

**In The
Supreme Court of Ohio**

CRUTCHFIELD, INC.,	:	
	:	
Appellant,	:	Case No. 15-0386
	:	
v.	:	Appeal from the Ohio Board of
	:	Tax Appeals, BTA Case Nos. 2012-926,
JOSEPH W. TESTA,	:	2012-3068, 2013-2021
TAX COMMISSIONER OF OHIO,	:	
	:	
Appellee.	:	

**APPELLEE TAX COMMISSIONER'S RESPONSE IN OPPOSITION TO MOTION TO
CONSOLIDATE OF APPELLANT CRUTCHFIELD, INC.**

Martin I. Eisenstein* (PHV 1095-2015)
*COUNSEL OF RECORD
David W. Bertoni (PHV 2436-2015)
Matthew P. Schaefer (PHV 2399-2015)
BRANN & ISAACSON
184 Main Street
P.O. Box 3070
Lewiston, Maine 04243-3070
Phone: (207) 786-3566
Fax: (207) 783-9325
meisenstein@brannlaw.com
dbertoni@brannlaw.com
mschaefer@brannlaw.com

Mike DeWine (0009181)
Ohio Attorney General

Daniel W. Fausey* (0079928)
*COUNSEL OF RECORD
Christine Mesirow (0015590)
Assistant Attorneys General
30 E. Broad Street, 25th Floor
Columbus, Ohio 43215
Phone: (614) 995-9032
Fax (866) 513-0356
daniel.fausey@ohioattorneygeneral.gov
christine.mesirow@ohioattorneygeneral

Edward J. Bernert (0025808)
BAKER HOSTETLER
65 E. State Street, Suite 2100
Columbus, Ohio 43215-4260
Phone: (614) 462-2687
Fax: (614) 462-2616
ebernert@bakerlaw.com

*Counsel for Appellee/Cross-Appellant
Joseph W. Testa, Tax Commissioner of Ohio*

Counsel for Appellant Crutchfield, Inc.

INTRODUCTION

Joseph W. Testa, Tax Commissioner of Ohio (“Commissioner”), hereby responds in opposition to Appellant Crutchfield Inc.’s (Crutchfield) Motion to Consolidate this appeal with *Newegg Inc. v. Testa*, Case Number 2015-0483.

These cases present the Court with its first opportunities to rule on the interpretation of certain statutory provisions of the Commercial Activity Tax (“CAT”) and the application of those statutes to out-of-state businesses that make substantial sales in Ohio. These issues are of great public importance to both the State and remote sellers and this Court should allow full briefing and full oral argument on each for that reason alone.

Moreover, it is likely that at least one of these appellants will seek review of this Court’s decision by the United States Supreme Court, should the BTA’s decision be affirmed. It will be far better to maintain the separateness of these appeals to keep the record for further appeal as clean and the decision as precise as possible.

LAW AND ARGUMENT

Consolidation of tax appeals for briefing and oral argument is improper in cases of first impression wherein the Board of Tax Appeals made few factual findings and reserved constitutional questions for review by this Court.

Consolidation of appeals to this Court is highly unusual. It is a departure from the standard practice and should not be undertaken in appeals where the BTA has made few, if any, factual findings.

The Board of Tax Appeals made very few findings of fact in this case because it didn’t need to. Indeed, the BTA’s short decisions expressly avoid making any factual findings, because they were based upon the plain language of the statutes involved. See, BTA orders at 4. As the statutes require, and the BTA held, Crutchfield and Newegg were responsible for remitting CAT

based on the unambiguous operation of the laws at issue. See, R.C. 5751.01(H) and (I); R.C. 5751.02; R.C. 5751.033; BTA Orders at 4.

Still, in the event that the BTA or this Court would entertain nexus arguments outside the plain statutory language, the parties introduced voluminous evidence in the form of documents, expert reports, and fact and expert witness testimony.

But the BTA expressly avoided addressing Crutchfield and Newegg's statutory interpretation arguments regarding the definition "taxable receipts," finding that such interpretation required a constitutional analysis that the BTA was powerless to undertake. See BTA Orders at 3-4. Regardless of whether the BTA's premise was right or wrong, the result is that the BTA left it to this Court to address Crutchfield and Newegg's issues of statutory interpretation. *Id.*

The Tax Commissioner believes that the plain language of the CAT statutes controls, and that this Court will largely avoid the need to rule on as-applied constitutional challenges, because they were not properly preserved below. Still, for Crutchfield and Newegg, a key issue in resolving the issue of statutory interpretation will be the analysis of the "substantial nexus" that appellants each maintain with Ohio. See, R.C. 5751.01(H) and (I); see, also *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 250-51 (1987).

Nexus is a fact-dependent inquiry, both by statute and by Supreme Court precedent (although, as explained in the Tax Commissioner's Notices of Appeal, this Court will not reach as-applied challenges in these appeals). In *Tyler Pipe*, the U.S. Supreme Court explained that: "[T]he crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a

market in this state for the sales.” *Id.* at 250. Naturally the “activities performed in Ohio” on behalf of Newegg will differ from those performed on behalf of Crutchfield.

The gravity of the legal issues in play in these appeals also weighs against consolidation. The Crutchfield and Newegg appeals are the first putative challenges to the application of the CAT to remote sellers that this Court will hear, and these are leading-edge cases across the entire United States.

The CAT was designed to be one of the key components of a series of tax revisions generally designed to lessen the burden of taxation on entities engaged in business in Ohio. *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, ¶ 6. As a part of these tax revisions, the CAT phased out, and replaced, the existing corporate-franchise and personal-property taxes. See R.C. 5733.01(G)(1) and (2) (phasing out the corporate-franchise tax); R.C. 5711.22(E), (F), and (G) (phasing out the personal-property tax); and R.C. 5751.031 (phasing in the CAT). The enactment of the CAT is arguably the most significant overhaul of Ohio’s tax code in the last 40 years.

The appeals raise issues of statutory interpretation of CAT definitional provisions, and appellants contend that they also raise issues of the constitutionality of the CAT nexus provisions. Chiefly, appellants assert that the CAT statutes cannot apply to remote retailers such as themselves by the laws’ own terms, relying on cases like *Quill Corp. v. North Dakota*, 504 U.S. 298, 311, 112 S.Ct. 1904 (1992). And beyond that, Newegg and Crutchfield are attempting to assert newly-raised as-applied and facial challenges to the CAT statutes. Such issues of serious public import should not be given short shrift.

These appeals will likely be taken to the US Supreme Court, if this Court affirms the BTA and Tax Commissioner. Indeed, in the recent *Direct Marketers* decision from the US

Supreme Court, Justice Kennedy's concurring opinion seemed to invite such an appeal, calling into question the ongoing relevance of the Court's precedent in those remote marketer cases relied upon by appellants, such as *Quill Corp. v. North Dakota*, 504 U.S. 298, 311, 112 S.Ct. 1904 (1992):

The Internet has caused far-reaching systemic and structural changes in the economy, and, indeed, in many other societal dimensions. Although online businesses may not have a physical presence in some States, the Web has, in many ways, brought the average American closer to most major retailers. A connection to a shopper's favorite store is a click away—regardless of how close or far the nearest storefront. * * * Today buyers have almost instant access to most retailers via cell phones, tablets, and laptops. As a result, a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term.

Given these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier.

Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring)

(internal citations omitted).

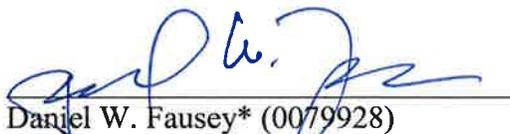
The interests of businesses, this Court, and the State, are all of sufficient import as to warrant ordinary, and not condensed, consideration of these matters by this Court. Moreover, businesses and practitioners will benefit from the clarity of analysis that may arise from individual opinions in these appeals, based on the factual record of each appeal.

CONCLUSION

For the foregoing reasons, the Tax Commissioner respectfully requests that this Court deny Crutchfield's Motion to Consolidate these appeals.

Respectfully submitted,

Mike DeWine (0009181)
Ohio Attorney General



Daniel W. Fausey* (0079928)

*COUNSEL OF RECORD

Christine Mesirow (0015590)

Assistant Attorneys General

30 E. Broad Street, 25th Floor

Columbus, Ohio 43215

Phone: (614) 995-9032

Fax (866) 513-0356

daniel.fausey@ohioattorneygeneral.gov

christine.mesirow@ohioattorneygeneral

*Counsel for Appellee/Cross-Appellant
Joseph W. Testa, Tax Commissioner of Ohio*

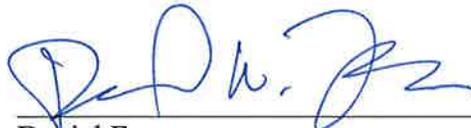
CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Cross-Appeal was filed electronically with the Ohio Supreme Court and was served by email, and a courtesy copy sent via US Mail, this 18 day of May, 2015, upon the following:

Martin I. Eisenstein, Esq.
David W. Bertoni, Esq.
Matthew P. Schaefer, Esq.
BRANN & ISAACSON
184 Main Street
P.O. Box 3070
Lewiston, Maine 04243-3070
meisenstein@brannlaw.com
dbertoni@brannlaw.com
mschaefer@brannlaw.com

Edward J. Bernert, Esq.
BAKER HOSTETLER
65 E. State Street, Suite 2100
Columbus, Ohio 43215-4260
ebernert@bakerlaw.com

Counsel for Appellant Crutchfield, Inc.



Daniel Fausey