

NOTICE OF APPEAL OF APPELLANT NEWEGG, INC.

Appellant Newegg, Inc. (“Newegg”) hereby gives notice of its appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from the Decision and Order (“Decision”) of the Board of Tax Appeals (“Board”) journalized on February 26, 2015, in *Newegg, Inc. v. Joseph W. Testa, Tax Commissioner of Ohio*, being BTA Case No. 2012-234. A true copy of the Decision being appealed is attached hereto and incorporated by reference herein.

INTRODUCTION

In this case, the Tax Commissioner of Ohio (the “Commissioner”) assessed Appellant, Newegg, Inc., the state’s commercial activity tax (the “CAT”), even though neither Newegg, nor any other person acting on its behalf, conducted any activities in Ohio during the relevant period. As the Board explained it in its decision, the Commissioner imposed the CAT strictly because “the [C]ommissioner determined that Newegg had [statutory] substantial nexus with this state, *i.e.*, a ‘bright line presence’ in the state because it had at least \$500,000 [per year] in taxable gross receipts for the periods assessed. R.C. 5751.01(H)(3); R.C. 5751.01(I)(3); R.C. 5751.033(E) (as such section were numbered in July 2005).” [Decision at 4 (brackets added)]. The Board concluded that, with the statutory sales threshold met and nothing more, imposition of the CAT was obligatory. [Decision at 4 (“[W]e are constrained to follow the mandate of the General Assembly in concluding that appellant, an out-of-state seller, has [statutory] substantial nexus within this state by virtue of its gross receipts for the reporting periods in question.”) (second bracketed term added)].

In proceedings below, Newegg did not dispute, nor does it dispute here, that its gross receipts from interstate sales to Ohio consumers exceeded the statutory threshold of \$500,000 annually. Newegg’s challenge—as asserted in its petition for reassessment before the

Commissioner, in its appeal to the Board, and now—is based upon the Commerce Clause of the United States Constitution.

Newegg has consistently asserted that, as applied to Newegg, the CAT statute violates Commerce Clause principles, because Newegg lacks “substantial nexus” with Ohio under the standards established by the Supreme Court in cases involving gross receipts taxes like the CAT, including, but not limited to, *Standard Pressed Steel, Inc. v. Wash. Dep’t of Revenue*, 419 U.S. 560 (1975), and *Tyler Pipe Indus., Inc. v. Wash. Dep’t of Revenue*, 483 U.S. 232 (1987). This “as applied” challenge was properly raised below. [See Decision at 3 (quoting para. 6 of Newegg’s notice of appeal) (“*Application of the CAT to Newegg would violate principles of the Commerce Clause of the United States Constitution...*” (italics added).)]¹

As a corollary to its “as applied” constitutional challenge, Newegg has consistently urged both the Commissioner and the Board that, in order to preserve the CAT statute’s constitutionality, the statute should be interpreted, in the first instance, so that it does not apply to Newegg. See, e.g., *Buchman v. Board of Educ.*, 73 Ohio St. 3d 260, 269 (1995) (“where a statute reasonably allows for more than a single construction or interpretation, it is the duty of the court to choose that construction or interpretation which will avoid rather than raise serious questions as to its constitutionality”). Newegg offered interpretations of multiple provisions of the CAT that could be reasonably interpreted by the Commissioner and the Board to avoid causing the CAT statute to violate the Constitution by imposing tax on a business—Newegg—that lacked “substantial nexus” with the state. [See Decision at 2-3 (quoting paras. 1-5 of Newegg’s notice of appeal).] Under these interpretations, Newegg would not be liable for the CAT.

¹ Any assertion that Newegg did not present an as-applied challenge to the Commissioner and the Board would be frivolous.

Citing its limited role in cases involving constitutional challenges, the Board declined to rule on either the constitutional issues or the related statutory interpretation arguments raised by Newegg below. Instead, the Board explained that the parties “have set forth their respective positions regarding the constitutional validity of the commissioner’s application of the statutory provisions in question *** and we find such arguments may only be addressed on appeal by a court which has the authority to resolve constitutional challenges.” [Decision at 3 (citation omitted).]

It is well-established that the Board’s role is to receive evidence for constitutional challenges and that it may not declare a statute unconstitutional. *See, e.g., MCI Telecommunications Corp. v. Limbach*, 68 Ohio St.3d 195, 197-98 (1995).² However, Newegg’s statutory interpretation contentions would have permitted the Board to resolve the appeal *without* declaring the CAT unconstitutional on its face or as applied, consistent with the Board’s duty to construe the statute in a manner to preserve its constitutionality. *E.g., Buchman*, 73 Ohio St. 3d at 269 (duty of tribunal to choose a construction of a statute that will avoid serious constitutional questions). Nevertheless, the Board concluded that the terms of the CAT statute are unambiguous and require resolution of Newegg’s appeal by this Court through a declaration concerning the statute’s constitutionality. [Decision at 4 (“[W]e are constrained to follow the mandate of the General Assembly in concluding that appellant, an out-of-state seller, has substantial nexus within this state by virtue of its gross receipts”).] In declining to give the CAT statute a reasonable interpretation consistent with the Constitution, the Board erred.

² In that regard, the Board over-stepped its authority in one respect in its Decision. It determined that the pertinent CAT statutes, “under the plain language set forth therein,” do not require that a company have an in-state presence in order to be subject to the CAT. [Decision at 4.] Such a reading interprets the CAT in a manner which is at odds with the limitations on state taxing power under the Commerce Clause, necessarily rendering the CAT unconstitutional.

The Board also failed to recognize that it has the authority to apply binding precedent regarding the constitutionality of state statutes. *See Marysville Exempted Village Sch. Dist. Bd. of Educ. v. Union County Bd. of Revision*, 2013 Ohio 3077, ¶ 15, 136 Ohio St. 3d 146, 150 (limits on Board’s jurisdiction over constitutional questions do not preclude it from giving effect to binding precedent). Because the United States Supreme Court has held in multiple cases that gross receipts taxes like the CAT are subject to the constitutional standards of “substantial nexus,” including specifically the “physical presence” requirement described by the Court, the Board should have applied such clear authority to invalidate the CAT assessment against Newegg. *See, e.g., Standard Pressed Steel*, 419 U.S. 560 (1975) and *Tyler Pipe*, 483 U.S. 232 (1987). The Board’s failure to reverse the final determination of the Commissioner was error.

As a result of the proceedings below, this case arrives at the Supreme Court of Ohio with a complete evidentiary record from the Board—including exhibits and live testimony from fact witnesses and experts—on Newegg’s constitutional and related statutory arguments. The Court now properly has jurisdiction to determine the necessary facts and resolve all of the as-applied constitutional issues and questions of statutory interpretation presented by Newegg’s appeal, despite the Board’s Decision not to make any findings or rulings below.

In addition, Newegg hereby invokes the jurisdiction of the Court to determine whether the gross receipts “bright line presence” provision of the CAT statute, R.C. 5751.01(I)(3), on its face, violates the Commerce Clause of the Constitution. No extrinsic facts are required to make such a determination. Newegg’s standing as a company that satisfies the threshold of \$500,000 in annual gross receipts is alone enough to establish this Court’s authority to consider the issue. *See, e.g., Global Knowledge Training, L.L.C. v. Levin*, 2010 Ohio 4411, ¶¶ 16, 17, 127 Ohio St.3d 34, 38 (a facial challenge to the constitutionality of a statute, which is made without regard to extrinsic facts, may be raised initially on appeal before the Ohio Supreme Court); *Palazzi v.*

Estate of Gardner, 32 Ohio St. 3d 169, 175 (1987) (a party within the class to whom the statute applies has standing to challenge its constitutionality).

ERRORS TO BE REVIEWED AND PROPOSITIONS OF LAW PRESENTED

Newegg complains of the following errors in the Board's Decision, and sets forth the following propositions of law concerning the constitutional and other questions as to which this Court has jurisdiction, but which the Board declined to address. Newegg also asserts a facial challenge to R.C. 5751.01(I)(3).

1. The Board erred by upholding the final determination of the Commissioner against Newegg because the evidence presented to the Board established that the CAT could not be imposed upon Newegg consistent with the requirements of the Commerce Clause of the United States Constitution, under long-standing and binding precedent of the United States Supreme Court, including, but not limited to, *Tyler Pipe*, 483 U.S. 232 (1987), and *Standard Pressed Steel*, 419 U.S. 560 (1975). Consistent with these binding precedents, Newegg lacked the in-state business activities necessary to establish the "substantial nexus" required for the State of Ohio to have constitutional authority to impose the CAT on Newegg. The Board had jurisdiction and authority to apply such precedents. *Marysville Exempted Village Sch. Dist.*, 2013 Ohio 3077, ¶ 15, 136 Ohio St. 3d 146, 150 (Board may give effect to binding precedent on constitutional issues).

2. The Board erred by upholding the final determination against Newegg because the evidence presented to the Board established that the CAT assessments against Newegg are not supported by the terms of the CAT statute, when the statute is properly construed to avoid constitutional infirmities. The Board erred in not interpreting the CAT statute to avoid presenting serious constitutional questions regarding the statute. *See Buchman*, 73 Ohio St. 3d at 269. Multiple provisions of the CAT statute may be reasonably construed so as to prevent its

application to Newegg, a company that lacked the in-state presence required by the Commerce Clause to permit the imposition of the CAT on its gross receipts under long-standing Supreme Court precedent, including:

(a) R.C.5751.02: Because the evidence showed that Newegg engaged in no activity within Ohio, and neither owns nor leases property in the state, the company was not “doing business in this state” within the meaning of R.C. 5751.02;

(b) R.C. 5751.01(H)(3) & (I)(3): Although Newegg had gross receipts from sales to Ohio residents in excess of \$500,000 annually, such receipts are not “taxable gross receipts” within the meaning of R.C. 5751.01(I)(3), in that none of its gross receipts are subject to taxation in Ohio because the Commissioner lacks the authority to impose the CAT on Newegg, so that Newegg lacks “bright line presence” in the state under R.C. 5751.01(H)(3);

(c) R.C. 5751.01(F)(2)(jj) (formerly codified at R.C. 5751.01(F)(2)(aa)): Newegg’s receipts from sales to Ohio residents are not subject to the CAT because the term “gross receipts” under R.C. 5751.01(F)(2)(jj) excludes “[a]ny receipts for which the tax imposed by this chapter is prohibited by the constitution or laws of the United States.” Because the Commissioner lacks the authority to impose the CAT on Newegg, taxation of its receipts from sales to Ohio residents is prohibited by the Constitution.

These provisions of the CAT statute should be interpreted to avoid the imposition of the CAT on Newegg. While the Board had jurisdiction to enter such an order because it would not have involved a declaration that the CAT statute is unconstitutional, this Court now has the necessary

jurisdiction and authority to interpret the CAT statute to avoid serious constitutional infirmities in the law.

3. The Board likewise erred by upholding the final determination against Newegg because the evidence presented to the Board established that the CAT assessments against Newegg are not supported by any of the other provisions of the CAT statute, nor did the Commissioner allege that such provisions supported the final determination. In particular, the evidence established that the following provisions did not apply to Newegg:

(a) R.C. 5751.01(H)(1), (2) and (4): Newegg lacked statutory “substantial nexus with this state” under R.C. 5751.01(H)(1), (2) and (4), in that Newegg did not own or use “part or all of its capital in this state,” lacked a “certificate of compliance with the laws of this state authorizing [it] to do business in this state,” and did not “otherwise [have] nexus in this state . . . under the Constitution of the United States.”

(b) R.C. 5751.01(H)(3) and 5751.01(I)(1), (2), (4) & (5): Newegg lacked statutory “‘bright line presence’ in this state” under R.C. 5751.01(H)(3) and 5751.01(I)(1), (2), (4) & (5) in that Newegg did not have in Ohio at any time (i) property with an aggregate value of at least fifty thousand dollars, (ii) payroll of at least \$50,000, (iii) twenty-five or more percent of its total property, total payroll or total receipts, or (iv) domicile for corporate, commercial or other business purposes.

If any of these provisions is asserted by the Commissioner before this Court as a basis for upholding the final determination or the Board’s Decision, this Court has jurisdiction and authority to rule that none of these provisions is a basis for sustaining the assessments, final determination or Decision.

3. The Board's Decision affirming the final determination should be reversed, and the assessments cancelled, because the CAT statute is unconstitutional as applied to Newegg. In particular, if interpreted to require the imposition of the CAT against Newegg, R.C. 5751.01(H)(3), (I)(3), (I)(4) & (F)(2)(jj), and R.C. 5751.02, or any of them, are unconstitutional as applied. Imposition of the CAT on Newegg violates the "substantial nexus" standards of the Commerce Clause of the U.S. Constitution, as established by the Supreme Court in numerous decisions. *See, e.g., Tyler Pipe*, 483 U.S. 232; *Standard Pressed Steel*, 419 U.S. 560; *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977); *National Bellas Hess v. Ill. Dep't of Revenue*, 386 U.S. 753 (1967); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617, 626 (1981); *Goldberg v. Sweet*, 488 U.S. 252, 263 (1989); *Norton Co. v. Ill. Dep't of Revenue*, 340 U.S. 534, 537 (1951). Merely obtaining gross receipts in excess of \$500,000 annually does not establish constitutional "substantial nexus" under long-standing Supreme Court authority, so applying the CAT statute based solely on Newegg's gross receipts violates the Constitution. Furthermore, because the evidence shows that Newegg engaged in no business activities within the State of Ohio sufficient to satisfy the constitutional "substantial nexus" standards established by the Supreme Court, application of the CAT to Newegg on any other basis, whether separate from or together with its gross receipts, is also unconstitutional. This Court has the jurisdiction and authority to make the necessary findings of fact and rulings of law to declare the CAT statute unconstitutional as applied to Newegg. *E.g., MCI Telecommunications Corp.*, 68 Ohio St.3d 197-98 (Board of Tax Appeals receives evidence for an as applied challenge, but this Court determines the facts and resolves the constitutional questions).

4. The Board's Decision affirming the final determination against Newegg should be reversed, and the assessments cancelled, because the Ohio CAT statute is unconstitutional on its

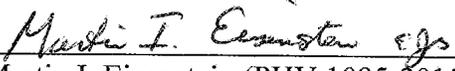
face, without regard to any extrinsic facts. By operation of the CAT statute according to its plain terms, the gross receipts “bright line” presence provision set forth in R.C. 5751.01(I)(3) requires the CAT to be imposed on a company solely because the company meets a statutory threshold of \$500,000 in annual gross receipts from interstate sales to Ohio consumers, irrespective of whether the company has the in-state presence required under the “substantial nexus” standards established by the Supreme Court under the Commerce Clause. A declaration by this Court that R.C. 5751.01(I)(3) is unconstitutional and unenforceable, on its face, and a ruling striking it from the statute, will eliminate the constitutional defect in the CAT statute. The Court has jurisdiction over Newegg’s facial challenge. *E.g., Global Knowledge Training*, 2010 Ohio 4411, ¶¶ 16, 17, 127 Ohio St.3d 34, 38 (Court has jurisdiction to consider facial challenges presented to it).

5. Finally, in its Decision, the Board stated as follows: “The parties hereto agree that Newegg has not challenged the constitutionality of the relevant statutes, but has instead, challenged the commissioner’s conclusion that Newegg is liable for the commercial activity tax, which Newegg argues is prohibited by the U.S. Constitution.” [Decision at 3.] Newegg understands this sentence to mean that the Board believed Newegg was not presenting to the Board a *facial* constitutional challenge to the CAT, but was asserting—as plainly stated in paragraph 6 of its notice of appeal to the Board—that the *application* of the CAT to Newegg violates (“is prohibited by”) the Constitution. If, however, the above-quoted sentence from the Decision means that Newegg did not assert an as-applied challenge before the Board, that conclusion is clearly erroneous. [See Decision at 3 (quoting Newegg’s notice of appeal, para. 6) (“*Application of the CAT to Newegg would violate the Company’s rights under the Commerce Clause . . .*”) (italics added).] As noted in paragraph 4, above, Newegg asserts before this Court a facial challenge, in addition to its as-applied challenge to the CAT under the Commerce Clause.

CONCLUSION

For all of the foregoing reasons, Newegg respectfully requests that the Decision of the Board be reversed. Newegg requests that final judgment be entered in its favor voiding the Board's Decision and the CAT assessments at issue in this appeal.

Respectfully submitted,


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**BEFORE THE BOARD OF TAX APPEALS
STATE OF OHIO**

Newegg, Inc.,	:	Case No. _____
	:	
Appellant,	:	
	:	Appeal from the Ohio
v.	:	Board of Tax Appeals
	:	
Joseph W. Testa,	:	
Tax Commissioner of Ohio,	:	
	:	BTA Case No. 2012-234
Appellee.	:	

PRAECIPE

TO THE OHIO BOARD OF TAX APPEALS

Demand is hereby made that the Ohio Board of Tax Appeals (“Board”) prepare, transmit and file with the Supreme Court of Ohio a certified transcript of the records and proceedings of the Board pertaining to its Order in the above-styled matter; including in said certified transcript, the Board’s Order, the original papers in the case or a transcript thereof, and all evidence with originals or copies of all exhibits as adduced in said proceeding considered by the Board in making its Order.

Respectfully submitted,



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One of the Attorneys for Appellant
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PROOF OF SERVICE UPON OHIO BOARD OF TAX APPEALS

This is to certify that the Notice of Appeal of Newegg, Inc., was filed by hand delivery with the Ohio Board of Tax Appeals, State Office Tower, 30 East Broad Street, 24th Floor, Columbus, Ohio as evidenced by its date stamp as set forth hereon.



Edward J. Bernert (0025808)
One of the Attorneys for Appellant
Newegg, Inc.

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Notice of Appeal of Appellant Newegg, Inc. was sent by certified U.S. mail to Appellee Joseph W. Testa, Tax Commissioner of Ohio, 30 East Broad Street, 22nd Floor, Columbus, Ohio 43215; and to counsel of record for Appellee Tax Commissioner, by certified mail and hand delivery to The Honorable Mike DeWine, Attorney General of Ohio, Christine T. Mesirov and Daniel W. Fausey, Assistant Attorneys General, State of Ohio, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3428, on this 25th day of March, 2015.



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One of the Attorneys for Appellant
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OHIO BOARD OF TAX APPEALS

NEWEGG, INC., (et. al.),

CASE NO(S). 2012-234

Appellant(s),

(COMMERCIAL ACTIVITY TAX)

vs.

DECISION AND ORDER

JOSEPH W. TESTA, TAX COMMISSIONER OF
OHIO, (et. al.),

Appellee(s).

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Entered Thursday, February 26, 2015

Mr. Williamson and Mr. Harbarger concur.

This matter is considered by the Board of Tax Appeals upon a notice of appeal filed on behalf of appellant Newegg, Inc. ("Newegg"). Newegg appeals from a final determination of the Tax Commissioner in which the commissioner affirmed six commercial activity tax assessments against Newegg. The subject assessments relate to periods from July 1, 2005 through December 31, 2009, the first through fourth quarters of 2010, and the first quarter of 2011. This matter is considered by the Board of Tax Appeals upon the notice of appeal, the statutory transcript ("S.T.") certified to this board by the Tax Commissioner, the record of this board's hearing ("H.R."), and any written argument filed by the parties. We note that Appellee's exhibits 4-11, 22-24, 30, 36, and 39-43, as jointly redacted by the parties, are received into evidence.

In its brief, Newegg, which is headquartered in Industry, California, describes itself as selling

"computer-related products, including gaming products, to consumers across the United States, including consumers residing in the State of Ohio. *** Newegg is a pure online retailer, meaning that it sells its products *only* online. *** It does so via an Internet website *** located on the Company's servers in California and New Jersey. *** Separate legal entities operate a Newegg website in China ***. Customers located anywhere in the world other than China and Canada access the same website to purchase Newegg products ***. *** The Company has warehouses and other physical locations only in Tennessee, California, and New Jersey. ****" (Emphasis sic.). Newegg Brief at 8. Before this board, Newegg presented extensive testimony and evidence relating to the operations of its website, its email promotions and online advertising, and its participation in comparison websites and an internet affiliate program, as well as its non-internet based marketing efforts. Newegg Brief at 10-23.

In its notice of appeal to this board, Newegg specified the following:

"1. Because Newegg engages in no commercial activity within the State of Ohio and, likewise, neither owns nor leases property in the state, either directly or indirectly, the Company is not 'doing business in the state' under R.C. 5751.02. The Commercial Activity Tax, therefore, does not apply.

"2. Newegg lacked a 'substantial nexus with this state' under R.C. 5751.01(H) inasmuch as it (a) neither owned nor used 'part or all of its capital in this state' [R.C. 5751.01(H)(1)]; (b) lacks a 'certificate of compliance with the laws of this state authorizing [it] to do business in this state' [R.C. 5751.01(H)(2)]; and (c) does not 'otherwise [have] nexus in this state...under the constitution [sic] of the United States.' [R.C. 5751.01(H)(4)].

"3. Newegg lacked a "'bright-line presence" in this state' under R.C. 5751.01(H)(3) & (I) inasmuch as it did not have: (a) 'at any time during the calendar year property in this state with an aggregate value of at least fifty thousand dollars' [R.C. 5751.01(I)(1)]; (b) 'during the calendar year payroll in this state of at least fifty thousand dollars' [R.C. 5751.01(I)(2)]; (c) during the calendar year 'taxable gross receipts of at least five hundred thousand dollars,' inasmuch as (i) none of its gross receipts are subject to taxation in Ohio; and (ii) it had no taxable sales within the State of Ohio [R.C. 5751.01(I)(3)]; or (d) 'during the calendar year within this state at least twenty-five per cent of the person's total property, total payroll, or total receipts.' [R.C. 5751.01(I)(4)]. In addition, Newegg was not 'domiciled in this state as an individual or for corporate, commercial, or other business purposes.' [R.C. 5751.01(I)(5)].

"4. Newegg's receipts are not subject to taxation because, under R.C. 5751.01(F)(2)(ff), such tax is 'prohibited by the Constitution or laws of the United States... .'

"5. Ohio statutes should be interpreted to avoid the imposition of the CAT on Newegg, inasmuch as imposing the tax on Newegg would violate the

Company's rights under the Commerce Clause of the United States Constitution. ***

"6. Application of the CAT to Newegg would violate the Company's rights under the Commerce Clause of the United States Constitution since Newegg does not possess the requisite 'bright-line' physical presence in Ohio. *** Since the bright-line physical presence test applies to taxes like the CAT, the assessments are void in their entirety, and the Determination should be vacated.

"7. The penalty should be abated. The Commissioner erred in arbitrarily and capriciously assessing penalties for each of the aforesaid reasons, and in light of Newegg's good faith reliance upon existing federal constitutional law in regard to the application of the 'substantial nexus' test to cases involving gross receipts taxes, as well as sales and use taxes and other state taxes." Notice of Appeal at 5-7.

Initially, we note that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Belgrade Gardens, Inc. v. Kosydar* (1974), 38 Ohio St.2d 135; *Ohio Fast Freight v. Porterfield* (1972), 29 Ohio St.2d 69; *National Tube v. Glander* (1952), 157 Ohio St. 407. The taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Federated Department Stores v. Lindley* (1983), 5 Ohio St.3d 213.

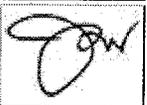
The parties hereto agree that Newegg has not challenged the constitutionality of the relevant statutes, but has instead, challenged the commissioner's conclusion that Newegg is liable for the commercial activity tax, which Newegg argues is prohibited by the U.S. Constitution. Specifically, Newegg claims its gross receipts are excluded from the CAT, pursuant to the U.S. Constitution, Commerce Clause, and the "substantial nexus" and corresponding "in-state presence" analysis thereunder. See R.C. 5751.01(F)(2)(z) (as such section was numbered in July 2005).

Upon review of the arguments raised, we find this board's pronouncement in *L.L. Bean, Inc. v. Levin* (Mar. 6, 2014), BTA No. 2010-2853, unreported, settled on appeal (Nov. 20, 2014), 11/20/2014 Case Announcements, 2014-Ohio-5119, to be controlling, to the extent Newegg raises constitutional claims. As we held in *L.L. Bean*, "this board makes no findings with regard to the constitutional questions presented. The parties, through the presentation of evidence and testimony and the submission of briefs to this board, have set forth their respective positions regarding the constitutional validity of the commissioner's application of the statutory provisions in question *** and we find such arguments may only be addressed on appeal by a court which has the authority to resolve constitutional challenges." *Id.* at 6-7. See, also, *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195; *S. S. Kresge Co. v. Bowers* (1960), 170 Ohio St. 405, paragraph one of the syllabus; *Herrick v. Kosydar* (1975), 44 Ohio St. 2d 128, 130; *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St. 3d 7, 8; *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229, paragraph one of the syllabus. Any constitutional implications of the relevant statutory provisions must be considered by a tribunal that has jurisdiction over such questions of constitutional interpretation.

Herein, based upon the applicable commercial activity tax statutory provisions, Newegg was assessed commercial activity tax for the periods in question. R.C. 5751.02(A). The commissioner determined that Newegg had substantial nexus with this state, i.e., a "bright-line presence" in the state, because it had at least \$500,000 in taxable gross receipts for the periods assessed. R.C. 5751.01(H)(3); R.C. 5751.01(I)(3); R.C. 5751.033(E) (as such sections were numbered in July 2005). Newegg, as L.L. Bean before it, contends that its gross receipts cannot be taxed under the commercial activity statutes under consideration herein because it lacks an "in-state presence," as required by the Commerce Clause, necessary to establish "substantial nexus." See *Quill Corp. v. North Dakota* (1992), 504 U.S. 298 (1992), *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987). Newegg Brief at 24, et seq. Even without considering any constitutional claims, however, we conclude, under the plain language set forth therein, the pertinent CAT statutes do not impose such an in-state presence requirement. See *L.L. Bean*, supra.

As we stated in *L.L. Bean*, supra, "[a] plain reading of the statutes under consideration provides that an entity has substantial nexus with this state if it has a bright-line presence in this state, which is defined as having taxable gross receipts of at least five hundred thousand dollars ***. While we recognize that an out-of-state seller must have "substantial nexus" with a taxing state, *Quill*, supra, we are also cognizant of the explicit statutory language of R.C. 5751.01(H), where, by definition, substantial nexus exists if any of the elements set forth in R.C. 5751.01(H)(1)-(4) are met. *** [W]e are constrained to follow the mandate of the General Assembly in concluding that appellant, an out-of-state seller, has substantial nexus within this state by virtue of its gross receipts for the reporting periods in question." *Id.* at 9-10.

Thus, following this board's precedent established in *L.L. Bean*, supra, it is the decision of the Board of Tax Appeals that the final order of the Tax Commissioner must be, and hereby is, affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Mr. Harbarger		

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