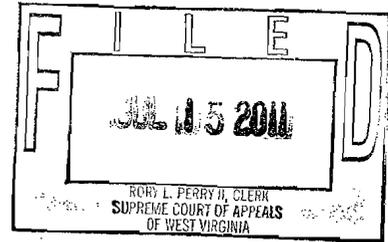


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0252



**CRAIG A. GRIFFITH, WEST VIRGINIA
STATE TAX COMMISSIONER,**

Respondent Below, Petitioner,

v.

CONAGRA BRANDS, INC.,

Petitioner Below, Respondent.

TAX COMMISSIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
I. TAX COMMISSIONER’S RESPONSE TO CONAGRA’S CORRECTION TO PETITIONER’S STATEMENT OF THE CASE	1
II. STANDARD OF REVIEW	4
III. ARGUMENT	5
A. WEST VIRGINIA’S CNIT AND BFT REACH THE PRESENCE OF CONAGRA’S INTANGIBLES IN WEST VIRGINIA	5
B. CONAGRA’S PURPOSEFUL DIRECTION OF ITS TRADEMARKS INTO WEST VIRGINIA SATISFIES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION; THEREFORE, THE CIRCUIT COURT HOLDING THAT THE IMPOSITION OF CNIT AND BFT WAS UNLAWFUL IS ERRONEOUS	8
C. CONAGRA’S COMMERCE CLAUSE CHALLENGE MUST FAIL BECAUSE IT HAS SUBSTANTIAL ECONOMIC PRESENCE WITH WEST VIRGINIA	12
IV. CONCLUSION	

TABLE OF AUTHORITIES

CASES

<i>Appalachian Power Co. v. State Tax Dep't</i> , 195 W. Va. 573, 466 S.E.2d 424 (1995)	4
<i>Asahi Metal Indus. Co. v. Superior Court of California</i> , 480 U.S. 102 (1987)	9
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274 (1977)	2, 12, 13
<i>Davis Memorial Hospital v. West Virginia</i> 222 W. Va. 677, 671 S.E.2d 682 (2008)	8
<i>Hill by Hill v. Showa Denko, K.K.</i> , 188 W. Va. 654 S.E.2d 609 (1992)	10
<i>J. McIntyre Machinery, Ltd. v. Nicastro</i> 2011 WL 2518811 at *7 (U.S. June 27, 2011)	9
<i>KFC Corp. v. Iowa Dept. Of Revenue</i> , 792 N.W. 2d 308	16, 17, 19
<i>Lutz Industries v. Dixie Home Stores</i> , 242 N.C. 332, 88 S.E.2d 333(1955)	4
<i>Maxwell v. Kent-Coffey Mfg. Co.</i> 168 S.E.2d 397 (N.C. 1933)	4
<i>Miller Bros. Co. V. Maryland</i> , 347 U.S. 340, 74 S.Ct. 535 L.Ed. 744 (1954)	9
<i>Norfolk & W. Ry. Co. v. Field</i> , 143 W. Va. 219, 100 S.E.2d 796 (1957)	4
<i>Quill Corp. v. North Dakota</i> , 504 U.S. 298, 112 S.Ct. 1904 (1992)	9
<i>Sizemore v. Statefarm Gen. Ins. Co.</i> , 202 W. Va. 591, 505 S.E.2d 654 (1998)	8
<i>Sproul v. Commission</i> , 1 Or. Tax 31, 63 (1962), <i>rev'd on other grounds</i> , 234 Or. 567 P.2d 99 (1963)	4
<i>Tax Assessment of Foster Foundation's Woodlands Retirement Community</i> , 223 W. Va. 14, 672 S.E.2d 150 (2008)	4
<i>Telebright Corp., Inc. v. Director</i> , 25 N.J. Tax 333 (2010)	7

<i>United Bank, Inc. v. Stone Gate Homeowners Ass'n, Inc.</i> , 220 W. Va. 375, 647 S.E.2d 811 (2007)	7
<i>United States v. Gonzales</i> , 520 U.S. 1, 5 (1997)	7
<i>West Virginia Tax Commissioner v. MBNA</i> , 220 W. Va.163, 640 S.E.2d 234	passim
<i>Western Maryland Ry. Co. v. Goodwin</i> , 167 W. Va. 804 S.E.2d 240 (1981)	12

STATUTES

W. Va. Code §11-23-3 (b)(1)	7
W. Va. Code 11-23-3(b)(8)	6, 7
W. Va. Code § 11-23-5(a)	15
W. Va. Code §11-23-5 (n)(4)	7
W. Va. Code § 11-23-6(a)	6
W. Va. Code § 11-24-3a(2)	7
W. Va. Code §11-24-3a(a)(11)	7
W. Va. Code § 11-24-4(1)	6, 7
W. Va. Code § 11-24-4(3)	6
W. Va. Code 11-24-6b(3)	1
W. Va. Code § 11-24-7(b)	15
W. Va. Code §11-24-7 (f)(4)	7

OTHER

16 C.J.S. *Constitutional Law* § 193 4

Fatale, 23 Hofstra L.Rev. at 450; Laskin, 22 Akron Tax J. at 25-26 16

Nat'l Geographic Soc'y, 430 U.S. at 556 16

Webster's Third New International Dictionary 97 (1976) 7

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v.

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Petitioner Below, Respondent.

TAX COMMISSIONER'S REPLY BRIEF

I.

TAX COMMISSIONER'S RESPONSE TO CONAGRA'S CORRECTION TO
PETITIONER'S STATEMENT OF THE CASE

ConAgra Brands, Inc. (hereinafter "ConAgra") correctly points out that the Multi-State Tax Audit upon which the State relies reflects that deductions were made from ConAgra's income for taxes it paid in other jurisdictions. This was done prior to the imposition of taxes properly apportioned on ConAgra's receipt of royalties attributable to West Virginia sales. Thus, based on the deductions given, the State does not contest that ConAgra paid 20 million dollars of income tax in other jurisdictions¹

Counsel wishes to correct its previous statement and apologize for the oversight. This

¹The deductions were taken from ConAgra's income *prior* to arriving at the amount of income to be apportioned to West Virginia. This roughly \$20 million deduction was done under W. Va. Code 11-24-6b(3), providing an income tax deduction for taxes paid in other states. Thus, West Virginia's allowance of these deductions from the income that was apportioned to West Virginia proves there is no double taxation.

occurred in part as there was no evidence that the amount to be taxed was mis-apportioned. App., Vol. 5, 832 (“With respect to the fair apportionment and discrimination prongs of *Complete Auto* test, [ConAgra] has presented no evidence which would tend to support these contentions.”) Based on this lack of evidence, neither the Respondent’s Proposed Circuit Court Order, App. Vol. 5, 919-930, nor the Circuit Court’s Order, *id.* at 960-970, addresses the issue of the *amount* of ConAgra’s income that is apportioned to West Virginia. Accordingly, the apportionment argument is waived.

The remaining alleged misstatements are denied as more fully discussed herein. ConAgra claims that the Commissioner’s brief “inaccurately states” that the business entities which transferred intangible property (trademarks and trade names) to ConAgra did not receive any consideration for the transfers, Resp. Br., 1 and cites a document purporting to authorize the issuance of shares of ConAgra stock to the transferors as consideration for the intangible property. Resp. Br., 1, citing App., Vol 5, at 804-813. However, OTA found “[i]n exchange for the trademarks, ConAgra Foods, Inc. and affiliates received no apparent consideration in the form of cash, assets, or their equivalent from Brands,” App., Vol. 5, 820, and the Circuit Court order did not disturb this finding.² *Id.* at 960-970.

Considering the substance of the transaction as a whole, the ALJ’s finding was not clearly erroneous. The corporate resolution ConAgra cites purports to authorize the issuance of shares of common stock to ConAgra Foods, Inc. and several of its subsidiaries as payment for assignment of trademarks and trade names,³ but a separate transfer document states that ConAgra, Inc. transfers

²The Circuit Court did not disturb any of OTA’s factual findings. Circuit Court COL 62.

³This document was not introduced at OTA; it was attached to a brief ConAgra filed after the OTA hearing.

the intangible property to ConAgra “without additional consideration.” App., Vol. 2, 385, ¶2.⁴ Another document binds ConAgra Foods, Inc. to pay royalties to ConAgra for use of the intangible property (trademarks and trade names) that it previously owned outright. App., Vol. 2, 400, ¶ 3.b.⁵ Considering only these documents, it might appear that there was consideration for the transfer. However, this ignores the corporate structure of the two entities: ConAgra was a wholly-owned subsidiary of ConAgra Foods, Inc., Inc. App., Vol. 5, 816, ¶1. Thus, when ConAgra Foods, Inc. transferred intangibles to ConAgra, it transferred them, in effect, to itself; and when ConAgra Foods, Inc. paid royalties to ConAgra, it paid those royalties to itself. The effect of the agreements was to allow ConAgra Foods, Inc. to move money and assets from one pocket to another and receive a tax deduction in the process.

Furthermore, the Respondent points to an inartfully drafted footnote, taking it out of context to suggest the Tax Commissioner claims the issues before this Court do not involve whether ConAgra receives benefits from West Virginia. The Petitioner’s brief, taken in its totality is clear that ConAgra challenges whether it receives services and benefits from the State. Pet’r Br. at n.2.

Finally, ConAgra observes the State did not include in its Statement of Facts that ConAgra has employees and offices in Nebraska. While true, the State acknowledged ConAgra “had no agents or employees in West Virginia, did not rent offices, warehouses, or other such facilities in West Virginia, and did not direct and/or dictate how the licensees distributed the products bearing the licensed trademarks or tradenames.” Pet’r Br. at 6.

⁴The ALJ attached this document to his Order as Exhibit A. App., Vol. 5, 817, ¶ 2.

⁵The ALJ attached this document to his Order as part of the Stipulated Facts as Exhibit B. App., Vol. 5, 817, ¶3.

II.

STANDARD OF REVIEW

The standards of review that the Respondent faces are not friendly to it. First, while a statute is reviewed de novo, “[a]n inquiring court—even a court empowered to conduct *de novo* review—must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion.” *Appalachian Power Co. v. State Tax Dep’t*, 195 W.Va. 573, 582, 466 S.E.2d 424, 433 (1995). Second, “[i]n this State and in this Nation it is the universal and fundamental rule that there is a presumption in favor of a legislative enactment[.]” *Lutz Indust. v. Dixie Home Stores*, 242 N.C. 332, 342, 88 S.E.2d 333, 340 (1955). This Court’s “prior decisions have repeatedly counseled that statutes are presumed to be constitutional.” *In re Tax Assessment of Foster Foundation*, 223 W. Va. 14, 22, 672 S.E.2d 150, 158 (2008). “The presumption in favor of constitutionality is especially strong in the case of statutes enacted to promote a public purpose, such as statutes relating to taxation.” 16 C.J.S. *Constitutional Law* § 193 (footnotes omitted). Contrary to the Respondent’s assertion (unsupported by authority) that “as applied” challenges are not governed by these principles, “[i]t is elementary that the constitutionality of a statute and its application are both supported by a very strong presumption.” *Sproul v. Comm’n*, 1 Or. Tax 31, 63 (1962), *rev’d on other grounds*, 234 Or. 567, 382 P.2d 99 (1963). The burden rests upon the appellee here, as in all cases where one attacks the constitutionality of a statute in its applicability to him, to overcome that presumption of facts supporting constitutionality of a statute in its applicability to him, to overcome that presumption of facts supporting constitutionality which attaches to all legislative acts. *Maxwell v. Kent-Coffey Mfg. Co.* 168 S.E.2d 397, 401 (N.C. 1933) (cited approvingly in *Norfolk & W. Ry. Co. v. Field*, 143 W. Va. 219, 233-34, 100 S.E.2d 796, 805 (1957)).

III. ARGUMENT

A. WEST VIRGINIA'S CNIT AND BFT REACH THE PRESENCE OF CONAGRA'S INTANGIBLES IN WEST VIRGINIA.⁶

ConAgra claims that neither the BFT nor the CNIT statutes reach its conduct because the language of the statutes do not reach it. But, explicit language in both the BFT and the CNIT extends the respective taxes to ConAgra.

The crux of ConAgra's statutory argument is that it is not engaged in business in West Virginia because (1) it did not bring the products carrying its trademarks or tradenames into West Virginia and (2) it was not the owner of the tangible property to which its trademarks or tradenames are applied. ConAgra's argument must fail because it ignores that the Legislature chose to impose the taxes on income received from the use of tangible and intangible property. Nothing in the statutes supports ConAgra's argument that intangibles can only be taxed when the intangibles' owner also owns the tangible property. ConAgra's argument reads the taxes placed on intangible property out of the statutes.

For ConAgra's argument to succeed, the Court must ignore that ConAgra receives income because West Virginia customers purchase a tremendous amount of products bearing its trademarks or tradenames. The fact that the West Virginia customers are not direct customers of ConAgra does not change the statutory analysis. ConAgra receives royalty income because its intangibles are used in West Virginia to induce West Virginia residents to purchase goods. ConAgra seeks to side-step this by claiming it does not direct where its licensees choose to market the products. However, this

⁶The issues raised in this assignment of error are found in the Appendix at: 00013-20; 00027-29; 00049-83; 00762-65; 00781-91; 00797-802; 00814-835; 00859-868; 00888-905; 00919-929; 00933-957; 00960-970.

is disingenuous because (1) ConAgra Foods, the owner of the Respondent, is one of the licensees, (2) subsidiaries of ConAgra Foods are licensees, and (3) it allowed all of its licensees, including unrelated entities, to use its trademarks throughout the United States. App., Vol. 5, 00818. Plainly stated, ConAgra has chosen to allow its trademarks and tradenames to be affixed to its licensees' products in all States. If ConAgra wanted to avoid taxes in West Virginia, it could have chosen to exclude West Virginia from the areas where products with its tradenames or trademarks could be sold.

By choosing to allow their licensees' products to come into West Virginia, ConAgra received royalties because West Virginia customers bought products bearing ConAgra trademarks or tradenames. ConAgra made the choice not to restrict the marketplace. As a result of this choice, ConAgra received royalties attributable to sales in West Virginia. Having exercised the choice to allow its trademarks or tradenames to be affixed to its licensees' products, it should not now be allowed to avoid the taxes that are imposed because of its generation of income.

Turning to examine the applicable statutes, the BFT provides, “[a]n annual business franchise tax is hereby imposed on the privilege of doing business in this state and in respect of the benefits and protection conferred.” W. Va. Code § 11-23-6(a). The Act further provides that “ ‘doing business’ means *any* activity of a corporation or partnership which enjoys the benefits and protection of the government and laws of this state[.]” *Id.* 11-23-3(b)(8) (emphasis added).

The CNIT provides that “a tax is hereby imposed for each taxable year. . . on the West Virginia taxable income of every domestic or foreign corporation engaging in business in this state *or deriving income from property, activity or other sources in this state*[.]” *Id.* §§11-24-4(1) and 11-24-4(3) (emphasis added). The CNIT defines engaging in business or doing business as “*any* activity

of a corporation which enjoys the benefits and protection of government and laws in this state.” *Id.* §11-24-3a(a)(11) (emphasis added).

Both West Virginia Code §§ 11-23-3(b)(8) and 11-24-3a(a)(11) use the word “any.” “Any” has an expansive meaning— that is, “one or some indiscriminately of whatever kind.” *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster’s Third New International Dictionary* 97 (1976)).

“In common parlance, the adjective ‘any’ refers to ‘all.’ ” *United Bank, Inc. v. Stone Gate Homeowners Ass’n, Inc.*, 220 W. Va. 375, 380, 647 S.E.2d 811, 816 (2007) (citations omitted). Thus, “ ‘[d]oing business’ . . . is intended to be interpreted expansively.” *Telebright Corp., Inc. v. Director*, 25 N.J. Tax 333, 344 (2010).

The CNIT imposes tax on the income of corporations engaging in business “or deriving income from property, activity or other sources in this State.” W. Va. Code §11-24-4 (1). It also defines business income to explicitly include “income from tangible and intangible property if the acquisition, management and disposition of the property or the rendering of services in connection therewith constitute integral parts of the taxpayer’s regular trade or business operation.” W. Va. Code §11-24-3 a(2). Moreover, “income-producing activity” explicitly includes “the sale, licensing or other use of intangible personal property.” *Id.* §11-24-7 (f)(4).

Likewise, the BFT taxes the privilege of doing business in West Virginia and defines business income to include “income from tangible and intangible property if the acquisition, management and disposition of the property or the rendering of services in connection therewith constitute integral parts of the taxpayer’s regular trade or business operations.” W. Va. Code §11-23-3(b)(1). “[I]ncome-producing activity explicitly includes “the sale, licensing or other use of intangible personal property.” *Id.* §11-23-5 (n)(4).

ConAgra's entire business consists of acquiring, licensing, managing, and publicizing trademarks and tradenames. Its income consists of royalties received from the licensing of those intangible properties. Thus, ConAgra has "income-producing activity" from the use of its intangibles in West Virginia and clearly falls within the coverage of both statutes.

ConAgra argues that if the Court perceives any ambiguity as to whether, "under the facts here, the Respondent is doing business in this State" under the CNIT or BFT statutes, it must resolve any such ambiguity in favor of the conclusion that it is not. In support of this argument, ConAgra cites case law to the effect that laws imposing a tax are strictly construed in favor of the taxpayer and against the State when there is any doubt as to the meaning of such laws. There is no need to resort to principles of statutory construction because neither the statutes nor the facts of this case are ambiguous.⁷

Both statutes unambiguously require tax to be imposed on businesses that receive income from the sale, licensing or other use of intangible personal property to produce income, and it is undisputed that ConAgra Brands received more than \$1 million in income that arose from the use of its intangibles in West Virginia for the three year period at issue. Thus, there is no need to resort to statutory construction.

B. CONAGRA'S PURPOSEFUL DIRECTION OF ITS TRADEMARKS INTO WEST VIRGINIA SATISFIES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION; THEREFORE, THE CIRCUIT COURT HOLDING THAT THE IMPOSITION OF CNIT AND BFT WAS UNLAWFUL IS ERRONEOUS⁸

⁷As this Court observed in *Davis Memorial Hospital v. West Virginia* 222 W.Va. 677, 683, 671 S.E.2d 682 (2008), a statute is not ambiguous just because the Tax Commissioner and the taxpayer disagree. *Id. Sizemore v. State Farm Gen. Ins. Co.*, 202 W.Va. 591, 596, 505 S.E.2d 654, 659 (1998).

⁸The issues raised in this assignment of error are found in the Appendix at: 00027-29; 00765; 00787- (continued...)

The Circuit Court erred as a matter of law when it found that West Virginia's imposition of CNIT and BFT on royalties earned by ConAgra from sales in West Virginia violated the Due Process Clause. Its analysis as discussed herein began by correctly acknowledging at COL 45 that:

A state's jurisdiction to tax under the Due Process Clause " 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' " *Quill Corp. v. North Dakota*, 504 U.S. 298, 306, 112 S.Ct. 1904 (1992) (quoting *Miller Bros. Co. V. Maryland*, 347 U.S. 340, 344-45, 74 S.Ct. 535, 98 L.Ed. 744 (1954)).

App., Vol. 5, 00967.

Further, the Circuit Court then correctly concluded at COL 46 the following:

The extent of contacts by a foreign entity with a state, necessary to satisfy the Due Process Clause, is comparable to that needed to support a state court's jurisdiction over a defendant in a civil matter, and is met if the entity purposefully directs its activity into a jurisdiction; thus, the Due Process Clause does not require physical presence in the taxing state. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

App., Vol. 5, 00967.

The Circuit Court grounded its decision that West Virginia's taxes as imposed on ConAgra, violated the Due Process Clause upon language in *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 112 (1987).⁹ App., Vol. 5, 00967.

⁸(...continued)

88; 00799-801; 00821-25; 00833-34; 00865-868; 00897-903; 00926-27; 00960; 00966-70.

⁹The regular and high volume contact between West Virginia and the trademarks here distinguish this case from the recent United States Supreme Court case of *J. McIntyre Machinery, Ltd. v. Nicastro*, 2011 WL 2518811, at *7 (U.S. June 27, 2011). In *Nicastro*, four justices explicitly rejected Brennan's *Ashai* concurrence and therefore voted to reverse the lower court. Justice Breyer, joined by Justice Alito, agreed to reverse, but did not join the majority's rationale. Justice Breyer wrote separately that his conclusion was premised on the fact that a single, isolated incident of an injury producing product being placed into the stream of commerce (as was the case in *Nicastro*) is insufficient to satisfy due process either Justice O'Connor's *Ashai* plurality or Justice Brennan's *Ashai* concurrence and that *Nicastro* was not an appropriate (continued...)

The Circuit Court at COL 47 concluded that

However, “the placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State [A] defendant’s awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

App., Vol. 5, 00967.

The Circuit Court’s reliance on *Asahi* is misplaced. The above-quoted language from *Asahi* that the Circuit Court relied on was not a holding of the Supreme Court. Because the *Asahi* Court split on whether placing a product in the stream of commerce is enough to satisfy Due Process and importantly expressed no majority opinion on this point, the individual states were left free to determine whether placement of a product in the stream of commerce satisfied the minimum contact requirements of the Due Process Clause.¹⁰ In *Hill by Hill v. Showa Denko, K.K.*, 188 W.Va. 654, 425 S.E.2d 609 (W.Va. 1992), this Court held that placement of a product in the stream of Commerce is enough to satisfy the Due Process Clause. See Syl. Pt. 2.

Inasmuch as placement of a product in the stream of commerce is enough to satisfy Due Process consistent with *Hill*, the Respondent’s argument that it has not purposefully directed its products to West Virginia relies on the fact that (1) the tangible good in the stream of commerce is not its product and (2) it did not choose to bring the tangible goods with its trademarks here.

The weakness of this argument is apparent. ConAgra’s trademarks or tradenames were

⁹(...continued)
vehicle to deal with the O’Connor-Brennan split.

¹⁰Furthermore, as will be discussed herein, ConAgra does more than allowing its intangible trademarks and tradenames to enter West Virginia.

attached to goods that are sold in West Virginia. Plainly stated, the narrow reading of *Hill* urged by the Respondent relies upon the fact that its intangible trademarks and tradenames are not tangible products. There is no principled reason to draw the distinction Respondent now proffers. Neither the Respondent's proposed order to the Circuit Court, nor the Circuit Court itself drew such a distinction. App., Vol. 5, 919-932, 960-971. That ConAgra's "products" are intangible does not alter the fact that their placement into the stream of commerce satisfies Due Process.

Additionally, the use of ConAgra's trademarks or tradenames to sell goods in West Virginia is substantial not occasional, and ConAgra is not the passive actor that it characterizes itself to be. If it did not want its trademarks or tradenames used to sell goods here, they would not have been used here in the magnitude they were. ConAgra oversees the quality of the products to which its trademarks or tradenames are attached and directs national advertising which reaches West Virginia. All of this activity is designed to increase the value of its trademarks and tradenames so as to sell more products and thereby receive more royalties. ConAgra's quality control activities ensure the quality of its licensees' products to maximize the value of its trademarks or tradenames. Moreover, these actions are taken so that West Virginia customers will choose goods with ConAgra's trademarks and tradenames on them as opposed to choosing a generic brand.

The Respondent's argument that its trademarks or tradenames are not "products" ignores the necessary interrelationship between the licensee's product and ConAgra's trademark and tradenames. Without the tangible good, albeit someone else's tangible property, ConAgra's trademark or tradename would not generate any royalty income here. Thus, trademarks or tradenames are attached to a vast array of goods, whose sale to West Virginia customers generates substantial income for ConAgra.

Finally, in concluding that ConAgra lacked minimum contacts with West Virginia, the Circuit Court did not disturb OTA's extrapolation that for the three years of the audit, West Virginia customers purchased at least \$19,269,000 and perhaps as much as \$46, 247,000 worth of goods bearing ConAgra's trademark or tradename. App., Vol. 5, 831. Thus, despite ConAgra's attempt to exalt form over substance, imposition of CNIT and BFT does not offend Due Process.

C. CONAGRA'S COMMERCE CLAUSE CHALLENGE MUST FAIL BECAUSE CONAGRA HAS SUBSTANTIAL ECONOMIC PRESENCE IN WEST VIRGINIA¹¹

Under the Commerce Clause, a tax survives if (1) there is substantial nexus between the State and the activity that is sought to be taxed; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to the benefits provided by the State. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).¹² The parties disagree as to the scope of the Commerce Clause challenge before this Court.

The Tax Commissioner's position is that ConAgra's challenge is limited to examining whether the taxes imposed violate the first and fourth prong.¹³ While ConAgra asserts it is challenging every prong of the *Complete Auto* test, this is unsupported by the record. In an apparent recognition that any apportionment challenge or discrimination claim was waived, ConAgra argues its challenge to the apportionment and discrimination prongs has been preserved inherently. Rep't Br. at 1. This is wrong. Specifically, the ALJ at OTA commented "With respect to the fair apportionment and discrimination

¹¹The issues raised in this assignment of error are found in the Appendix at: 00008; 00020; 00027-29; 00767-778; 00788-790; 00800-802; 00825-834; 00869-885; 00897-903; 00913-916; 00967-970.

¹²The Court adopted the *Complete Auto* test for examining challenges under the Commerce Clause in *Western Maryland Ry. Co. v. Goodwin*, 167 W.Va. 804, 282 S.E.2d 240 (1981).

¹³As discussed in the Petition, prong 4 is satisfied because ConAgra receives benefits from the State because our roads are essential to the trademarked goods and customers getting to market.

prongs of the *Complete Auto* test, the Petitioner has presented no evidence which would tend to support these contentions.” Moreover, the Respondent’s assertion that the Circuit Court made a finding that the taxes were mis-apportioned or discriminatorily applied to it is wrong. To the contrary, the Circuit Court Order made no finding of mis-apportionment or discrimination and could not have made these findings because there was insufficient evidence at OTA demonstrating unfair apportionment or discrimination. See App., Vol. 5, 960-971.

Turning to ConAgra’s substantial nexus challenge (prong 1 of *Complete Auto*), this Court adopted a “substantial economic presence” standard as an appropriate indicator of whether substantial nexus exists under the *Complete Auto* test. This Court determined that a substantial economic presence standard incorporates Due Process purposeful direction toward a state while examining the degree to which a taxpayer has exploited the local market. *West Virginia Tax Commissioner v. MBNA America Bank, N.A.*, 220 W.Va. 163, 171, 640 S.E.2d 226, 234. This involves an examination respecting both the quality and quantity of its economic presence. *Id.* In addition, the Court must consider the frequency, quantity, and systematic nature of its contacts with the State. *Id.* The evidence at OTA was that ConAgra had a substantial economic presence in West Virginia. Specifically, ConAgra’s economic presence is established because the goods bearing its trademarks and trade names are found in most retail stores that sell food products. Trademarks and tradenames attached to these goods are “a veritable laundry list of familiar brand names.” Thus, ConAgra purposefully directed its trademarks and tradenames to West Virginia and profited handsomely because of their use here.

The quality and quantity of ConAgra’s economic presence is shown by its decision to allow goods with its trademarks and tradenames to be sold in West Virginia. Additionally, its oversight of national marketing and quality control of the products bearing its mark ensures the ultimate purchase

of the Butterball turkeys, Peter Pan peanut butter and Orville Redenbacher items, to name just a few of the goods bearing its trademarks or tradenames.

Extrapolating from the royalties ConAgra received, the ALJ calculated that the licensed product sales totaled between \$19.3 and \$46.2 million for the three-year period at issue. These figures demonstrate the frequency, quantity and systematic nature of ConAgra's contacts with the State. Accordingly, ConAgra has substantial economic presence in the State of West Virginia. In summary, ConAgra's choice to allow its trademarks and tradenames to enter West Virginia, its oversight of national marketing and advertising plans that includes West Virginia, and its quality control oversight all reflect its substantial economic nexus with West Virginia customers, who make the purchases from which ConAgra receives royalties.

However, contrary to this Court's holding in *MBNA*, the Circuit Court relied on a mechanistic analysis of its own creation and then decided that the taxes at issue do not pass the test. Specifically, the Circuit Court concluded that:

Without violating the Due Process or Commerce Clauses, the Legislature may, for CNIT and BFT purposes, *create a rebuttable statutory* presumption of taxable substantial nexus with the State by an out-of-state company, *without a physical presence* in the State, based on a quantitative degree of that company's systematic and continuous activity of soliciting and/or conducting business with customers in West Virginia. *Tax Commissioner v. MBNA America Bank N.A.* 220 W. Va. 163, 640 S.E.2d 226 (2006), cert. denied, 551 US 1141, 127 S. Ct. 2997 (2007).

Final Order at 9 (emphasis added), App., Vol. 5, 00968.

This is erroneous because the Circuit Court created a rebuttable presumption not found in the BFT or CNIT applicable to corporations. The Circuit Court required that the legislature create a rebuttable presumption for non-financial organizations, based on the fact that the Legislature included

such presumptions for financial organizations. There is no legal basis for the corresponding requirement that the Circuit Court imposed. Financial organizations are different from other corporations and partnerships; financial organizations have particular characteristics not shared by other entities and conduct their business in a manner unlike other business entities. W. Va. Code § 11-23-5(a) (1996); W. Va. Code § 11-24-7(b) (1996). Therefore, the creation of a rebuttable presumption for financial organization and not for corporations in general was rational, and the Legislature's decision to treat the two differently should not have been ignored by the Circuit Court. Furthermore, the introduction of a physical presence requirement in the absence of a rebuttable presumption is contrary to Syl. Pt. 2 in *MBNA*.

Additionally, the Circuit Court erred when it created a privity requirement for corporations without a physical presence. The Circuit Court relied upon a law review article written by Sheldon Laskin, who works for the MultiState Tax Commission. Mr. Laskin is counsel to the MultiState Tax Commission; however, he is not its General Counsel as indicated in Footnote 32 of the Respondent's brief. Resp. Br. 33. More to the point, ConAgra appears to imply that the MultiState Tax Commission disagrees with the assessment of taxes on ConAgra. Nothing could be further from the truth. The MultiState Tax Commission conducted the audit at issue in this case and in doing so was well aware of the lack of privity between ConAgra and the West Virginia customers who purchased the goods to which ConAgra's trademarks and tradenames are affixed.¹⁴

¹⁴Respondent cites the Laskin article for the proposition that when a licensor has neither a legal nor a contractual relationship with the retailers in a taxing state, but only has such a relationship with an intervening licensee, only the licensee is properly subject to income tax on the amounts received from the sale of licensed products. Resp. Br. 33. He quotes an example from the article about a book author, who typically has neither a legal nor a contractual relationship with the retail sellers of the books, but rather has only a contractual relationship with the publisher of the book. Under this example, Respondent claims the
(continued...)

Furthermore, the Court's conclusion disregards the economic realities of trademark and tradename licensing transactions. The realities are that the licensor of the trademark or tradenames retains the property right in these intangibles and makes contractual demands of its licensees, including the maintenance of quality, maintenance of goodwill, and the payment of royalties. In exchange for that, the licensees receive the right to use the trademarks or tradenames in developing, distributing, marketing, and selling licensed goods in the United States, including West Virginia. Thus, under this arrangement ConAgra permits its licensees to sell the trademarked or tradenamed products in West Virginia, and ConAgra financially benefits from those sales. Ownership of the trade names and trademarks would be virtually worthless without this penetration of economic markets by ConAgra's licensees.

Furthermore, the Circuit Court adopted ConAgra's position that it should not be taxed because after it licenses its trademark or tradename for use in West Virginia it does virtually nothing more. As

¹⁴(...continued)

book author should not be taxed. The Iowa Supreme Court rejected this precise hypothetical as follows:

The hypothetical fails for several reasons. First, slight presence in a state has never been held sufficient to establish a "substantial nexus" under the dormant Commerce Clause, and a truly *de minimis* economic presence by a book author should not be subject to tax. See *Nat'l Geographic Soc'y* [v. Cal. Bd. of Equalization, 430 U.S.551(1977)] at 556. Moreover, royalties earned by an author of a book are ordinarily paid by a publisher to the author, not by a local retailer. The income from a book deal thus arises out of the contract between the publisher and the author. The relationship between the publisher and the local retailer has no relevance for purposes of *income taxation*. See *Fatale*, 23 Hofstra L.Rev. at 450; Laskin, 22 Akron Tax J. at 25-26. Further, if the states become overly aggressive in their tax policy, Congress has the express authority to intervene under the Commerce Clause.

KFC Corp. V. Iowa Dept. Of Revenue, 792 N.W.2d 308, at 325 (parallel citations omitted).

further support for the fact that ConAgra has substantial economic nexus with West Virginia, this Court needs to look no further than Footnote 11 of the *MBNA* opinion. *MBNA*, 220 W. Va. at 168, 640 S.E.2d at 231.

ConAgra reads this footnote as the Court's indication that it rejects the holdings of the cases from other jurisdictions where intangibles are subject to tax because the trademarks and tradenames generate revenue in those jurisdictions. The Court's acknowledgment of these cases' limited persuasiveness to the *MBNA* facts is not a wholesale rejection of the cases' application to the issue of intangible taxation. It appears to be a signal that when the issue of the taxation of intangibles is raised, the intangible cases from our sister states will be given weight. Indeed, the Iowa Supreme Court, which characterized the *MBNA* case as "the frontier of state assertions of nexus to tax out-of-state entities," concluded that intellectual property such as tradenames and trademarks "arguably have a stronger nexus to the host jurisdiction than credit cards and other lending transactions." *KFC Corp. v. Iowa Dept. Of Revenue*, 792 N.W. 2d 308, 322 (Iowa 2010).

In summary, ConAgra and the Circuit Court ignore the fundamental reality that (A) the trademarks and tradenames have value and (B) ConAgra's royalties are dependent on its intangibles being used in West Virginia. Furthermore, this Court's holding in *MBNA* supports the imposition of tax here. Just as in *MBNA*, ConAgra's income for sales in West Virginia is dependent on someone else's product.¹⁵ *MBNA* received no income absent a sale of someone else's product. Similarly, without a turkey to attach the Butterball trademark to, ConAgra receives no revenue. The fact that ConAgra's activities are one step removed from *MBNA*'s extension of credit to West Virginia customers is true but not dispositive. The commonality between *MBNA* and ConAgra – that is, sales

¹⁵Sometimes as noted herein, the product belongs to its parent or a related subsidiary.

of someone else's product in West Virginia resulting in income – is stronger than the lack of direct privity with the customer. This is especially true when the tangible property to which ConAgra's trademarks or tradenames are attached belong to its parent or a subsidiary of its parent. (The parties stipulated that ConAgra derived its income from royalty payments it receives from the various licensees for use of the trademarks and tradenames including ConAgra Foods, Inc., its owner, subsidiaries of ConAgra Foods, Inc., and unrelated parties. App., Vol. 5, 00962, ¶9.)

The Respondent's turkey farmer analogy ignores the trigger for taxation. Here ConAgra is being taxed because it owns the intangibles, trademarks or tradenames, that are on products sold in West Virginia. As a result of sales to customers here, ConAgra generates revenue. In contrast to how ConAgra makes its money, the turkey farmer in the Respondent's hypothetical generates income outside of West Virginia where he sells the turkey.

Therefore, the question for this Court is whether the owner of the intangibles, which receives income because of sales to West Virginia customers, can escape taxation. Just as *MBNA* paid tax because it extended credit to West Virginia customers, ConAgra must pay taxes because it used its intangibles to induce West Virginia customers to buy goods, thereby producing royalty income. The fact that ConAgra has no direct relationship with the customer makes the imposition of taxes more compelling because it is relying on a number of related and unrelated entities to generate revenue. Furthermore, the amount of stores where goods with its trademarks or tradenames are sold, far exceeds those where the intangible company is intertwined with the retailer.

In closing, contrary to the Respondent's characterization of the intangible cases from other jurisdictions as distinguishable, these cases were decided because the intangibles' presence in the

various jurisdictions was the engine that generated the revenue being taxed.¹⁶ See *KFC Corp.*, 792 N.W.2d at 323 (the presence of transactions within the state that give rise to KFC's revenue provide a sufficient nexus under established Supreme Court precedent).

IV

CONCLUSION

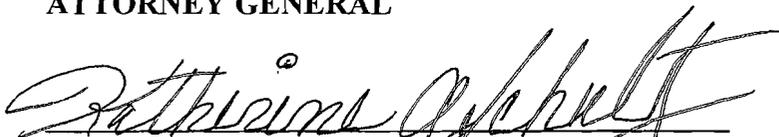
The Tax Commissioner requests reversal of the Circuit Court's decision and reinstatement of the CNIT and BFT tax assessments at issue in this case.

Respectfully submitted,

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STATE TAX COMMISSIONER,**

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¹⁶The Respondent attempts to lessen the impact of the near uniform decisions of our sister jurisdictions which find that an intangible is taxed in the jurisdiction in which revenue is generated by erroneously suggesting that the cases are distinguishable. Specifically, the Respondent points to the fact that most, if not all of the cases, involves companies with a relationship and/or IHC's who were formed for the express purpose of paying no tax anywhere. However, as pointed out by the Iowa Supreme Court, these cases were decided because it was proper to impose the taxes where the revenue was generated.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0252

CRAIG A. GRIFFITH, WEST VIRGINIA
STATE TAX COMMISSIONER,

Respondent Below, Petitioner,

v.

CONAGRA BRANDS, INC.,

Petitioner Below, Respondent.

CERTIFICATE OF SERVICE

I, Katherine A. Schultz, Senior Deputy Attorney General and counsel for Petitioner, do hereby certify that a true and exact copy of the foregoing *Tax Commissioner's Reply Brief* was served Via Facsimile 304-267-3822 and by United States Mail to all counsel, postage prepaid, this 15th day of July 2011, addressed as follows:

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