



# This Week in State Tax (TWIST)

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## Ohio: State Supreme Court Rejects Commissioner's Sourcing Position

The Supreme Court of Ohio recently overturned a Board of Tax Appeals determination holding that certain receipts related to the use of intellectual property should be sitused to Ohio for CAT purposes. The taxpayer at issue was the reporting member of a combined group that included the National Association for Stock Car Auto Racing (NASCAR), which held NASCAR-sanctioned events in Ohio and broadcast races in all fifty states, as well as other countries. NASCAR did not file CAT returns for the tax years at issue and was subsequently audited. On audit, the Commissioner sitused NASCAR's broadcast and media revenue to Ohio based on the number of cable television households in Ohio as a proxy for the Ohio audience of the programs. Revenues from license fees and sponsor fees related to the events were sitused to Ohio based U.S. Census population data, applying the percentage of population in Ohio as compared to the national population. Other fees—sanction fees, membership revenue, and competition revenue—were sitused based on the location of the race event for which they were paid. NASCAR protested the Commissioner's adjustments, arguing that nearly all its relevant revenue should be sitused to its headquarters in Florida where it received the benefit of its agreements with the purchasers of the intellectual property rights. After the Board upheld the Commissioner's assessment, NASCAR directly appealed to the Ohio Supreme Court.

Before the high court, the key issue was whether the taxpayer's broadcasting, media, licensing and sponsorship receipts were sitused to Ohio. Under Ohio law, gross receipts from the sale, exchange, disposition, or other grant of the right to use trademarks, trade names, patents, copyrights, and similar intellectual property are sitused to Ohio to the extent that the receipts are based on the amount of use of the property in Ohio. There is an alternative catch-all situsing provision that applies to other receipts. The Commissioner had originally relied on the catch-all provision to source NASCAR's receipts, but the Board determined the statute addressing gross receipts from licensing intellectual property was the proper situsing statute and that the outcome (i.e., that the receipts should be sourced based on number of cable TV households and population) was the same regardless. The Ohio Supreme Court first addressed and dismissed as a "nonstarter" the taxpayer's argument that it was improper for the Board to affirm an assessment of tax on a statute that differed from that under which the Commissioner had made the original determination. The court then moved on to the taxpayer's substantive challenges to the assessment. The statute at issue permitted taxation of gross receipts derived from a grant of the right to use intellectual property only "to the extent the receipts are based on the right to use the property in this state." Although the receipts at issue were payments for the right to use intellectual property, none of NASCAR's contracts tied the payment of the fees to a specific

right to use the licensed intellectual property in Ohio. As such, the court concluded that the fees were not “based on the right” to use the property in the state. The Commissioner’s position that he could approximate what share of the nationwide rights should have been attributable to the use of the intellectual property in Ohio was rejected as being beyond the scope of his statutory authority. As a result, the court concluded that the assessments related to NASCAR’s broadcast revenue, media revenue, licensing fees and sponsorship fees were invalid under the statute. Having agreed with NASCAR’s statutory argument, the court declined to address additional constitutional arguments relating to the dormant Commerce Clause.

In a partial dissent, three justices asserted that NASCAR’s licensing fees should have been analyzed under the provision for actual use of intellectual property (instead of the provision concerning the right to use such property) and that the assessments related to licensing fees should have been upheld on those grounds. The majority, however, pointed to the clear statement by the Commissioner that his assessment relating to licensing fees had been calculated under the right-to-use standard and chose to “steer clear of new theories for taxability that were neither relied on by the tax commissioner nor argued by the parties.” Please contact [Dave Perry](#) with questions on *NASCAR Holdings, Inc. v. McCain*, Slip Opinion No. 2022 Ohio-4131.



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