexical sources such as dictionaries and the meaning that the word acquired when used in case law. *Id*.; *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992), quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-740 (1989).

Dictionary definitions of "receive" confirm the definition found in R.C. 5739.033(C)(6). *See, e.g., Black's Law Dictionary* (11th Ed. 2019) ("Receive" means "to take (something offered, given, sent, etc.); to come into possession of or get from some outside source."); *Merriam-Webster Online*, https://www.meriam-webster.com/dictionary/receive (accessed Sept. 9, 2024) ("Receive" means "to come into possession of"). Thus, it is unsurprising that the Supreme Court similarly

defined "receive" as "to take possession or deliver of." *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 2008-Ohio-1770, ¶ 17 (relying on *Webster's Third New International Dictionary* (1986)).

We note that the Supreme Court interprets "receive" to include the taking of "delivery." Therefore, we must consider the definition of "delivery" to ensure its consistency with "receive" as used in R.C. 5751.033(E). First, we turn to the statutory language, but the word "delivery" is not defined within the statute. Next, we consider dictionary definitions, which define "delivery" as "the formal act of voluntarily transferring something; esp., the act of bringing goods, letters, etc., to a particular person or place." *Black's Law Dictionary* (11th Ed. 2019). "Actual delivery" is "the act of giving real and immediate possession to the buyer or the buyer's agent." *Id*. The Supreme Court concluded that "delivery" and "delivered" mean "[t]he formal act of transferring something, such as a deed; the giving or yielding possession or control of something to another." *State v. Smith*, 2013-Ohio-1698, ¶ 18; *see also* R.C. 1301.201(B)(15) ("delivery" is the "voluntary transfer of possession."). Thus, a person who takes "delivery" is taking possession or "receiving" as defined above.

Reviewing our decisions, we find that the Board has defined "delivery" in multiple sales tax cases. *See, e.g., C&M Marine, Inc. v. Tracy*, BTA No. 95-M-250, 1997 Ohio Tax LEXIS 41 (Jan. 10, 1997); *Apex Micrographics, Inc. v. Tracy*, BTA No. 91-R-1571, 1994 Ohio Tax LEXIS 897 (Jun. 3, 1994). In *C&M Marine*, we defined "delivery" as "a giving or handing over; transfer." *Id*. at *5. In *Apex*, where there was a factual dispute over whether the sales were made out-of-state or in Ohio, we concluded that "delivery . . . was completed at the consumer's Michigan location, sales to the City of Pontiac were out-of-state sales and not sales consummated in Ohio, thus, not subject to Ohio sales tax . . ." *Id*. at *13. Although the present case concerns the CAT, we find no

need to depart from our prior precedent defining "delivery." The concepts of delivery and receipt complement and reinforce one another. We find this notion confirms the meaning of "receive" and "delivery" under R.C. 5751.033(E).

Upon review, the Board finds the language of R.C. 5751.033(E) is plain and unambiguous. The Commissioner does not advocate a different interpretation of the statute's first sentence. Instead, the Commissioner contends that *Greenscapes*, *House of Seagram*, *Dupps*, and *Mia Shoes* should control our decision. However, 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 sitused to Ohio.

*The vehicles were not delivered by transportation or by other means*

We continue our examination of R.C. 5751.033(E). The second sentence provides an exception to the general rule expressed in the first sentence. It states, "*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.)

The Transportation Clause of R.C. 5751.033(E), by its terms, applies when "delivery" is accomplished by transporting tangible property into Ohio to be "ultimately received" in Ohio. However, as we found above, Straub delivered the vehicles to its customers (who received them) in West Virginia. Thus, the vehicles could not have been "delivered" again once Ohio customers returned to Ohio. Stated differently, once Straub relinquished physical possession of the new or used car to the buyer in West Virginia, Straub could not again deliver physical possession of the

vehicles for a second time by transportation or otherwise. The Commissioner agrees such a reading of the statute would be absurd. *See generally* Appellee's Brief.

Upon review of the Commissioner's argument and final determination, it seems she erred in concluding that "delivery" means "transportation." However, "delivery," as defined above, does not mean "transportation." The Supreme Court stated, " [t]he word, 'transport,' in its ordinary and accepted meaning implies movement – the carrying or conveying of persons or things from one place to another." *Clinger v. Duncan*, 166 Ohio St. 216, 219 (1957); *see also* Adm.Code 5703-9-39 (sales and use tax on interstate commerce). This understanding is reinforced under R.C. 5739.029, a neighboring sales tax statute, addressing when a vehicle is sold in Ohio to an out-of-state resident. It is telling that R.C. 5739.029 does not describe the buyer who purchased the car and drove it back to their home state as performing "delivery" or "transportation." Here, there was no movement ("transportation") used to transfer possession ("deliver") of the vehicles to the buyers.

In addition, it seems the Commissioner misconstrued the statute to mean that all "transportation" into Ohio triggers the exception in the Transportation Clause. But we find that such a conclusion is incorrect. "Transportation" into Ohio must be for the sole purpose of delivering possession of the tangible property. We have already addressed this issue and found delivery occurred in Ohio, not West Virginia.

Next, the "transportation" must be "by motor carrier" or "by other means of transportation." Neither "motor carrier" nor the phrase "other means of transportation" are defined within the statute. The common and ordinary definition of "motor carrier" is "a company or individual that transports goods or passengers using commercial motor vehicles." 40 C.F.R. 202.10 (Motor Carriers Engage in Interstate Commerce); *see also* 49 C.F.R. 325.5 (Motor Carrier Noise Emissions Act).

Further, "other means of transportation" in the statute is a catchall phrase. Thus, we turn to

two canons of statutory interpretation to understand the meaning of that phrase as used in R.C. 5751.033(E) – the "noscitur a sociis" and "ejusdem generis" canons. The noscitur canon counsels that "words grouped in a list should be given related meanings." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012). It is particularly useful when interpreting "'a word [that] is capable of many meanings.'" *McDonnell v. United States*, 579 U. S. 550, 569 (2016) (quoting *Jarecki v. G. D. Searle & Co.*, 367 U. S. 303, 307 (1961)); *see also Gustafson v. Alloyd Co.*, 513 U. S. 561, 573-575 (1995). The ejusdem canon applies when "a catchall phrase" follows "an enumeration of specifics, as in dogs, cats, horses, cattle, and other animals." Scalia & Garner, at 199. Courts often interpret the catchall phrase to "embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U. S. 105, 115 (2001); see also *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U. S. 371, 375 (2003) (employing the canon to construe the general term in the statutory list "'execution, levy, attachment, garnishment, or other legal process'"). Here, the list is small – by motor carrier – and then the use of the catchall phrase. Despite this, a commercial motor carrier does not include an individual customer's newly acquired automobile. The plain application of these canons leads to that conclusion.

Lastly, we turn to the Supreme Court's decision in *Trotwood Trailers v. Evatt*, 142 Ohio St. 197 (1943). Although the statute has changed since the decision, the legal reasoning has never been overruled and still applies. In *Trotwood Trailers*, an Ohio company sold car trailers to out-of-state customers who came into Ohio in their vehicles, paid, hooked up the trailers, and drove them back to their home state. *Id*. at 198-99. The Court concluded that Ohio could tax these sales, even though the purchasers drove the vehicles back home out-of-state. The Court held "delivery [wa]s made, not to an interstate carrier for transportation beyond the state, but to the purchaser who comes within the state to close the transaction and to accept delivery." *Id*. at paragraph 3 of the syllabus. The present appeal is the opposite of *Trotwood Trailers* but under the

auspices of the CAT rather than sales tax. Here, there was no transportation of the vehicles to Ohio by commercial carrier. Instead, as we indicated above, the entire transaction was consummated in West Virginia because the Ohio customers drove to West Virginia to receive their car. Thus, we find the Commissioner's use of the Transportation Clause in R.C. 5751.033(E) is misplaced and incorrect. Accordingly, the gross receipts from these sales cannot statutorily be sitused to Ohio.

## CONCLUSION

Based on the foregoing, we find that Straub Nissan has met its burden of proof to demonstrate that it is not subject to Ohio's commercial activity tax. We acknowledge Straub has leveled constitutional claims, but we lack jurisdiction to consider those claims. Accordingly, the final determination is hereby reversed, and the assessment is vacated.

| BOARD OF TAX APPEALS | | |
|---|---|---|
| | | |
| RESULT OF VOTE | YES | NO |
| Ms. Clements | | |
| Ms. Allison | | |

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

Kathleen M. Crowley, Board Secretary