

In the Supreme Court of Ohio

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|---------------------------|---|-------------------------|
| Crutchfield, Inc., | : | |
| | : | Case No. 2015-0386 |
| | : | |
| Appellant, | : | |
| | : | Appeal from the Ohio |
| v. | : | Board of Tax Appeals |
| | : | |
| Joseph W. Testa, | : | |
| Tax Commissioner of Ohio, | : | |
| | : | BTA Case Nos. 2012-926, |
| Appellee. | : | 2012-3068, 2013-2021 |

**MOTION OF APPELLANT CRUTCHFIELD, INC. TO CONSOLIDATE
WITH APPEAL OF NEWEGG INC. (CASE NO. 2015-0483)**

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Appellant Crutchfield, Inc. (“Crutchfield”) hereby moves pursuant to S.Ct.Prac.R. 4.01(A)(1) and Civ.R. 42(A) to consolidate this appeal with the appeal filed by Appellant Newegg Inc. (“Newegg”), docketed as Case No. 2015-0483. A similar motion will be filed by Newegg promptly upon restoration of Case No. 2015-0483 to the active docket from mediation. Each appeal presents essentially identical questions regarding the constitutionality of the Commercial Activity Tax when applied to the gross receipts of companies located outside of Ohio. Consolidation of the cases will facilitate the Court’s review of the important constitutional issues presented and promote the efficient use of judicial resources. The Court should grant the motion.

Crutchfield requested the Commissioner’s assent to this motion on May 1, 2015 and, again, on May 7, 2015. The Commissioner is still considering whether to consent to the motion.

ARGUMENT

I. Consolidation Is Within the Sound Discretion of the Court Where Two Cases Present a Common Issue.

Whether to consolidate two or more pending cases is entrusted to the sound discretion of the Court in the efficient and just administration of its docket. Civ.R. 42(A) provides:

When actions involving a common question of law or fact are pending before a court, that court after a hearing may order a joint trial or hearing of any or all the matters in issue in the actions; it may order some or all of the cases consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

The sole criterion limiting the exercise of the Court’s discretion is that the cases must share a common issue of law or fact. *Dir. of Highways v. Kleines*, 38 Ohio St.2d 317, 320, 313 N.E.2d 370 (1974). Not all questions of law and fact must be identical in order for consolidation to be appropriate. *Clemente v. Gardner*, 5th Dist. Licking No. 2002CA00120, 2004–Ohio–2254, ¶ 18.

Nor is the consent of all parties required as a condition of consolidation under Civ.R. 42(A).
Dir. of Highways, 38 Ohio St.2d at 319.

II. The *Crutchfield* and *Newegg* Appeals Are Nearly Identical and Present Many Common Issues.

The *Crutchfield* and *Newegg* appeals share not merely one, but multiple common issues. Each case is an appeal from a decision of the Board of Tax Appeals (the “Board”) affirming a final determination of the Tax Commissioner that sustained an assessment of Commercial Activity Tax (“CAT”) against the company. Each appellant is an online retailer of consumer goods located outside of Ohio that sold products directly to consumers nationwide, including consumers in Ohio, via the Internet. *Crutchfield* also distributed mail order catalogs. Neither appellant had any agents or representatives performing activities in Ohio on its behalf that are significantly associated with the appellant’s ability to establish and maintain a market in Ohio. Nor did either appellant have any offices, facilities, property or employees located in Ohio at any time during the relevant period (2005-2011). Goods purchased by Ohio customers from each appellant were delivered by common carrier from distribution centers located outside of the state.

Neither *Crutchfield* nor *Newegg* reported Commercial Activity Tax during the relevant time period on its gross receipts from sales to Ohio consumers, because each company determined that it had no obligation to do so under the “substantial nexus” standard for state taxes applicable under the Commerce Clause of the United States Constitution. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) (“substantial nexus” is first prong of the four prong test for state taxes); *Tyler Pipe Industries, Inc. v. Wash. Dept. of Revenue*, 483 U.S. 232, 250, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987) (substantial nexus standard in context of gross receipts taxes). The Commissioner, however, issued CAT assessments to each company based solely upon its gross receipts from sales to Ohio

purchasers. Each company sought reassessment by the Commissioner and subsequently appealed the Commissioner's denial of its petition for reassessment to the Board, which issued parallel decisions in each appeal on February 26, 2015.

As is evident from the nearly identical Notices of Appeal filed with the Court by both Crutchfield and Newegg, and from the matching Notices of Cross Appeal filed in response by the Commissioner in each case, these appeals reach the Court in the same procedural posture and present essentially identical issues. At their core, the central legal question presented in each case is whether the so-called "bright line presence" standard of \$500,000 in gross receipts under R.C. 5751.01(H)(3) and (I)(3) is at odds with the "substantial nexus" standard of the Commerce Clause. As recited by the Board in identical language (except for the company's name) in its Decision and Order in each case:

[B]ased upon the applicable commercial activity tax statutory provisions, [appellant] was assessed commercial activity tax for the periods in question. R.C. 5751.02(A). The commissioner determined that [appellant] 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).

(Emphasis added.) (*See, e.g.*, Notice of Appeal of Appellant Crutchfield, Inc. ("Crutchfield Notice"), Attachment at 4). The Board declined, however, on appeal to reach the question of whether the Commerce Clause prevented the imposition of the CAT against each appellant, due to the Board's understanding of the limitations on its authority over constitutional issues. (*See id.* at 3-4). At the same time, the Board concluded, based on its ruling in yet another, similar appeal (now settled) that the statutory gross receipts standard required affirmance of the Commissioner's determination: "[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.” (Citation omitted.) (*Id.* at 4).

Crutchfield and Newegg each challenge before this Court the constitutionality of the CAT’s gross receipts “bright line presence” standard, both as-applied to the company, and on its face. (*See* Crutchfield Notice at 9-10 (fourth and fifth errors/propositions of law) (incorrectly numbered 3 and 4)). All of the other issues presented by the appellants’ respective appeals are subsidiary to this principal constitutional question. Thus, each appellant also contends that Commissioner, and the Board on appeal, were obligated, in the first instance: (i) to enforce binding precedents of the United States Supreme Court with regard to the substantial nexus requirement for state gross receipts taxes, (*see id.* at 6 (first error/proposition of law)); and (ii) to interpret the relevant CAT provisions in a manner that would not conflict with the Constitution and would otherwise show the CAT to be inapplicable to the appellant, (*see id.*, at 6-9 (second and third errors/propositions of law)).

The Commissioner’s Notices of Cross Appeal in each case are likewise premised on identical grounds. In particular, the Commissioner argues that neither appellant properly alleged an as-applied challenge to the CAT before the Board, despite clearly contrary language in the appeals of both Crutchfield and Newegg. (*Compare* Notice of Cross Appeal at 7-8 (first through fourth errors) *with* Crutchfield Notice, Attachment at 3 (quoting Crutchfield’s appeal to the Board (“*Application of the CAT to Crutchfield* would violate principles of the Commerce Clause of the United States Constitution...” (Emphasis added.)))). The Commissioner does not dispute, however, that the appellants can assert a facial constitutional challenge to the CAT statute before this Court. (Notice of Cross Appeal at 7). While Crutchfield vigorously disputes the assertion that it has not properly preserved each of its challenges to the relevant provisions of the CAT, the Commissioner’s Notices of Cross Appeal present additional common issues and place even more

emphasis on the core question of the constitutionality of the gross receipts “bright line presence” standard of the CAT. The Commissioner’s Notices of Cross Appeal therefore reinforce the reasons for consolidating the two cases.

III. Consolidation Will Promote Judicial Efficiency.

In addition to the many common issues between the two cases, consolidation will further promote the efficient resolution of the appeals. Rather than addressing parallel proceedings presenting the same issues, the Court can resolve the important constitutional issues presented in a single appeal and through a single decision. Moreover, Crutchfield and Newegg are represented by the same counsel, as is the Commissioner, for both appeals. Consolidation will therefore promote efficiencies with respect to briefing and oral argument, as well.

Consolidation of the cases would require only modest adjustments in scheduling. The *Crutchfield* case was returned to the live docket from mediation on April 28, 2015. Mediation has been concluded in the *Newegg* case, and it will be returned to the live docket shortly. Crutchfield has separately moved for a stay in the briefing schedule in this case pending a ruling by the Court on its motion to consolidate. If the Court elects to consolidate the two cases, Crutchfield further requests that the deadline for the appellants to file a joint brief (or briefs, if the Court prefers a separate brief from each appellant) be extended to the later of: (a) forty (40) days from the date the Court rules on the motion to consolidate; or (b) forty (40) days from the date the Newegg appeal is restored to the live docket.

CONCLUSION

For all of the foregoing reasons, Crutchfield respectfully requests that the Court grant Crutchfield's motion to consolidate the two appeals and issue a new briefing deadline as proposed by Crutchfield.

Filed: May 8, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Motion of Appellant Crutchfield, Inc. to Consolidate with Appeal of Newegg Inc. (Case No. 2015-0483) was sent via the Court's electronic filing system and by U.S. mail to counsel of record for Appellee Tax Commissioner, Daniel W. Fausey and Christine T. Mesirow, Assistant Attorneys General, State of Ohio, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3428, on this 8th day of May, 2015.

s/ Edward J. Bernert
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One of the Attorneys for Appellant
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