Supreme Court of Ohio Clerk of Court - Filed June 19, 2015 - Case No. 2015-0483

# In the Supreme Court of Ohio

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| 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. | : | |

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**APPELLANT NEWEGG INC.'S RESPONSE IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPELLANT'S ASSIGNMENTS OF ERROR NUMBERS 1 AND 3 (sic)**

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Martin I. Eisenstein (PHV 1095-2015)
(Counsel of Record)
Matthew P. Schaefer (PHV 2399-2015)
BRANN & ISAACSON
184 Main Street
P.O. Box 3070
Lewiston, ME 04243-3070
Tel. (207) 786-3566
Fax (207) 783-9325
Email: meisenstein@brannlaw.com
mschaefer@brannlaw.com

AND

Edward J. Bernert (0025808)
BAKER HOSTETLER
Capitol Square, Suite 2100
65 East State Street
Columbus, OH 43215-4260
Tel: (614) 462-2687
Fax: (614) 462-2616
Email: ebernert@bakerlaw.com

Counsel for Appellant,
Newegg, Inc.

Mike DeWine (0009181)
Attorney General of Ohio
Christine T. Mesirow (0015590)
Daniel W. Fausey (0079928)
Assistant Attorneys General
Office of the Attorney General
Taxation Section, 25th Floor
Rhodes Tower
30 East Broad Street
Columbus, OH 43215
Tel. (614) 466-5967
Fax (614) 466-8226
christine.mesirow@ohioattorney general.gov
daniel.fausey@ohioattorneygeneral.gov

Counsel for Appellee,
Joseph W. Testa, Tax Commissioner of Ohio

## TABLE OF CONTENTS

**Page**


I. PRELIMINARY STATEMENT ..... 1

II. STATEMENT OF THE CASE ..... 3

A. Background ..... 3

B. The Petitions for Reassessment ..... 5

C. The Commissioner's Final Determination ..... 6

D. Newegg's Notice of Appeal to The Board ..... 7

E. The Board's Decision and Order ..... 9

III. DISCUSSION ..... 10

IV. CONCLUSION ..... 17

V. CERTIFICATE OF SERVICE ..... 19

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

*Abraitis v. Testa*,
137 Ohio St.3d 285, 2013-Ohio-4725, 998 N.E.2d 1149 .....11

*Buchman v. Wayne Trace Local Sch. Dist. Bd. of Edn.*,
73 Ohio St.3d 260, 652 N.E.2d 952 (1995) .....15

*Castle Aviation, Inc. v. Wilkins*,
109 Ohio St.3d 290, 2006-Ohio-2420, 847 N.E.2d 420 .....11

*Cleveland Gear Co. v. Limbach*,
35 Ohio St.3d 229, 520 N.E.2d 188 (1988) .....12

*Hopkins v. Kissinger*,
31 Ohio App. 229, 166 N.E. 916 (1928).....16

*MCI Telecommunications Corp. v. Limbach*,
68 Ohio St.3d 195, 625 N.E.2d 597 (1994) .....5

*WCI Steel, Inc. v. Testa*,
129 Ohio St.3d 256, 2011-Ohio-3280, 951 N.E.2d 421 .....11

**Statutes**

R.C. 5717.02 .....11

Tax Commissioner of Ohio ("Commissioner") has moved to dismiss the first and fourth Statements of Error/Propositions of Law ("Errors") asserted by the Appellant, Newegg Inc. ("Newegg") ("Motion to Dismiss"), on the ground that the Errors in question allege an as-applied constitutional challenge to the nexus provisions of the Commercial Activity Tax ("CAT")[1] that, according the Commissioner in his present motion, was not raised below with the Commissioner or the Board of Tax Appeals ( "Board"). Newegg opposes the Commissioner's motion. As demonstrated by a plain reading of Newegg's contentions in its filings below, as well as the statements of the Commissioner and the Board in their rulings below, and the *admissions of the Commissioner himself in motion filings with the Board*, Newegg has at all times properly raised and asserted an as-applied constitutional challenge to the CAT in response to the assessments in this case. The Commissioner's Motion to Dismiss should be denied.[2]

## I. PRELIMINARY STATEMENT

It is important to note from the outset that the Commissioner's contention that Newegg failed to assert (and thereby preserve) its as-applied constitutional challenge to the CAT is a concoction of recent vintage. Indeed, throughout the proceedings before the Board of Tax Appeals, the Commissioner himself left no doubt regarding the nature of the constitutional challenge asserted by Newegg. In the Commissioner's successful motion to designate Newegg's appeal as complex litigation submitted in April 2012, which was filed for the express purpose of

[1] The first Error in Newegg's Notice of Appeal alleges that the Board of Tax Appeals failed to apply binding precedents of the United States Supreme Court under the dormant Commerce Clause that preclude application of a gross receipts tax like the CAT to a company, like Newegg, that engages in no activities in the State. (*See* Newegg's Notice of Appeal, at p. 6). The fourth Error, which is incorrectly numbered 3, directly alleges an as-applied constitutional challenge to the CAT based on such precedents. (*Id.* at p. 9).

[2] The Commissioner has filed virtually identical partial Motions to Dismiss in cases involving Crutchfield Corporation (Case No. 2015-0386) and Mason Companies, Inc. (Case No. 2015-0794). Newegg understands that similar oppositions have been filed by the Appellant in each of those cases.

obtaining far-reaching discovery on Newegg's constitutional claim, the Commissioner represented to the Board as follows:

> *The appeal challenges the constitutionality of the Commercial Activity Tax ("CAT") nexus provisions as applied to the appellant*. This issue has not yet been reviewed or decided by any Ohio tribunal or court, and is of great importance to the scope and vitality of Ohio's principal business tax.

(Emphasis added.) (Appx. 2, Ex. 1, Motion to Designate Case As Complex Litigation, Extend Discovery And To Set a Case Management Schedule, filed April 5, 2012 ("Motion to Designate"), at p. 2).[3] In that same motion, Commissioner further advised the Board that "there are several appeals of this same nature now pending before this Board, *raising 'as applied' constitutional challenges similar to the present one*." (Emphasis added.) (Appx. 3, Ex. 1, Motion to Designate, at p. 3).[4]

Several months later, during pre-trial proceedings before the Board, the Commissioner filed a motion seeking to amend the case management schedule, in which the Commissioner again informed the Board that:

> Newegg has asserted an as-applied constitutional challenge to Ohio's primary business tax, the Commercial Activity Tax ("CAT"). *In its Notice of Appeal*, Newegg makes the novel and as-yet untested claim *that the Commerce Clause of the United States Constitution precludes Ohio's taxing power as-applied to Newegg*.

(Emphasis added.) (Appx. 7, Ex. 2, Tax Commissioner's Motion To Amend Case Management Schedule, filed October 12, 2012 ("Motion to Amend"), at p. 3).[5]

In each of these motions filed with the Board, the Commissioner accurately described the nature of Newegg's contention that the application of the CAT by the Commissioner to Newegg

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[3] A copy of this motion is included in the Appendix of Exhibits in support of Appellant Newegg Inc.'s Response in Opposition to Motion to Dismiss ("Appendix") as Exhibit 1.
[4] It is Newegg's understanding that these similar appeals included the Crutchfield and Mason appeals now also pending before the Court.
[5] A true copy of this motion is included in the Newegg Appendix as Exhibit 2.

violates the Commerce Clause. Indeed, as demonstrated herein through direct quotations from key record documents, Newegg clearly raised and preserved its as-applied Commerce Clause challenge to the CAT at all times below—namely, in its Petitions for Reassessment filed with the Commissioner and in its Notice of Appeal to the Board from the Commissioner's Final Determination. What is more, the Commissioner himself—and, later, the Board—expressly acknowledged Newegg's assertion of an as-applied challenge in his written decision denying Newegg relief and in his motion practice before the Board.

Now, however, before this Court, the Commissioner changes his tune and flatly states that Newegg's as-applied constitutional challenge, the very one described in his Board motions and his Final Determination of Newegg's Petitions for Reassessment, was "not raised to the Tax Commissioner or the Board of Tax Appeals." (Motion to Dismiss, at p. 2). Because this assertion is plainly false, Newegg respectfully asks the Court to deny the Commissioner's motion.

Against this backdrop, Newegg turns to the procedural background.

## II. STATEMENT OF THE CASE

### A. Background

For all tax periods from July 1, 2005 through March 31, 2011, Newegg received CAT assessments from the State of Ohio. It is undisputed that, in response to the CAT assessments, Newegg timely filed Petitions for Reassessment (collectively, the "Petitions for Reassessment").[6] (Appx. 24-31, Ex. 3, Petition for Reassessment). These Petitions for Reassessment each explicitly referenced and included a five page attachment entitled, "BASES FOR PETITION." The Commissioner ruled on Newegg's Petitions for Reassessment in a single Final

[6] A true copy of one of Newegg's Petitions for Reassessment, for the first quarter of 2011 (Newegg's Petitions were substantially identical for each tax period), is included in Newegg's Appendix as Exhibit 3.

Determination encompassing all relevant tax periods.[7] (Appx. 32-35, Ex. 4, Final Determination). There is no dispute that Newegg thereafter timely filed with the Board a Notice of Appeal from the Commissioner's Final Determination.[8] (Appx. 36-48, Ex. 5, Notice of Appeal).

Newegg's appeals ultimately went to hearing before the Board in May 2014.[9] (*See* Appx. 49, Ex. 6, Tr. at p. 1). The Board issued a Decision and Order regarding the appeal on February 26, 2015 (the "Decision and Order").[10] Tellingly, in its Decision and Order, the Board confirmed that Newegg's as-applied constitutional challenge was, in fact, the focus of the hearing, during which both Newegg and the Commissioner had the opportunity to present testimony and documentary evidence and make a record for appeal on the issue. The Board, however, further ruled that it would not decide Newegg's as-applied challenge, because as an administrative tribunal it lacked the authority to do so:

> As we stated in *L.L. Bean* [BTA No. 2010-2853 and Supreme Court Case No. 2014-0456], "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 respecting 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."

(Citations omitted.) (Appx. 55, Ex. 7, Decision and Order, at p. 3).[11]

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[7] A true copy of the Commissioner's Final Determination dated November 22, 2011, is included in Newegg's Appendix as Exhibit 4.

[8] A true copy of Newegg's Notice of Appeal to the Board filed January 19, 2012, is included in Newegg's Appendix as Exhibit 5 (the "Notice of Appeal").

[9] The pages of the transcript of the hearing conducted May 13, 2014 before the Board ("Tr.") which reflects Newegg's statement of the issues raised in the appeal is included in Newegg's Appendix as Exhibit 6. The Tax Commissioner did not object to Newegg's statement of the issues.

[10] The Decision and Order of the Board is included in Newegg's Appendix as Exhibit 7.

[11] Each of the cases cited by the Board in its Decision and Order stand for the proposition that the role of the Board is to take evidence on the constitutional question, but to decline to resolve the

This appeal timely followed. The Commissioner does not dispute that Newegg's appeal to this Court includes an as-applied Commerce Clause challenge based upon Newegg's lack of "substantial nexus" with the state. Instead, the Commissioner claims—in the face of directly contradictory filings and rulings below—that Newegg's as-applied challenge was not presented to the Board. In fact, Newegg's as-applied challenge was properly raised by Newegg beginning with its Petitions for Reassessment to the Commissioner, and was asserted again in its Notice of Appeal to the Board.

**B. <u>The Petitions for Reassessment</u>**

In each of its Petitions for Reassessment filed with the Commissioner, Newegg raised an as-applied challenge. The Petitions for Reassessment stated, in part, as follows:

> *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.* The Supreme Court has made clear that 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. *Tyler Pipe*, 483 U.S. at 250 (1987) ("the crucial factor governing nexus is whether <u>the activities performed in this state on behalf of the taxpayer</u> are significantly associated with the taxpayer's ability to establish and maintain a market in this State") (internal citation omitted and emphasis added); *Standard Pressed Steel*, 419 U.S. at 562-64 (1975) (sufficient nexus for gross receipts tax established through presence of full-time employee in state calling on customers); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (applying the bright-line rule to a general revenue tax on the value of coal extracted from the state, and finding that "the interstate business must have a substantial nexus with the State before any tax may be levied on it"). * * * *Since the bright-line physical presence test applies to taxes like the CAT, the assessment is void in its entirety.*

(Emphasis added.) (Appx. 30-31, Ex. 3, BASES FOR PETITION, at ¶ 6, pp. 4-5). Moreover, the Petitions for Reassessment also provided a detailed narrative discussion of Newegg's as-applied Commerce Clause challenge in a three page introduction, which included citations to and discussions of governing U.S. Supreme Court precedent, and carefully described how Newegg

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issue, deferring resolution of the constitutional question to the courts. *See, e.g.*, *MCI Telecommunications Corp. v. Limbach*, 68 Ohio St.3d 195, 625 N.E.2d 597 (1994).

"is protected from the imposition of the Commercial Activity Tax ("CAT") under the Commerce Clause of the United States Constitution" as a result of its lack of a physical presence in Ohio. (Appx. 27-29, Ex. 3, BASES FOR PETITION, at pp. 1-3).

Separately, Newegg argued that the assessments against it were invalid under the CAT statute itself on multiple grounds, noting that, "[i]n addition to its constitutional protections, Newegg also submits that it does not satisfy the statutory requirements for imposition of Ohio's Commercial Activity Tax." (Appx. 28, Ex., BASES FOR PETITION, at p. 2). Newegg argued that, properly construed to avoid running afoul of constitutional infirmities, the CAT should be interpreted so as not to apply to Newegg. The company further argued that the CAT's statutory "substantial nexus" provisions, its "bright-line presence" provisions, and the limitation that the CAT does not apply to "[a]ny receipts for which the tax imposed by this chapter is prohibited by the constitution or laws of the United States or the constitution of this state," each should be read so as not to apply the CAT to Newegg. (Appx. 29-30, Ex. 3, BASES FOR PETITION, at ¶¶ 2-4, p. 3-4). But these alternative arguments in no way negated Newegg's primary, constitutional challenge. Indeed, at no point in connection with its Petitions for Reassessment did Newegg waive or abandon its as-applied challenge to the CAT assessments, a fact confirmed by the Commissioner's Final Determination denying Newegg's Petitions, to which we turn next.

### C. <u>The Commissioner's Final Determination</u>

That the Commissioner fully understood the nature of Newegg's as-applied constitutional challenge is clear from his rulings denying Newegg's Petitions for Reassessment. In his Final Determination, the Commissioner expressly recognized that Newegg asserted the contention that "*Newegg is protected from imposition of the Commercial Activity Tax ("CAT") under the Commerce Clause of the United States Constitution*." (Emphasis added.) (Appx. 32, Ex. 4, Final Determination, at p. 1). The Commissioner then expressly considered, and rejected, this clear as-

applied challenge to the CAT assessments, acknowledging that Newegg argued that it had "no activities or contacts in Ohio which rise to the level necessary for Ohio to constitutionally impose the tax," but finding that Newegg "has 'substantial nexus with this state' as that phrase is defined in R.C. 5751.01(H)." (Appx. 33, Ex. 4, Final Determination, at p. 2).

The Commissioner, in his motion to this Court, makes no mention of either the Commissioner's prior acknowledgement and acceptance of Newegg's as-applied claim or his substantive determination of that claim in the Final Determination, instead baldly stating, without citation to the record, that Newegg's as-applied challenge was "not raised to the Tax Commissioner or the Board of Tax Appeals." (Motion to Dismiss, at p. 2).

**D. <u>Newegg's Notice of Appeal to The Board</u>**

Presented with a Final Determination by the Commissioner rejecting the as-applied constitutional challenge to the CAT assessments issued against it, Newegg timely appealed to the Board. Far from providing a cursory statement of the grounds for its appeal, Newegg submitted a detailed, eight-page, twenty-plus paragraph Notice of Appeal cataloging the Commissioner's errors. (*See* Appx. 36-43, Ex. 5, Notice of Appeal). First, in a detailed Background section, Newegg explained the nature of, and authority for, its as-applied Commerce Clause challenge to the CAT assessments, citing applicable Supreme Court authority defining the appropriate Commerce Clause standards. (Appx. 37-38, Ex. 5, Notice of Appeal, at ¶¶ 1-4, pp. 2-3). Newegg then explained that, "in addition to its constitutional protections," it asserted that the CAT statute, properly read, should be construed so as not to apply to Newegg. (Appx. 38-39, Ex. 5, Notice of Appeal, at ¶¶ 5-7, pp. 3-4).

Next, Newegg identified the specific bases on which the Commissioner rested in making his Final Determination. (Appx. 39-40, Ex. 5, Notice of Appeal, at ¶¶ 9-13, pp. 4-5). The very first basis for the Commissioner's Final Determination was that "Newegg had 'substantial nexus'

with Ohio as that term is defined in the statute [*see* R.C. 5751.01(H)(3)], based on the 'bright-line presence' test set forth on R.C. 5751.03(I)(3)." (Appx. 39, Ex. 5, Notice of Appeal, at ¶ 10, p. 4). Newegg further noted that the Commissioner had "concluded that '[u]nder established Commerce Clause jurisprudence, the imposition of the tax measured by [gross] receipts is not prohibited by the law or the Constitution of either the United States or Ohio." (Brackets added.) (Appx. 40, Ex. 5, Notice of Appeal, at ¶ 12, p. 5). Newegg then unequivocally informed the Board that "[e]ach of the grounds given by the Commissioner for the [Final] Determination is in error." (Brackets added.) (Appx. 40, Ex. 5, Notice of Appeal, at ¶ 13, p. 5).

In light of the Background section and the specific grounds for the Final Determination challenged by Newegg in its Notice of Appeal, Newegg then further described several specific "Assignments of Error." It began with its various statutory contentions, which it presented as alternatives that the Board could adopt to avoid forcing a conflict between the CAT statute and applicable constitutional requirements. (Appx. 40-41, Ex. 5, Notice of Appeal, at ¶¶ 1-5, pp. 5-6). The CAT statute, Newegg suggested, "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." (Appx. 41, Ex. 5, Notice of Appeal, at ¶ 5, p. 6).

If the Board rejected such an interpretation, however, Newegg stated once again, in the alternative, its as-applied challenge:

> *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.* The Supreme Court has made clear that 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. *Tyler Pipe*, 483 U.S. at 250 (1987) ("the crucial factor governing nexus is whether <u>the activities performed in this state on behalf of the taxpayer</u> are significantly associated with the taxpayer's ability to establish and maintain a market in this State") (internal citation omitted and emphasis added); *Standard Pressed Steel*, 419 U.S. at 562-64 (1975) (sufficient nexus for gross receipts tax established through presence of full-time employee in state calling on customers);

> *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (applying the bright-line rule to a general revenue tax on the value of coal extracted from the state, and finding that "the interstate business must have a substantial nexus with the State before any tax may be levied on it"). This physical presence standard derives from constitutional principles and authorities set forth by the Court in *National Bellas Hess* and subsequently affirmed in *Quill*. The Supreme Court relied upon *Tyler Pipe*, *Standard Pressed Steel*, and *Commonwealth Edison* in upholding the physical presence test for sales and use taxes in *Quill*, and the Court has never held that a state has the power under the Commerce Clause to impose gross receipts tax on a company based on any lesser, or different standard than [the] physical presence test of *Tyler Pipe* and *Quill*. *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.*

(Underlining sic. Emphasis added.) (Appx. 41, Ex. 5, Notice of Appeal, at ¶ 6, p. 7).

Moreover, at no point during proceedings before the Board did Newegg ever waive or otherwise abandon its as-applied Commerce Clause challenge to the CAT Assessments,[12] a fact ultimately confirmed by the Decision and Order of the Board, which is discussed in Section E, below. That challenge, in fact, was the central focus of the evidentiary hearing below, as the Board explained in its Decision and Order.

**E. <u>The Board's Decision and Order</u>**

In its Decision and Order, the Board confirmed that an as-applied Commerce Clause challenge had been asserted by Newegg in its appeal, quoting directly from the company's Notice of Appeal:

> 6. Application of the CAT to Newegg would violate the Company's rights under the Commerce Clause of the United States Constitution since Newegg did 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.*

[12] For example, in its opening statement at the hearing before the Board on May 13, 2014, Newegg's counsel reiterated that "we challenge the constitutionality of the statute as applied to Newegg, and we do think that the statute should not apply." (Appx. 52, Ex. 6, Tr. at 10:16-21). The Commissioner's counsel did not argue that no as-applied challenge had been raised by Newegg, but countered with the statement that the "assessments are supportable under the United States Constitution." (*Id*. at 10:10-11).

(Emphasis added.) (Appx. 55, Ex. 7, Decision and Order, at p. 3). The Board further explained, accurately, that Newegg had "challenged the Commissioner's conclusion that Newegg is liable for the commercial activity tax, which Newegg argues is prohibited by the U.S. Constitution." (*Id.*).

Although, as the Board recognized, Newegg clearly asserted an as-applied challenge, the Board in its Decision and Order concluded that it lacked authority to address Newegg's constitutional claims. The Board, therefore, made no findings "with regard to the constitutional questions presented." (Citation omitted.) (*Id.*). "Any constitutional implications of the relevant statutory provisions," the Board explained, "must be considered by a tribunal that has jurisdiction over such questions of constitutional interpretation." (Citations omitted.) (*Id.* (noting that such arguments "may only be addressed on appeal by a court which has the authority to resolve constitutional challenges")).

## III. DISCUSSION

The Commissioner's Motion to Dismiss rests wholly on the contention that Newegg's as-applied Commerce Clause challenge was "not raised to the Tax Commissioner or the Board of Tax Appeals." (Motion to Dismiss, at p. 2). As shown in the Statement of the Case, above, this claim is untrue.

Indeed, at each and every step in the administrative review process below—from Newegg's Petitions for Reassessment to its Notice of Appeal—Newegg meticulously set forth its express claim that application of the CAT to Newegg violated the "substantial nexus" requirement of the Commerce Clause. The Commissioner and the Board each acknowledged this expressly in their written decisions below. Indeed, the Commissioner not only acknowledged Newegg's as-applied claim, he ruled on it. The Commissioner then also made motions to the Board of Tax Appeals premised on Newegg's as-applied constitutional challenge. Thus, while

the Supreme Court of Ohio has made clear that it can only consider claims of error that were "specified in the notice of appeal to the [Board]," Newegg has clearly raised, and preserved, its as-applied challenge by specifying the claim in its Notice of Appeal. *See, e.g.*, *Abraitis v. Testa*, 137 Ohio St.3d 285, 2013-Ohio-4725, 998 N.E.2d 1149, ¶ 21; *see also* R.C. 5717.02 (effective March 22, 2012 to October 10, 2013) (requiring the party appealing a decision of the Commissioner to "specify the errors therein complained of").

The jurisdictional requirements of R.C. 5717.02 are well-established. The statute, as worded when Newegg filed its appeals, called upon a party contesting final determination of the Commissioner to "specify the errors therein complained of." R.C. 5717.02 (2012). In general, the Court has explained that:

> a notice of appeal is sufficient to give notice of a particular error when it has "specified the commissioner's action that it questioned, cited the statute under which it objected, and asserted the treatment that it believed the commissioner should have applied."

(Citations omitted). *WCI Steel, Inc. v. Testa*, 129 Ohio St.3d 256, 2011-Ohio-3280, 951 N.E.2d 421, ¶ 28). In addition, the Court has explained that the "words of the notice of appeal must be read in the context of the particular case," including with reference to the objections and the evidence that were presented to the Commissioner. *Id.* at ¶ 36.

In the case of an as-applied constitutional challenge, the Court has emphasized that "[t]he purpose of specifying errors to the [Board] * * * is to put the Tax Commissioner on notice of the issues that will be contested." *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 290, 2006-Ohio-2420, 847 N.E.2d 420, ¶ 39. Adequate notice to the Commissioner of the errors alleged before the Board is important because:

> [w]hen a statute is challenged on the basis that it is unconstitutional in its application, this court needs a record, and the proponent of the constitutionality of the statute [*i.e.*, the Commissioner] needs notice and an opportunity to offer testimony supporting his view.

(Brackets added.) *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 232, 520 N.E.2d 188 (1988)). Thus, a Notice of Appeal that fails to specify how the application of a statute violates an appellant's rights is not adequate. *Castle Aviation*, 2006-Ohio-2420, ¶ 40.

Newegg's Notice of Appeal clearly satisfies these standards. Newegg alleges how the Commissioner erred, identifies specific statutory provisions and case authority for Newegg's contentions, and asserts precisely what action the Commissioner should have taken. Moreover, when viewed in context, there can be absolutely no doubt that Newegg alleged an as-applied challenge, and that both the Commissioner and the Board were fully apprised and aware that its appeals presented an as-applied challenge. The Commissioner's own motion practice before the Board makes that fact crystal clear, (*see* Section I, Preliminary Statement, *supra* at pp. 1-3), as does the Board's acknowledgement in its Decision and Order that the parties presented evidence on Newegg's constitutional challenge and made a record. (Appx. 53-56, Ex. 7, Decision and Order). Indeed, the Commissioner successfully moved to designate this case as complex for the express purpose of taking extensive discovery on Newegg's as-applied Commerce Clause challenge. (Appx. 1-4, Ex. 1, Motion to Designate).

Faced with this clear record in the proceedings below, the Commissioner's tactics in the Motion to Dismiss are troubling in a number of respects.

**First**, the Commissioner's claim that Newegg failed to preserve its as-applied Commerce Clause challenge is flatly contradicted by numerous representations made by the Commissioner during proceedings before the Board, in which he stated in no uncertain terms that Newegg's appeal asserted (and thereby preserved) an as-applied constitutional challenge under the Commerce Clause. (*See* Appx. 1-4, Ex. 1, Motion to Designate; Appx. 5-23, Ex. 2, Motion to Amend; *see also* Section I, Preliminary Statement, *supra*, at pp. 1-3). These statements not only

resulted in the Commissioner obtaining extraordinary relief from the Board (including far-ranging discovery from Newegg *related solely to its constitutional claim* under a complex case designation), but demonstrated that the Commissioner at all times understood fully the nature of Newegg's claims.

**Second**, the Commissioner blatantly mischaracterizes the Board's Decision and Order, stating flatly—and falsely—that the Board "agreed that Newegg did not raise an as applied constitutional challenge." (Motion to Dismiss, at p. 15 (citing Decision and Order, at p. 3)). In the Decision and Order, however, on the very page to which the Commissioner cites, the Board lists among Newegg's specified errors that "[a]pplication 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 [Final] Determination should be vacated." (Appx. 55, Ex. 7, Decision and Order, at p. 3).

If the Board had not made that sufficiently clear, on the very same page the Board explains that it:

> makes no findings with regard *to the constitutional questions presented*. The parties, through their presentations 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.

(Citations omitted. Emphasis added.) (*Id*.). Nowhere in the Decision and Order does the Board suggest, even remotely, that Newegg failed to preserve this constitutional claim. In fact, the Decision and Order states the opposite.

**Third**, the Commissioner does *not* include in his Appendix: (a) Newegg's Petitions for Reassessment (which plainly assert an as-applied Commerce Clause claim); (b) the Commissioner's own Final Determination in this case (in which the Commissioner both accepts and rules upon Newegg's as-applied Commerce Clause claim); (c) the Commissioner's various motions filed with the Board, acknowledging the as-applied claim; (d) the transcript of the Board's hearing in this case (where Newegg clearly reiterated its assertion of an as-applied constitutional claim, without any objection from Commissioner's counsel); and (e) the Board's Decision and Order (quoted above) that is now on appeal to this Court (and which expressly recognizes that Newegg asserted and preserved its as-applied Commerce Clause argument). Instead, apart from the Notice of Appeal to the Board, the Commissioner chose to include in his Appendix only a Pre-Hearing Statement and Decision and Order from *another* CAT appeal (involving L.L. Bean, Inc.), documents having no conceivable relevance to the question of whether Newegg timely asserted and preserved an as-applied constitutional challenge in its own challenge to the CAT assessments.[13]

**Fourth**, while stating flatly that Newegg's as-applied challenge was not "raised with the Tax Commissioner," the Commissioner withholds from the Court the clear language in Newegg's Petitions for Reassessment asserting (and thereby preserving) this challenge. More troubling still, the Commissioner fails to advise the Court of the fact that the Commissioner, in his written Final Determination, not only acknowledged that Newegg had presented an as-

[13] In resorting to an irrelevant filing from an appeal filed by L.L. Bean (which has since settled), the Commissioner mischaracterizes even that document. In the sentence immediately following the statement quoted by the Commissioner, and for all sixteen pages thereafter, the L.L. Bean Pre-Hearing Statement carefully explains the nature of its as-applied constitutional challenge to the CAT statute in that case. (*See* Commissioner's Appendix, Ex. E, at 1 (the case "involves L.L. Bean's claim that the imposition of the CAT on the company violates the Commerce Clause of the United States Constitution") and 2-17 (discussing the Commerce Clause limitations on state authority to impose gross receipts taxes)).

applied Commerce Clause challenge, but, in fact, issued a substantive ruling on that constitutional challenge. (*See* Appx. 24-31, Ex. 3, Petition for Reassessment; Appx. 32-35, Ex. 4, Final Determination).

**Fifth**, the Commissioner presents only selective, confusing, and misleading quotations from Newegg's Notice of Appeal to the Board to make it appear that Newegg's challenge to the CAT Assessments was limited to a statutory challenge. (*See, e.g.*, Motion to Dismiss, at pp. 5-7). While Newegg did make statutory claims, it plainly (and explicitly) did *not* do so in lieu of the as-applied Commerce Clause claims it clearly asserted, without reservation, in other parts in its Notice of Appeal. Likewise, despite the Commissioner's arguments to the contrary, Newegg's urging of the Commissioner and the Board to construe the CAT statutes so as to avoid their application to Newegg, and thereby avoid constitutional infirmities under the Commerce Clause, neither waived nor limited Newegg's separate as-applied Commerce Clause claim. Indeed, it is a well-established canon of statutory construction that statutes should be read, if possible, in a way that prevents them from being applied in violation of the Constitution. *See, e.g.*, *Buchman v. Wayne Trace Local Sch. Dist. Bd. of Edn.*, 73 Ohio St.3d 260, 269, 652 N.E.2d 952 (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").[14]

[14] Newegg's contentions regarding statutory construction were intended to present ways in which the constitutionality of the CAT provisions in question might be preserved. Seeking such a limiting construction is, indeed, the obligation of the tribunal (and, by extension, the parties) to explore. *Buchman*, *supra.* The Commissioner's response is that such an interpretation of the CAT is impossible because the CAT, by its plain terms, permits only one interpretation: that the tax *must* apply to all companies that meet the $500,000 sales threshold, *regardless of whether they have substantial nexus with the State*. In other words, the Commissioner is insisting that the General Assembly intended the CAT to be placed in the constitutional cross-hairs. This contention, by itself, contradicts the basic principle that the legislature should be presumed to have sought to comply with constitutional standards, if there is any reasonable construction of

**Sixth**, the Commissioner quotes only the first sentence of Newegg's as-applied challenge contained in Paragraph 6 of its Notice of Appeal—which states that "[a]pplication of the CAT to Newegg would violate the Company's rights under the Commerce Clause"—implying that it somehow precludes Newegg's as-applied challenge because of its use of the word "would." (*See* Motion to Dismiss, at p. 10). Putting aside this inscrutable semantic argument about the meaning and import of Newegg's choice of verb tense, particularly in light of the pages 1-4 of the Notice of Appeal, we note that the Commissioner fails to quote the balance of the paragraph that makes absolutely clear that Newegg was presenting an as-applied constitutional challenge:

> The Supreme Court has made clear that 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. *Tyler Pipe*, 483 U.S. at 250 (1987) ("the crucial factor governing nexus is whether <u>the activities performed in this state on behalf of the taxpayer</u> are significantly associated with the taxpayer's ability to establish and maintain a market in this State") (internal citation omitted and emphasis added); *Standard Pressed Steel*, 419 U.S. at 562-64 (1975) (sufficient nexus for gross receipts tax established through presence of full-time employee in state calling on customers); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (applying the bright-line rule to a general revenue tax on the value of coal extracted from the state, and finding that "the interstate business must have a substantial nexus with the State before any tax may be levied on it"). This physical presence standard derives from constitutional principles and authorities set forth by the Court in *National Bellas Hess* and subsequently affirmed in *Quill*. The Supreme Court relied upon *Tyler Pipe*, *Standard Pressed Steel*, and *Commonwealth Edison* in upholding the physical presence test for sales and use taxes in *Quill*, and the Court has never held that a state has the power under the Commerce Clause to impose gross receipts tax on a company based on any lesser, or different standard than [the] physical presence test of *Tyler Pipe* and *Quill*. *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.*

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the law that permits it. *See, e.g.*, *Hopkins v. Kissinger*, 31 Ohio App. 229, 233, 166 N.E. 916, 917 (1928) (courts "presume that the Legislature acted wisely, and with an honest purpose to keep within the restrictions and limitations laid down by our state and Federal Constitutions"). The Commissioner's further insistence that any proposal by Newegg that the CAT might be interpreted as consistent with the Constitution thereby results in a waiver by Newegg of the underlying constitutional challenge is wholly without merit.

(Underlining sic. Emphasis added.) (Appx. 41-42, Ex. 5, Notice of Appeal, at ¶ 6, pp. 6-7). Newegg's Notice of Appeal could not have been clearer in asserting an as-applied Commerce Clause challenge and seeking the invalidation of the assessments against it (and the reversal of the Final Determination) on that basis.

## IV. CONCLUSION

For all of the reasons set forth above, Newegg respectfully requests that the Court deny the Commissioner's Motion to Dismiss Errors 1 and 3 (sic) of Newegg's Notice of Appeal. After nearly five years of carefully and consistently presenting and preserving its contention that the application of the CAT to Newegg through assessments of the CAT runs afoul of the Commerce Clause's bright-line physical presence standard, as set forth in *Tyler Pipe* and other U.S. Supreme Court cases, and having spent time and resources establishing a full evidentiary record for this Court, Newegg respectfully submits that the time has finally arrived for Newegg to have its day in court on this important constitutional claim.

Respectfully submitted,

/s Edward J. Bernert
Martin I. Eisenstein (PHV 1095-2015)
(Counsel of Record)
Matthew P. Schaefer (PHV 2399-2015)
BRANN & ISAACSON
184 Main Street
P.O. Box 3070
Lewiston, ME 04243-3070
Tel.: (207) 786-3566
Fax: (207) 783-9325
Email: meisenstein@brannlaw.com
mschaefer@brannlaw.com

AND

Edward J. Bernert (0025808)
BAKER HOSTETLER

Capital Square, Suite 2100
65 East State Street
Columbus, OH 43215-4260
Tel.: (614) 462-2687
Fax: (614) 462-2616
Email: ebernert@bakerlaw.com

Counsel for Appellant
Newegg, Inc.

## CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Appellant Newegg, Inc.'s Opposition to Appellee's Motion to Dismiss Appellant's Assignments of Error Numbers 1 and 3 (sic) was sent via the electronic mail and served by U.S. and electronic 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 19th day of June, 2015.

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