ORIGINAL

NOTICE OF APPEAL FROM THE OHIO BOARD OF TAX APPEALS

In the Supreme Court of Ohio

Mason Companies, Inc.,	:	Case No. 15-0794
Appellant,	:	
v.	:	Appeal from the Ohio Board of Tax Appeals
Joseph W. Testa, Tax Commissioner of Ohio,	:	
Appellee.	:	BTA Case Nos. 2012-1169, 2012-2806

NOTICE OF APPEAL OF APPELLANT MASON COMPANIES, INC.

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NOTICE OF APPEAL OF APPELLANT MASON COMPANIES, INC.

Appellant Mason Companies, Inc. ("Mason") 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") entered on April 20, 2015, in *Mason Companies, Inc. v. Joseph W. Testa, Tax Commissioner of Ohio*, being Board Case Nos. 2012-1169 and 2012-2806. 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, Mason, the state's commercial activity tax (the "CAT"), even though neither Mason, 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 Mason has [statutory] substantial nexus with this state, i.e., a "bright line presence" in the state because it has 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, Mason 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. Mason'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.

Mason has consistently asserted that, as applied to Mason, the CAT statute violates Commerce Clause principles, because Mason 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, e.g.*, Decision at 3 (quoting para. 6 of Mason's notices of appeal) ("*Application of the CAT to Mason* would violate the Company's rights under the Commerce Clause of the United States Constitution * * * .") (italics added).]

As a corollary to its "as applied" constitutional challenge, Mason has consistently urged both the Commissioner and the Board that, in order to preserve the CAT statute's constitutionality, the stature should be interpreted, in the first instance, so that it does not apply to Mason. *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"). Mason 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—Mason—that lacked "substantial nexus" with the state. [*See* Decision at 2-3 (quoting paras. 1-6 of Mason's notices of appeal).] Under these interpretations, Mason would not be liable for the CAT.

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 Mason 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 4 (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).[1] However, Mason'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 CAT statute are unambiguous and require resolution of Mason'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.

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[1] 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 Mason. *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 Mason'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 Mason's appeal, despite the Board's Decision not to make any findings or rulings below.

In addition, Mason 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. Mason'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

Mason 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. Mason 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 Mason because the evidence presented to the Board established that the CAT could not be imposed upon Mason 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, Mason 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 Mason. 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 Mason because the evidence presented to the Board established that the CAT assessments against Mason 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 Mason, 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 Mason engaged in no activity within Ohio, and neither owns nor leases property in the state, the company is not "doing business in this state" within the meaning of R.C. 5751.02;

(b) R.C. 5751.01(H)(3) & (I)(3): Although Mason 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 Mason, so that Mason 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)): Mason'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 Mason, 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 Mason. 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 Mason because the evidence presented to the Board established that the CAT assessments against Mason 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 Mason:

(a) R.C. 5751.01(H)(1), (2) and (4): Mason lacked statutory "substantial nexus with this state" under R.C. 5751.01(H)(1), (2) and (4), in that Mason 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 [sic] of the United States."

(b) R.C. 5751.01(H)(3) and 5751.01(I)(1), (2), (4) & (5): Mason 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 Mason 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 fifty thousand dollars, (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.

4. The Board's Decision affirming the final determination should be reversed, and the assessments cancelled, because the CAT statute is unconstitutional as applied to Mason. In particular, if interpreted to require the imposition of the CAT against Mason, 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 Mason 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 Mason's gross receipts violates the Constitution. Furthermore, because the evidence shows that Mason 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 Mason 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 Mason. *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).

5. The Board's Decision affirming the final determination against Mason 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 Mason'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).

6. The Board erred by failing to abate the penalties imposed pursuant to R.C. 5751.06. Mason's non-registration, non-filing and non-payment each arose from Mason's good faith reliance upon existing federal constitutional law in regard to the application of the "substantial nexus" test to case involving gross receipts taxes, as well as sales and use taxes and other taxes. The failure to abate penalties under these circumstances constituted an abuse of discretion.

CONCLUSION

For all of the foregoing reasons, Mason respectfully requests that the Decision of the Board be reversed. Mason 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

Mason Companies, Inc.,	:	
	:	Case No. _____
Appellant,	:	
	:	Appeal from the Ohio
v.	:	Board of Tax Appeals
	:	
Joseph W. Testa,	:	
Tax Commissioner of Ohio,	:	
	:	BTA Case Nos. 2012-1169,
Appellee.	:	2012-2806

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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PROOF OF SERVICE UPON OHIO BOARD OF TAX APPEALS

This is to certify that the Notice of Appeal of Mason Companies, 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
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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Notice of Appeal of Appellant Mason Companies, 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. Mesirow and Daniel W. Fausey, Assistant Attorneys General, State of Ohio, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215–3428, on this 19th day of May, 2015.

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

OHIO BOARD OF TAX APPEALS

MASON COMPANIES, INC., (et. al.),

Appellant(s),

vs.

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

Appellee(s).

CASE NO(S). 2012-1169, 2012-2806

(COMMERCIAL ACTIVITY TAX)

DECISION AND ORDER

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Entered Monday, April 20, 2015

Mr. Williamson, Ms. Clements, and Mr. Harbarger concur.

These matters are considered by the Board of Tax Appeals upon two notices of appeal filed on behalf of appellant Mason Companies, Inc. ("Mason"). Mason appeals from two final determinations of the Tax Commissioner in which the commissioner modified multiple commercial activity tax assessments against Mason, relating to periods from July 1, 2005 through September 30, 2011. This matter is considered by the Board of Tax Appeals upon the notices of appeal, the statutory transcripts ("S.T.") certified to this board by the Tax Commissioner, the record of this board's hearing ("H.R."), the joint stipulations filed by the parties, which include depositions offered in lieu of live testimony before the board, and any written argument filed by the parties. We note that the commissioner, on his post hearing brief, referenced BTA No.

2014-495 as part of the group of appeals under consideration, which is not reflective of the record; accordingly, the commissioner's reference to such case number is hereby stricken and we reiterate that the only appeals determined herein are as set forth in the case caption above.

In its brief, Mason, which is "located exclusively" in Chippewa Falls, Wisconsin, describes itself as a "family-owned mail order and Internet footwear and apparel retailer. *** From Chippewa Falls, Mason promotes its business by mailing catalogs to consumers across the United States. Consumers, if they choose to do so, can also visit Mason's retail Internet sites that reside on the company's web servers located at its Chippewa Falls offices. It is undisputed that Mason's retail business is national in scope and does not target a particular geographic area, and all of its communications with consumers and all of its product shipments originate from its facilities in Wisconsin." Mason Brief at 2. Before this board, and through deposition, Mason presented extensive testimony and evidence relating to its database/internet operations and overall marketing efforts. Mason Brief at 8; Exs. KKK, LLL, MMM.

In its notices of appeal to this board, Mason essentially specified the same errors in each, in pertinent part, as follows:

> "1. Because Mason 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 this state' under R.C. §5751.02. The Commercial Activity Tax, therefore, does not apply.
>
> "2. Mason 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. Mason 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 [sic] of the person's total property, total payroll, or total receipts.' [R.C. 5751.01(I)(4)]. In addition, Mason was not 'domiciled in this state as an individual or for corporate, commercial, or other business purposes.' [R.C. 5751.01(I)(5)].
>
> "4. Mason'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 Mason, inasmuch as imposing the tax on Mason would violate the Company's rights under the Commerce Clause of the United States Constitution ***. ***

"6. Application of the CAT to Mason would violate the Company's rights under the Commerce Clause of the United States Constitution since Mason 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 Commissioner's assessment of the 'failing to register penalty' is erroneous and unlawful in that Mason was not required to register for the CAT because Mason was not a 'person subject to' chapter 5751 of the Revised Code. R.C. 5751.04(B).

"8. The penalty should be abated. The Commissioner erred in arbitrarily and capriciously asserting penalties for each of the aforesaid reasons, and in light of Mason'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." Notices of Appeal, at 5-7/5-8.

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.

Mason contends that "[t]he CAT assessments imposed against Mason are a tax on gross receipts generated by a company that lacks any in-state business activity. The Company's gross receipts, therefore, simply cannot be taxed consistent with the Constitution. *** In addition to violating the Constitution, including both the Commerce Clause and the Due Process Clause, the assessment against Mason violates the express terms of the CAT statute. The CAT statute expressly provides that it cannot be imposed on gross receipts where doing so 'is prohibited by the constitution or laws of the United States or the constitution of this state.' R.C. 5751[.01](F)(1)(jj). Accordingly, in violating the United States Constitution, the assessments here violate the express provisions of the CAT statute itself." Mason Brief at 13-14. Specifically, Mason claims its gross receipts are excluded from the CAT, pursuant to the U.S. Constitution, Commerce Clause and Due Process Clause, and the "substantial nexus" and corresponding "in-state presence" analysis encountered thereunder.

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, as followed in *Crutchfield, Inc. v. Testa* (Feb. 26, 2015), BTA Nos. 2012-926, 3068, 2013-2021, unreported, appeal pending Sup. Ct. No. 2015-0386 and *Newegg, Inc. v. Testa* (Feb. 26, 2015), BTA No. 2012-234, unreported, appeal pending Sup. Ct. No. 2015-0483, to be controlling and dispositive of Mason's specifications of error. 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. The 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, Mason was assessed commercial activity tax for the periods in question. R.C. 5751.02(A). The commissioner determined that Mason 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). Mason, as L.L. Bean and others before it, argues that under the Commerce Clause of the U.S. Constitution, "a state lacks the power to impose a use tax collection obligation on a company located outside the state that has no 'physical presence' in the taxing state and communicates with its customers in the state solely via the instrumentalities of interstate commerce ***." Mason Brief at 16. It cites to several cases in support, including *Natl. Bellas Hess, Inc. v. Dept. of Revenue of Illinois* (1967), 386 U.S. 753, *Quill Corp. v. North Dakota* (1992), 504 U.S. 298 (1992) and *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987), contending "a state lacks the power under the Commerce Clause to impose a gross receipts tax on a company with no physical presence in the state." Mason Brief at 17. Even without considering the constitutional aspects of Mason's position, 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 and its progeny, it is the decision of the Board of Tax Appeals that the final determinations of the Tax Commissioner must

be, and hereby are, affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Ms. Clements		
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