Supreme Court of Ohio Clerk of Court - Filed June 16, 2015 - Case No. 2015-0483

In the Supreme Court of Ohio

Newegg, Inc.,	:	
	:	Case No. 2015-0483
	:	
Appellant,	:	
	:	Appeal from the Ohio
v.	:	Board of Tax Appeals
	:	
Joseph W. Testa,	:	
Tax Commissioner of Ohio,	:	
	:	BTA Case No. 2012-234
Appellee.	:	

APPELLANT NEWEGG INC.'S MOTION TO CONSOLIDATE WITH APPEAL OF CRUTCHFIELD, INC. (CASE NO. 2015-0386)

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APPELLANT NEWEGG INC.'S MOTION TO CONSOLIDATE WITH APPEAL OF CRUTCHFIELD, INC. (CASE NO. 2015-0386)

Appellant Newegg Inc. ("Newegg") hereby moves pursuant to S.Ct.Prac.R. 4.01(A)(1) to consolidate this appeal with the appeal filed by Appellant Crutchfield, Inc. ("Crutchfield"), docketed as Case No. 2015-0386. On May 8, 2015, a similar motion was filed by Crutchfield in connection with its appeal. Appellee, Tax Commissioner of Ohio ("Commissioner"), opposed the motion in the *Crutchfield* case. Each appeal, however, presents essentially identical questions regarding the constitutionality of the Commercial Activity Tax ("CAT") when applied to the gross receipts of companies located outside of Ohio. Furthermore, 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.

Newegg notes that the Commissioner has filed substantially identical Notices of Cross Appeal and partial Motions to Dismiss in this case and the *Crutchfield* appeal, arguing that the appellants have failed to properly preserve their respective as-applied challenges to the constitutionality of the CAT. Although the Commissioner's filings are utterly lacking in merit, as a simple review of the proceedings below confirms, the Commissioner's filings demonstrate that the appeals of Newegg and Crutchfield are substantially identical, thus reinforcing the reasons for consolidation. After denial of the Motions to Dismiss, consolidation would permit the Court to consider the important issues presented by these cases in the most efficient manner.

Crutchfield requested the Commissioner's assent to this Motion to Consolidate on June 15, 2015. The Commissioner does not consent to the motion.

ARGUMENT

I. Consolidation Is Within the Sound Discretion of the Court Where Two or More 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. The sole criterion limiting the exercise of the Court's discretion is that the cases must share a common issue of law or fact. *See 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 *Newegg* and *Crutchfield* Appeals Are Nearly Identical and Present Many Common Issues.

The *Newegg* and *Crutchfield* 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 Commissioner that sustained an assessment of 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 Newegg nor Crutchfield 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 the 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 Newegg and Crutchfield, 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 Newegg, Inc. ("Newegg 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). 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).

Newegg and Crutchfield 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. (*Compare* Newegg Notice at 9-10 (fourth and fifth errors/propositions of law) (incorrectly numbered 3 and 4) *with* 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 United States 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 also 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* Commissioner's Notice of Cross Appeal at 7-8 (first through fourth errors) *with* Newegg 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 has also now filed essentially identical Motions to Dismiss in each case on the same basis. 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) ("To be sure, Newegg can raise a facial challenge…"). While Newegg vigorously disputes the assertion that it has not properly preserved its as-applied challenge to the relevant provisions of the CAT, the Commissioner's Notices of Cross Appeal and partial Motions to Dismiss 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 filings 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, Newegg and Crutchfield 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 promote the efficient scheduling of each appeal. The *Crutchfield* case is currently stayed, pending resolution of the parallel Motion to Consolidate filed in that case. If the Court elects to consolidate the two cases, Newegg 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 forty (40) days after the later of: (1) the date the Court resolves the appellants' Motions to Consolidate; or (2) the date the Court resolves the appellee's Motions to Dismiss.

CONCLUSION

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

Filed: June 16, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Motion of Appellant Newegg, Inc. to Consolidate with Appeal of Crutchfield, Inc. (Case No. 15-0386) was sent via the Court's electronic filing system and served by email and 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 16th day of June, 2015.

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