

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. | : | |

**APPENDIX OF EXHIBITS IN SUPPORT OF 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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Ohio

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served upon Christine T. Mesirov and Daniel W. Fausey, Office of the Ohio Attorney General, Taxation Section, attorneys for the Tax Commissioner, 30 E. Broad Street Columbus, Ohio 43215 by electronic and ordinary mail delivery this 19th day of June, 2015.

/s Edward J. Bernert _____
Edward J. Bernert

Exhibit 1

BEFORE THE BOARD OF TAX APPEALS
STATE OF OHIO

2012 APR -5 PM 2: 20

| | | |
|---------------------------|---|---------------------|
| NEWEGG, INC., | : | |
| | : | |
| Appellant, | : | |
| | : | Case No. 2012-K-234 |
| v. | : | |
| | : | |
| JOSEPH W. TESTA, | : | |
| TAX COMMISSIONER OF OHIO, | : | |
| | : | |
| Appellee. | : | |

**MOTION TO DESIGNATE CASE AS COMPLEX LITIGATION, EXTEND
DISCOVERY AND TO SET A CASE MANAGEMENT SCHEDULE**

Pursuant to Ohio Adm. Code 5717-1-07, the Appellee, Tax Commissioner, moves the Board to extend the discovery deadline for ninety (90) additional days, and to designate this matter as "Complex Litigation." The reasons in support are set forth in the following Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

The appellee seeks the BTA to designate this appeal as complex litigation and to extend the date for involvement by the Board in discovery disputes pending the adoption of a case management schedule. Under the BTA's rules, designation of a case as "complex litigation" is appropriate, among other circumstances, when it "presents unusual or complex issues of fact" and/or when it "involves problems which merit increased board supervision or special case management procedures." See, Ohio Adm. Code 5717-1-07(A)(3) and (4), respectively. This is the situation here.

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. For most commercial enterprises doing business in Ohio, the CAT replaces both the Ohio business personal property tax and the Ohio corporate franchise tax. *Ohio Grocers Ass'n v. Levin*, 123 Ohio St.3d 303, ¶¶ 6-7 (2009). Thus, the appellant's challenge to Ohio's exercise of its taxing power under R.C. Chapter 5751 presents both an unusual and fiscally important issue.

In addition, because appellant has not registered or filed returns for the CAT, the assessment was not prompted by an audit of appellant; rather, the assessment was estimated based on the information available to the Tax Commissioner. Because the appellant has not previously furnished any of the detailed records of its commercial activities that would normally have been reviewed by the Commissioner's auditing personnel had they been able to conduct a field audit, discovery concerning the appellant's sales and business activities in Ohio is particularly necessary in order to develop a more complete factual record upon which the constitutional issues will be analyzed. The Commissioner's determination that appellant has the

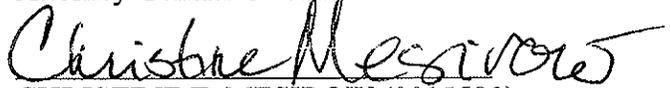
requisite nexus to levy the CAT may be supported under any basis permitted by the United States Constitution. R.C. 5751.01(H)(4).

Given the unusual and complex nature of the case, and the need to develop a full record for the appellate court's review of the constitutional challenge, it is likely that the course of proceedings may "involve[] problems which merit increased board supervision or special case management procedures." For example, there are several appeals of this same nature now pending at the BTA, raising "as applied" constitutional challenges similar to the present one. Some appellants have informally asked that they not be the lead case at the Board, and may seek such scheduling accommodations from the Board. Board supervision and/or case management procedures will aid in the progression of these appeals through the hearing process.

For all these reasons, the BTA should grant our request that the appeal be designated "complex litigation," and order the parties to propose a case schedule consistent with that designation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the *Notice of Appearance of Counsel for Appellee* was served upon the following by regular U.S. Mail on this 5th day of April, 2012:

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Exhibit 2

requests that this Board order discovery to proceed with or without a confidentiality agreement in place. A memorandum in support is attached. A new proposed case schedule is also attached.

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Newegg has asserted an as-applied constitutional challenge to Ohio's primary business tax, the commercial activity tax (the "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.

In mounting his defense, the Tax Commissioner intends to establish that Newegg had a physical presence in Ohio and regularly and systematically exploited the Ohio marketplace during the assessment periods, proving that taxation of Newegg's taxable gross receipts is perfectly lawful. Documents that Newegg provided during the audit and documents in the public domain support the Tax Commissioner's defense.

In order to obtain additional, nonpublic documents in support of his position, the Tax Commissioner timely served written discovery requests on Newegg. The Tax Commissioner's requests go to the central issue in this case—whether the CAT may be applied to Newegg's taxable gross receipts without violating the Constitution. However, Newegg has refused to substantively respond to the majority of the Commissioner's requests. In fact, Newegg has not produced a single document in response to the Commissioner's discovery requests. Additionally, Newegg has insisted upon a confidentiality agreement governing the treatment of documents to be provided through discovery, but has objected to every iteration proposed by the Tax Commissioner. Newegg's obstructionism has created a domino effect; the inability to meet this threshold deadline has made compliance with subsequent deadlines unworkable.

The parties have attempted to informally resolve their discovery disputes. The Tax Commissioner was initially hopeful that the parties would be able to work together in good faith to meet the deadlines set forth in the Board's June 6, 2012 scheduling order. However, the

process has already been made so litigious by Newegg that compliance with the existing case schedule is no longer possible.

If held to the case management schedule as it currently stands, the Tax Commissioner's ability to protect the State's interests will be compromised. The Tax Commissioner's right to obtain discovery to defend the CAT against Newegg's constitutional challenge should not suffer death by litigation. Accordingly, to prevent unfair prejudice from arising here, the Tax Commissioner requests that the Board amend its case management order of June 6, 2012.

For the foregoing reasons, as more fully explained below, good cause exists to amend the case management schedule in this case pursuant to O.A.C. 5715-1-11(A)(1). The Tax Commissioner respectfully requests that this Board extend the deadline for the conduct of written discovery and allow extra time in which to identify expert witnesses.

II. BACKGROUND REGARDING NEWEGG

Newegg is the second largest online only retailer in the United States and primarily sells information technology and consumer electronic products. It conducts the majority of its marketing efforts online using a variety of approaches such as targeted email, search engines, shopping comparison sites, mobile applications for smartphones and social media. Newegg also utilizes affiliates¹ located in Ohio to assist in promoting sales of Newegg products through internet links, and offers extended service contracts that provide for in-home service on articles that cannot be easily shipped.

III. PROCEDURAL BACKGROUND

On April 5, 2012, the Tax Commissioner filed a Motion to Designate Case as Complex Litigation, Extend Discovery and to Set a Case Management Schedule. On May 1, 2012, over

¹ An affiliate is a third party that Newegg contracts with and then compensates by way of a commission for each online purchase from Newegg that was bought about by such affiliate's own marketing efforts.

Newegg's objection, the Board ordered the parties to submit a case management schedule by May 22, 2012.

On May 21, 2012, the Commissioner filed the statutory transcript, including a disk containing the audit reports and related documents downloaded from the Commissioner's OFAST system with the Board.

On May 22, 2012, the parties submitted their proposed case management schedules. The dates proposed by the Commissioner were based on the expectation that the parties would be able to meet the proposed dates. Most importantly, the Commissioner assumed the parties would reach a confidentiality agreement prior to Newegg serving its responses to his written discovery requests. On June 6, 2012, the Board issued a case management schedule setting forth the following schedule:

Transcript shall be filed by the Tax Commissioner by May 25, 2012

Parties shall meet to discuss the streamlining/settlement of proceedings by June 1, 2012

Written discovery shall be served by June 11, 2012; responses shall be served by July 11, 2012

Parties shall execute amongst themselves any confidentiality agreements deemed appropriate by June 15, 2012

Parties shall disclose identities and contact information of anticipated witnesses, including qualifications and summary of anticipated opinions if experts, by July 11, 2012

Deposition notices for fact witnesses shall be served by August 15, 2012

Exchange of expert reports, if any, shall be served by August 1, 2012; deposition notices of experts shall be served by August 31, 2012; depositions shall be concluded by September 30, 2012

Parties shall file a joint stipulation of facts by October 15, 2012

Both parties timely served written discovery requests and both timely responded. However, Newegg's responses, while timely, were not complete or accurate. The Tax Commissioner sent a letter on August 15, 2012 pointing out deficiencies with and inaccuracies in Newegg's response. The Tax Commissioner sent another letter on September 26, 2012 attempting to narrow his discovery requests. To date, there has been no response from Newegg regarding these discovery issues.

By letter, the parties have agreed to extend: (a) the period for completing depositions to April 1, 2013; and (b) the time to file their joint stipulation of facts to April 15, 2013.

III. Law and Argument

This Board should extend the deadline for the conduct of written discovery and should allow extra time in which to identify expert witnesses and exchange expert reports.

The Board is empowered to adopt "special case management procedures." Ohio Adm. Code 5717-1-07(A)(4). And the Board has the power to order an amendment to the schedule pursuant to the "inherent authority" it possesses to "control its docket." *Streetsboro City School Dist. Bd. of Ed. v. Portage County Budget Commn.*, 2008-T-269 (Sept. 9, 2008).

This Board's rules permit the Board to "establish other specific times for completion of discovery" "upon motion and for good cause shown." O.A.C. 5715-1-11(A)(1); see, e.g., *Medina Blanking, Inc., et al. v. Medina Cty. Bd. of Rev., et al.*, BTA Case Nos. 2003-T-1375; 2003-T-1378, 2004 Ohio Tax LEXIS 1284 (August 23, 2004; August 17, 2004), unreported at *4-8, citing *Hypabyssal, Ltd. v. Summit Cty. Bd. of Rev.*, BTA No. 1998-A-487, (Mar. 18, 1999) unreported at *3. This Board has explained that this power flows from: (1) BTA Rule 5717-1-11(A)(1) which states that "Upon motion and for good cause, the board may establish other specific times for completion of discovery or consideration of discovery motions"; and (2) the

Board's authority to curtail discovery abuse under Civ.R. 37(D). *Medina Blanking, Inc.*, BTA Case Nos. 2003-T-1375; 2003-T-1378 at *8

“Good cause” is any “legally sufficient reason.” Black’s Law Dictionary, 7th Ed. (1999) at pg. 213. See also *America’s Floor Source, LLC v. Homes*, 191 Ohio App.3d 493, 506 (2010) (opining that a motion to modify a case management schedule should be reviewed to determine whether it would “effect just results.”). This Board has determined that good cause exists when extension would prevent discovery abuses and when the discovery requests at issue address the “central issue” in the case and “the free exchange of information will assist [the Board] in making [its] determination.” *Medina Blanking, Inc.*, BTA Case Nos. 2003-T-1375; 2003-T-1378 at *8.

In this case, there is good cause to amend the Board’s June 6, 2012 case management schedule for both of those two reasons. *First*, Newegg’s stonewalling on discovery has prejudiced the Tax Commissioner’s ability to defend against Newegg’s as-applied constitutional challenge to the CAT by hampering his ability to conduct a factual inquiry and to prepare for meaningful depositions. “Our system of discovery was designed to increase the likelihood that justice will be served in each case, not to promote principles of gamesmanship and deception in which the person who hides the ball most effectively wins the case.” *Cincinnati Bar Assn. v. Marsick*, 81 Ohio St.3d 551, 553 (1998); *Karrington of Kenwood, Ltd. v. Hamilton Cty. Bd. of Revision*, BTA No. 2000-T-1512 (Interim Order, Aug. 24, 2001), unreported, at 6. *Second*, the full and free exchange of information in this case will allow this Board to make a thorough and meaningful record for the Court for subsequent appeal of the constitutional issues in this case.

- 1. There is good cause to amend the scheduling order because Newegg has derailed the existing case management schedule.**

Newegg has confounded the conduct of discovery in this case, substantially departing from the current case management schedule. This has created a domino effect on the rest of the dates in the schedule, leaving the existing case management dates unworkable. As detailed below, Newegg has demanded a confidentiality agreement, but rejected the Tax Commissioner's every effort to accommodate this demand in light of Ohio's Public Records Act and record retention schedules. Newegg has not produced any documents in response to the Tax Commissioner's requests—failing even to provide information that we *know* Newegg has access to and documents that we *know* exist. Newegg has withheld documents without providing any reason for the refusal to produce. Newegg has objected to the Tax Commissioner's theory of the case as “irrelevant,” but has not sought a protective order and instead has simply refused to produce documents. And Newegg's refusal to provide documents has crippled the Tax Commissioner's efforts to identify potential expert witnesses and obtain meaningful expert opinion on Newegg's business activities in Ohio.

Newegg should not be rewarded for such obstructionist tactics, and this Board should grant the Tax Commissioner's request to amend the schedule.

A. Newegg has not agreed to a confidentiality agreement

In the case management order, the June 15, 2012 deadline for the confidentiality agreement (if needed) is the threshold deadline in the BTA's case management schedule. Newegg's refusal to reach agreement on a confidentiality agreement has been the major impediment to the conduct of discovery.

This Board should acknowledge that the parties most likely will not agree on the terms of a confidentiality agreement and order that discovery proceed without such agreement. The Tax Commissioner does not want or need a confidentiality agreement. Newegg does. In Ohio, open discovery is the norm—confidentiality is the exception to the rule. See, e.g. Civ.R. 37(C).

The party who seeks protection for his discovery responses bears the burden of requesting and establishing the need for protection. See, *id.* Protection from disclosure is provided to trade secrets under Ohio law, but there is no such protection afforded to documents that are referred to as “confidential” by agreement.

Newegg stands this process on its head. Newegg demands the privilege of sheltering its business documents as confidential prior to the release of any documents and prior to seeking a protective order from this Board. While Newegg characterizes the documents as “confidential,” it has yet to identify the grounds for treating any particular documents as confidential or to seek a protective order from this Board.

Newegg appears to believe that its entire document production is subject to protection, because it has not produced *any* documents in response to the Tax Commissioner’s requests without a confidentiality agreement. Of course, a confidentiality agreement is not a prerequisite to discovery, and Newegg can always seek a protective order from this Board if it believes that its documents are subject to privilege or protection.

Still, the Tax Commissioner has attempted to accommodate Newegg. The Tax Commissioner has drafted and offered several agreements for Newegg’s approval in an attempt to resolve the matter expediently and without the need for BTA involvement. Unfortunately, Newegg has been unwilling to agree to the terms of a confidentiality agreement that conforms to Ohio’s Public Records Act.

Newegg has two primary objections to any proposed agreement. The first is that the agreement must cover all documents produced, without a review as to whether they are trade secrets or not. The second objection is that the Attorney General’s statutorily-required and long-established records retention period is too long. Newegg believes that the Attorney General’s

two-year records retention period creates an insurmountable burden to production of records during discovery, because business competitors might make a public records request to obtain the documents produced by Newegg in discovery. Newegg would prefer that the documents be destroyed or returned within 60 days of the termination of all appeals in the dispute.

The Tax Commissioner cannot lawfully agree to a shorter timeframe within which to destroy or return documents that have not been exempted from the Public Records Act by the General Assembly.² The disagreement appears to be insurmountable.

The Tax Commissioner submitted yet another draft of a confidentiality agreement to Newegg on September 12, 2012. This draft was modeled after one that had been entered into in another matter pending before the Board, *The Cleveland Clinic Foundation v. Joseph Testa, et al.*, Case Nos. 2005-A-1726, 2006-A-99. Newegg responded to that proposal by letter dated September 27, 2012, rejecting the agreement, and insisting that we return to a draft that would actually provide no protection to Newegg upon the filing of a public records request, because the terms of the agreement would not be enforceable if in conflict with the Public Records Act.

This situation is a perfect example of the axiom: No good deed goes unpunished. Knowing full well that issues of confidentiality would intrude into the discovery process, the Commissioner tried to get ahead of the issue by including the negotiation of a confidentiality

² In early discussions, the Tax Commissioner's counsel and opposing counsel had been advised by the Tax Commissioner's public records counsel that an exemption from the Public Records Act could apply to all documents to be produced by Newegg. This advice was reflected in an early draft of the confidentiality agreement. However, after further review of relevant precedent, the advice likely was incorrect and the exemption would not apply. Therefore, any agreement based upon this faulty legal premise would have been unenforceable and thus the Tax Commissioner was unable to consent to unlawfully claim exemption from Public Records Act provisions. Newegg has subsequently seized upon this series of events in order to characterize the delay in reaching agreement as the Tax Commissioner's fault. Quite the contrary. The Tax Commissioner has undertaken every available basis upon which to accommodate Newegg's desire for a confidentiality agreement, but the Tax Commissioner cannot enter into an agreement that would unlawfully destroy public records. The delay has been occasioned by Newegg's repeated rejection of any agreement without this provision.

agreement in the case management schedule. The Commissioner is the only party who has suffered harm from Newegg's intransigence on the terms of the agreement; Newegg has already obtained complete and accurate discovery from the Tax Commissioner, but not vice versa. And, the longer Newegg drags the process out, the more deadlines slip away.

The Commissioner is not willing to hold up the progress on this appeal any longer in order to negotiate a confidentiality agreement that the Commissioner does not need. Thus, the Commissioner requests that this threshold deadline be removed from the case management schedule and that Newegg be directed to produce the documents requested or to seek a protective order for those documents for which it seeks trade secret protection.

B. Newegg has not produced information and documents that were requested by the Commissioner.

Further confounding the current case management schedule, Newegg has refused to produce a single document in response to the Tax Commissioner's discovery requests. On June 11, 2012, the Commissioner and Newegg served written discovery upon each other. The Tax Commissioner has completely responded to Newegg's requests. On the other hand, despite the passage of more than three months, Newegg has not produced a single document. In its General Objections to the Commissioner's interrogatories and documents requests, Newegg claimed that certain (unidentified) information and documents are confidential.³ However, Newegg did not identify any specific interrogatory or document request that it believes sought confidential information or documents.

³ See Newegg's General Objection No. 7 to the Tax Commissioner's First Set of Interrogatories and First Request for Production of Documents ("Newegg objects to each Interrogatory [Document Request] to the extent that it calls for the production of a trade secret or other confidential and proprietary information. Newegg will provide any responsive confidential information only if the parties have entered into a mutually acceptable confidentiality agreement, as provided for in the Board's June 6, 2012 Order.").

C. Newegg has withheld information and documents from the Commissioner for unexplained reasons.

The existing case management schedule has been frustrated by Newegg's refusal to provide information or documents—and also to explain its basis for this refusal. In its written response to several of the individual document requests, Newegg stated that it “will produce” the requested documents, but failed to explicitly state the reason why the documents were not being produced with its written responses and within the July 18, 2012 deadline for responding to discovery.⁴ See Newegg's Responses to Doc Request Nos. 14, 15, 22, 32, and 33 (“Newegg will produce responsive documents...”).

As a result, the Commissioner is unable to determine the reasons for Newegg's refusal to produce information or documents. The Tax Commissioner cannot ascertain whether the refusal is based upon the lack of a confidentiality agreement or for some other reason. As a result, the Commissioner cannot undertake efforts to address this refusal to produce discovery responses.

What is clear—and has been independently verified by the Tax Commissioner—is that Newegg *has* information and documents that have been requested by the Commissioner and *has not* produced them. For instance, in Interrogatories 19 and 20, and document requests 35 and 36, the Tax Commissioner requested information pertaining to all third parties who were authorized to use Newegg's trademarks, logos, and the like. In response, Newegg stated that it did not authorize the use of any such property by third parties in any geographic area that includes Ohio. Yet the Tax Commissioner knows—from documents obtained during audit—that Newegg's contract with Commission Junction grants a license to display the Newegg trademarks, etc. Moreover, the Tax Commissioner has copies of webpages from Ohio affiliates of Newegg that

⁴By mutual agreement, and with approval from the attorney examiner for the Board, the parties extended the discovery response date to July 18, 2012.

display the Newegg trademarks. In addition, Newegg directly contracted with Next Jump, Inc. and Bleeping Computer granting those companies the right to use Newegg trademarks.⁵

Thus, Newegg has documents that are responsive, but that it has refused to provide. An extension of the case management schedule is necessary to allow the Tax Commissioner to address this refusal.

D. Delay caused by Newegg's refusal to substantively respond to written discovery relating to its physical presence and exploitation of the Ohio marketplace.

Another major impediment to meeting the case management deadlines is Newegg's refusal to respond to an entire category of the Tax Commissioner's discovery requests. Those requests are intended to establish that Newegg has a physical presence in Ohio and is systematically and regularly exploiting the Ohio marketplace. The Commissioner cannot continue to meaningfully prepare his defense in this case in the face of Newegg's refusal to acknowledge the relevancy of this line of inquiry and its continued unwillingness to share any document related thereto. Moreover, the Commissioner cannot properly conduct the already-noticed depositions of certain Newegg employees and Rule 30(B)(5) designees without first reviewing the documents requested in discovery that have not yet been produced.

The current case management schedule requires all depositions to be completed by September 30, 2012. Newegg has informed the Tax Commissioner by letter dated September 28, 2012, that it is willing to modify the case management schedule for the taking of depositions, so that depositions would now conclude by April 1, 2013. The Commissioner has agreed to that cutoff date, but reserved the right to seek a further modification if the parties are unable to resolve their discovery disputes in a timely manner, necessitating the intervention of the Board.

⁵ The Tax Commissioner can provide other demonstrable examples of Newegg's failure to provide documents. The above is just one example provided for illustrative purposes.

E. The Tax Commissioner cannot complete his identification of expert witnesses or their opinions until Newegg responds to his written discovery requests.

The current case management schedule does not allow for the identification of expert witnesses whose need is ascertained after review of documents and information provided in discovery. . The Tax Commissioner has engaged and identified Professor Joseph Turow, of the Annenberg School of Communication at the University of Pennsylvania, to advise and testify as an expert regarding marketing using internet and mobile technology (emails, web bugs, cookies, etc.). The documents requested from Newegg may reveal other issues for which expert testimony is required. But the current schedule does not allow the Commissioner to supplement his witness disclosures, even where the expert identification deadline has passed prior to Newegg's compliance with the schedule's deadline for responding to discovery.

In its September 28 letter, Newegg has taken the position that the Commissioner is foreclosed from presenting any expert witness and expert reports because those deadlines have passed without the Commissioner having sought an extension of them. It is ironic that Newegg, having shown a complete disregard for the case management deadline for responding to discovery, objects to modifying deadlines that are premised on compliance with earlier case management deadlines.

In point of fact, the Tax Commissioner did timely disclose that it was in the process of engaging an expert, and identified that expert and provided his CV to Newegg. Unlike a private business that can decide to hire someone and act immediately, the government must follow state purchasing procedures in order to retain an expert witness. Those procedures had not yet been completed prior to the due date for disclosure of expert witnesses, but the Commissioner nevertheless disclosed the identity of Professor Turow in a timely manner, noting that the engagement was not yet complete. Newegg has not suffered any prejudice in this regard.

The Tax Commissioner has made every effort to work with Newegg to resolve all of the parties' discovery disputes, as well as the confidentiality issue, without seeking the intervention of an overburdened Board. The execution of the confidentiality agreement was intended to obviate the necessity for the Board to review the documents that Newegg claims to be confidential, and make a determination as to whether they should be accorded trade secret protection. The Commissioner should not be prejudiced for his attempts to resolve these disputes by forcing adherence to a case management schedule that Newegg has flouted.

2. This Board will benefit from the free exchange of discovery among the parties.

The Supreme Court and this Board have long recognized the role of the Board in appeals in which a constitutional violation is asserted. As the Court stated in *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 232 (1988):

When 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 needs notice and an opportunity to offer testimony supporting his or her view.

To accommodate this court's need for extrinsic facts and to provide a forum where such evidence may be received and all parties are apprised of the undertaking, it is reasonable that the BTA be that forum. The BTA is statutorily created to receive evidence in its role as factfinder. *R.C. 5717.01 and 5717.02.*

See also, *Columbia Gas Transmission Corp. v. Zaino*, BTA No. 2005-K-1876 (Interim Order March 4, 2005, February 25, 2005), 2005 Ohio Tax LEXIS 327; *MCI Telecommunications Corp. v. Limbach*, 68 OhioSt. 3d 195 (1994).

The central issue in this case is whether Newegg's taxable gross receipts may be constitutionally subject to application of the CAT. As explained above, the Tax Commissioner's discovery requests are designed to address this "central issue" now before the Board and "the

free exchange of information will assist [the Board] in making [its] determination.” *Medina Blanking, Inc.*, BTA Case Nos. 2003-T-1375; 2003-T-1378 at *8. Thus, there is good cause in this case to issue an order amending the case management schedule to preclude appellant from hiding the documents and information that are crucial to the Court’s determination of this as applied constitutional challenge. This Board—and the court that follows—will benefit from the free and fair exchange of information that discovery provides. If the Tax Commissioner is artificially limited in the discovery that he may conduct, this Board’s analysis will suffer as a result. The more information that this Board has about the particular facts and circumstances of this case, the more likely it is that the Board will provide the Court with the ability to reach a thorough and well-reasoned decision.

IV. Conclusion

For the foregoing reasons the Board should grant the Tax Commissioner’s motion to amend the case management schedule in accordance with the proposed schedule attached hereto, allowing for extra time in which to conduct written discovery and an extension to the deadline for identifying expert witnesses and exchanging expert reports. Additionally, this Board should make it clear that discovery must proceed with or without a confidentiality order in place.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio


CHRISTINE T. MESIROW (0015590)

Assistant Attorney General
30 East Broad Street, 25th Floor
Columbus, Ohio 43215
Telephone: (614) 466-5967
Facsimile: (614) 466-8226
christine.mesirov@ohioattorneygeneral.gov

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

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the *Tax Commissioner's Motion to Amend Case Management Schedule* was served upon the following by regular U.S. Mail on this ^{12th} day of October, 2012:

Martin I. Eisenstein, Esq.
Matthew P. Schaefer, Esq.
Brann & Isaacson
184 Main Street
P.O. Box 3070
Lewiston, Maine 04243-3070

*Counsel for Appellant
Newegg, Inc.*

Anthony Ehler, Esq.
Steven L. Smiseck, Esq.
Vorys, Sater, Seymour & Pease LLP
52 E. Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008

*Counsel for Appellant
Newegg, Inc.*


Christine Mesirow
Assistant Attorney General

Exhibit 3



Petition for Reassessment

Complete all applicable blanks and type or print in ink. See instructions for completing this form.

A. General information

Taxpayer name(s) Newegg, Inc.
Address 16839 E. Gale Avenue
City City of Industry State CA ZIP 91745
Tax type (e.g., personal income, sales) CAT
Telephone number (207) 786-3566
E-mail address meisenstein@brannlaw.com
Fax number (207) 783-9325

Assessment serial # 17201114476189
Date of assessment June 3, 2011
Account # 96066020
Tax period(s) 1/01/11-3/31/11 & 1/01/11-12/31/11
Disputed amount(s) \$77,538.36
Federal emp. I.D.# (FEIN) 20-3225548

If personal income tax, include Social Security number(s) (SSN).
SSN - Self Spouse

B. Please note: The tax commissioner may correct the assessment by issuing a "corrected assessment" pursuant to Ohio Revised Code 5703.60. This process is not available for property tax and some public utility tax matters. This streamlined procedure may result in a more timely resolution of this matter.

C. [X] Check this box if you do NOT want the "corrected assessment" procedure used.

D. Select one of the following boxes:
[] Please decide this matter based upon the information submitted. No hearing is requested.
[X] I request a hearing by telephone.
[] I request a personal appearance hearing.
(Hearings are held in Columbus, Ohio.)

E. [] Check this box if this petition is in response to a "corrected assessment."

F. Basis for filing this petition for reassessment (petition must list specific issues/objections):

Please see Attachment A.

[X] Basis for petition continued on attached. This is page one of 6 pages.

G. Person responsible for the filing of this petition. I declare under penalty of perjury that I'm the taxpayer or that I'm an authorized agent of the taxpayer, having knowledge of the relevant facts in this matter to file this petition for reassessment.

Signature [Signature] Date 7/28/11
Name Martin I. Eisenstein Title Attorney-in-Fact Telephone number (207) 786-3566

H. Contact person (if different from the person above responsible for filing this petition for reassessment)

Name Address City State ZIP Title Fax number Telephone number E-mail address

I. Mail this form to:

If property or public utility: Ohio Department of Taxation Personal Property Tax Division P.O. Box 530 Columbus, OH 43216-0530

If excise, motor fuel or commercial activity tax: Ohio Department of Taxation CAT, Excise and Motor Fuel Tax Division P.O. Box 530 Columbus, OH 43216-0530

For all other taxes: Ohio Department of Taxation Administrative Review Section P.O. Box 1090 Columbus, OH 43216-1090

For Department Use Only



7100 3581 7530 3017 5178

Commercial Activity Tax
P.O. BOX 16678
Columbus, OH 43216-6678
Telephone: 1-888-722-8829
Fax: 1-614-644-9641
TTY/TDD: 1-800-750-0750
tax.ohio.gov

**NOTICE OF ASSESSMENT
COMMERCIAL ACTIVITY TAX**

June 3, 2011

NEWEGG, INC.
16839 E. GALE AVE.
CITY OF INDUSTRY, CA 91745

Re: Assessment #: **17201114476189**
Taxpayer ID(s): 96066020
FEIN: 20-3225548
Audit Type: NEXUS
Case Type: 10

Pursuant to 5751.09 of the Ohio Revised Code, The Tax Commissioner Hereby Certifies the Following:

| | Period 1 | Period 2 | Period 3 | Period 4 | Period 5 | Total |
|---------------------------|-------------|------------|----------|----------|----------|--------------------|
| Starting Date | 01/01/2011 | 01/01/2011 | | | | |
| Ending Date | 03/31/2011 | 12/31/2011 | | | | |
| Tax Due Amount | \$49,850.00 | \$150.00 | | | | \$50,000.00 |
| Pre-Assessment Interest | \$38.24 | \$0.12 | | | | \$38.36 |
| Penalty | \$17,447.50 | \$52.50 | | | | \$17,500.00 |
| Late Payment Penalty | \$9,970.00 | \$30.00 | | | | \$10,000.00 |
| Additional Charge | | | | | | |
| Additional Charge Penalty | | | | | | |
| Period Totals | \$77,305.74 | \$232.62 | | | | \$77,538.36 |
| Less Payments | | | | | | |
| Total Due | | | | | | \$77,538.36 |

Notice to taxpayers in Bankruptcy: This assessment is a notice of tax deficiency permissible pursuant to 11USC 362(b) (9).

I HEREBY CERTIFY THE FOLLOWING TO BE A TRUE AND CORRECT COPY OF THE ACTION OF THE TAX COMMISSIONER TAKEN THIS DAY WITH RESPECT TO THE ABOVE MATTER.

TAX COMMISSIONER, STATE OF OHIO

To appeal this assessment, please follow the instructions on the following page.

ATAS0037

MAKE CHECK PAYABLE TO - TREASURER OF STATE
RETURN THIS PORTION WITH YOUR REMITTANCE
AND/OR CORRESPONDENCE PERTAINING TO THIS
MATTER.

CAT

COMMERCIAL ACTIVITY TAX

AMOUNT OWED: \$77,538.36

| | | | | | |
|---------------------|-------------------|-------------------|--|--|--|
| Period(s) Assessed: | 01/01/11-03/31/11 | 01/01/11-12/31/11 | | | |
|---------------------|-------------------|-------------------|--|--|--|

NEWEGG, INC.
Taxpayer ID(s): 96066020
Assessment #: **17201114476189**

Enter Amount Paid:

OHIO DEPARTMENT OF TAXATION **CAT**
P.O. BOX 16678
Columbus, OH 43216-6678

*****State Use Only*****

Payment Code: **PMT**

Payment Date: _____

OTC #: _____

096066020 & 000000000 0 17201114476189 4 PMT 00007753836 3

**PERTINENT INFORMATION
COMMERCIAL ACTIVITY TAX**

FAILURE TO RESPOND

If you do not pay the assessment or file a Petition for Reassessment within **sixty (60) days** from the day you receive this assessment, such assessment will become final. Judgement may be entered in the court of common pleas in the county in which your business is located, in the county in which you reside, or in the court of common pleas in Franklin County. After sixty (60) days, if a petition is not filed, any unpaid portion of the assessment will be turned over to the Attorney General's office for collection.

APPEAL

If you feel the assessment is incorrect, you must file a Petition for Reassessment. If you mail your petition via certified mail, the postmark date is considered to be the date filed. If you send the petition by regular mail, the date the petition is received is deemed to be the date filed. Please mail your petition to: Ohio Department of Taxation, P.O. BOX 16678, Columbus, OH 43216-6678.

Your petition must include the specific reasons for each and every item of the assessment you feel is in error. When a Petition for Reassessment has been properly filed, the Tax Commissioner *may* respond by issuing a "Corrected Assessment". The issuance of a "Corrected Assessment" modifies the original Petition for Reassessment. If a "Corrected Assessment" is issued and you disagree with the result, you still have the option of protesting the "Corrected Assessment" by filing a new Petition for Reassessment. The new Petition for Reassessment must be filed no later than sixty (60) days from the date that the "Corrected Assessment" was mailed. When filing the original Petition for Reassessment, you may request that the Tax Commissioner not use the "Corrected Assessment" procedure. If you do not file a new petition, the original petition is not subject to further administrative review or appeal. Therefore, the "Corrected Assessment" will become final.

PAYMENT

To pay the assessment, please make your check or money order payable to the Treasurer State of Ohio and mail it along with the attached payment coupon to P.O. BOX 16678, Columbus, OH 43216-6678. For your protection, please write the assessment serial number on your check or money order. Please pay any portion of the assessment that you are not appealing, including interest. Installment payments are not permitted. If you decide to pay that portion of the assessment while it is under appeal, such payment will not prejudice the determination of your appeal and you will receive interest on any refund you may later receive.

INTEREST

You have sixty (60) days from the day you receive this assessment in which to pay the amount due without accruing any additional interest. After this sixty (60)-day period, interest will accrue on any part of the assessment that remains unpaid, back to the original date of the assessment. If the assessment is appealed, interest will accrue on any portion of the assessment that is ultimately determined to be due through all appeal processes.

CASE TYPES:

- | | |
|--------------------------|---|
| 1. DQ or AMT DQ | Delinquency assessment for failure to file a required return. |
| 2. NR or AMT NR | Non-remittance assessment issued for failure to pay the reported tax liability. |
| 3. FA | Field Audit assessment generated based on a field audit. |
| 4. OA | Office Audit assessment generated based on an in-house office audit. |
| 5. NSF or AMT NSF | Assessment issued as a result of a bad check or failed EFT payment. |
| 6. VAR | Variance assessment due to a mathematical error on the return. |
| 7. JEP | Jeopardy Assessment. |
| 8. RM | Responsible Member assessment issued as a result of responsible member status. |
| 9. ENF | Assessment issued as a result of an enforcement action. |
| 10. NEXUS | Assessment issued as a result of failure to register and/or file. |

For additional information, please contact our taxpayer assistance at 1-888-722-8829. For deaf, hearing impaired or speech impaired who use TTY or TDD only, please contact the Ohio Relay Service at TTY/TDD: 1-800-750-0750 and give the communication assistant the Commercial Activity Tax telephone number.

ATTACHMENT A

BASES FOR PETITION

I. Introduction

Petitioner (“Newegg” or the “Company”) is an online retailer with no connection to the State of Ohio. It sells its goods through the Internet from locations entirely outside of the state. While some of Newegg’s customers reside in Ohio, Newegg itself has no personnel, agents, or property of any kind in Ohio, and makes no sales from within the State of Ohio.

As a result, Newegg is protected from imposition of the Commercial Activity Tax (“CAT”) under the Commerce Clause of the United States Constitution. 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 Industries, Inc. v. Wash. Dep’t of Revenue*, 483 U.S. 232, 250 (1987). This “bright line,” physical presence standard derives from constitutional principles and authorities set forth by the Court in *National Bellas Hess v. Ill. Dep’t of Revenue*, 386 U.S. 753 (1967), and subsequently reaffirmed in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). As it applies to gross receipts taxes like the CAT, the Court has made clear that the physical presence standard is only satisfied through in-state activities by, or on behalf of, the taxpayer that are significantly associated with its ability to establish and maintain a market in the state. *Tyler Pipe*, 483 U.S. at 250; *Standard Pressed Steel, Inc. v. Wash. Dep’t of Revenue*, 419 U.S. 560, 562-64 (1975) (sufficient nexus for gross receipts tax established through presence of full-time employee in the state calling on customers);

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617, 626 (1981) (citing *Bellas Hess* for threshold of state taxing power for gross receipts tax purposes, and finding sufficient presence); *see also Norton Co. v. Ill. Dep't of Revenue*, 340 U.S. 534, 537 (state lacks authority to impose gross receipts tax on a company with no "local incident" in the state). 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 "bright line," physical presence test of *Tyler Pipe* and *Quill*. Because Newegg lacks the necessary physical presence in Ohio required under the Commerce Clause, it is not subject to the CAT, and the assessments against it should be withdrawn.

In addition to its constitutional protections, Newegg also submits that it does not satisfy the statutory requirements for imposition of Ohio's Commercial Activity Tax (the "CAT") inasmuch as it does not satisfy the in-state activity requirements that underpin the imposition of such tax. Read as a whole, the CAT seeks to tax in-state business activities, not those between Ohio residents and those companies, like Newegg, having no in-state presence whatsoever. Moreover, even if it were to be held that the CAT statutes were ambiguous as to their application to out-of-state companies like Newegg, "there is one fundamental precept which still obtains in the interpretation of taxation statutes, to wit, that in case of doubt, such doubt is to be resolved in favor of the taxpayer." *Stephens v. Glander*, 151 Ohio St. 62, 84 N.E.2d 279, 281 (1949).

Newegg submits that, when all doubts are resolved in its favor as required by law, the assessment against it should be rescinded in its entirety.

Further, Newegg submits that any penalty sought to be imposed on the Company should be rescinding based upon the fact it (1) was reasonable for Newegg to conclude that Ohio's attempt to export a domestic tax to a foreign corporation with no in-state presence violated state and federal law; and (2) Newegg's reliance on well established legal principles, including the United States Supreme Court bright-line "substantial nexus" rule was justified and appropriate in light of Ohio's unprecedented attempt to impose the CAT on non-resident mail order and Internet sellers.

II. Specific Grounds

1. Because Newegg 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. Newegg 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"; (b) lacks a "certificate of compliance with the laws of this state authorizing [it] to do business in this state"; and (c) does not "otherwise [have] nexus in this state ... under the constitution [sic] of the United States."

3. Newegg lacked a "'bright-line presence' in this state" under R.C. § 5751.01(H) & (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"; (b) "during the calendar year payroll in this state of at least fifty thousand dollars"; (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; 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.” In addition, Newegg was not “domiciled in this state as an individual or for corporate, commercial, or other business purposes.”

4. Newegg’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 Newegg, inasmuch as imposing the tax on Newegg would violate the Company’s rights under the Commerce Clause of the United States Constitution, as discussed below. It is the duty of those charged with interpreting and applying a law to construe it so as to “prevent a declaration of unconstitutionality.” *Conold v. Stern*, 138 Ohio St. 352, 25 N.E.2d 133, 143 (1941) (citation omitted). Only by excluding Newegg from the reach of the CAT can the constitutionality of the tax be preserved.

6. 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 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”) (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 the 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 reaffirmed 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 physical presence test of *Tyler Pipe* and *Quill*.

Since the bright-line physical presence test applies to taxes like the CAT, the assessment is void in its entirety.

7. Even if it were held, contrary to clear United States Supreme Court precedent, that the “bright-line” rule applied in *Tyler Pipe* and affirmed in *Quill* applied only to sales and use taxes, the CAT is the functional equivalent of a sales tax. It is calculated based upon, and applies to, retail sales transactions by Newegg to residents of the State of Ohio. Whether cast as an assessment of use tax, sales tax, or gross receipts tax, “there is no real distinction [between such taxes] that has been subjected to Commerce Clause scrutiny.” *Commonwealth Edison*, 453 U.S. at 616.

8. The penalty should be abated.

Exhibit 4

FINAL DETERMINATION

Date: NOV 22 2011

Newegg Inc.
16839 E. Gale Avenue
City of Industry, CA 91745

Re: Six Assessments
Commercial Activity Tax

This is the final determination of the Tax Commissioner with regard to the petitions for reassessment under R.C. 5751.09 concerning the following commercial activity tax assessments:

| Assessment No. | Period | Tax | Interest | Late Filing | Late Payment | Total |
|----------------|--------------------------------|--------------|-------------|--------------|--------------|--------------|
| | | | | Penalty | Penalty | |
| 17201034126112 | 7/1/2005 - 12/31/2009 | \$447,580.00 | \$54,081.00 | \$156,655.00 | \$111,895.00 | \$770,211.00 |
| 17201034427316 | 2010 1st quarter/2010 estimate | \$50,000.00 | \$1,117.81 | \$17,500.00 | \$10,000.00 | \$78,617.81 |
| 17201034427317 | 2010 2nd quarter | \$50,000.00 | \$630.14 | \$17,500.00 | \$10,000.00 | \$78,130.14 |
| 17201034427318 | 2010 3rd quarter | \$50,000.00 | \$126.03 | \$17,500.00 | \$10,000.00 | \$77,626.03 |
| 17201106110042 | 2010 4th quarter | \$50,000.00 | \$71.23 | \$17,500.00 | \$10,000.00 | \$77,571.23 |
| 17201114476189 | 2011 1st quarter/2011 estimate | \$50,000.00 | \$38.36 | \$17,500.00 | \$10,000.00 | \$77,538.36 |

The petitioner was assessed as the result of an audit which was commenced because it failed to register for the Ohio commercial activity tax. The petitioner is the second largest on-line only retailer in the United States selling information technology and consumer electronic products. Most orders are fulfilled through on-line processing centers in California and New Jersey. The petitioner conducts the majority of its marketing efforts on-line through targeted marketing via affiliates, search engines, shopping comparison sites and e-mail programs. Its off-line marketing activities include advertisements in various technology publications, print and electronic catalogs, box inserts, event participation, public relations and targeted broadcast and major media print and broadcast activities designed to increase its brand awareness. The petitioner fulfills its orders from warehouses located in New Jersey and Tennessee.

The audit results clearly determined that the petitioner had more than \$500,000 in sales to customers in Ohio. Consequently, it was required to file and pay the commercial activity tax required by R.C. 5751.02(A) which it failed to do. The petitioner was assessed and it submitted petitions for reassessment, requesting a hearing which was duly held.

The petitioner makes the following contention:

* * * Newegg is protected from imposition of the Commercial Activity Tax ("CAT") under the Commerce Clause of the United States Constitution. 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 Industries,*

Inc. v. Wash. Dep't of Revenue, 483 U.S. 232, 250 (1987). * * * In addition to its constitutional protections, Newegg also submits that it does not satisfy the statutory requirements for imposition of Ohio's Commercial Activity Tax (the "CAT") inasmuch as it does not satisfy the in-state activity requirements that underpin the imposition of such tax. Read as a whole, the CAT seeks to tax in-state business activities, not those between Ohio residents and those companies like Newegg, having no in-state presence whatsoever. Moreover, even if it were to be held that the CAT statutes were ambiguous as to their application to out-of-state companies like Newegg, "there is one fundamental precept which still obtains in the interpretation of taxation statutes, to wit, that in case of doubt, such doubt is to be resolved in favor of the taxpayer." *Stephens v. Glander*, 151 Ohio St. 62, 84 N.E.2nd 279, 281 (1949).

While the petitioner has customers in Ohio to which it sells and ships goods, it asserts that it has no activities or contacts in Ohio which rise to the level necessary for Ohio to constitutionally impose the tax.

The petitioner's contention is not well taken. The petitioner is subject to the tax because it has "substantial nexus with this state," as that phrase is defined in R.C. 5751.01(H). The petitioner satisfies the third condition in that division, and therefore is a person on whom the tax is levied.

Effective June 30, 2005, R.C. 5751.02(A) levies the commercial activity tax

* * * on each person with taxable gross receipts for the privilege of doing business in this state. For the purposes of this chapter, "doing business" means engaging in any activity, whether legal or illegal, that is conducted for, or results in, gain, profit, or income, at any time during the calendar year. Persons on which the commercial activity tax is levied include, but are not limited to, persons with substantial nexus with this state.

Pursuant to R.C. 5751.01(H), a person has "substantial nexus with this state" if the person meets any of the following conditions:

- (1) Owns or uses a part or all of its capital in this state;
- (2) Holds a certificate of compliance with the laws of this state authorizing the person to do business in this state;
- (3) Has bright-line presence in this state;
- (4) Otherwise has nexus with this state to an extent that the person can be required to remit the tax imposed under this chapter under the Constitution of the United States.

Pursuant to R.C. 5751.01(I), a person "has bright-line presence" in this state for a reporting period if the person meets any of the following conditions:

- (1) Has at any time during the calendar year property in this state with an aggregate value of at least fifty thousand dollars. * * *
 - (2) Has during the calendar year payroll in this state of at least fifty thousand dollars. *
- * *

- (3) Has during the calendar year taxable gross receipts of at least five hundred thousand dollars.
- (4) Has at any time during the calendar year within this state at least twenty-five percent of the person's total property, total payroll, or total gross receipts.
- (5) Is domiciled in this state as an individual or for corporate, commercial, or other business purposes.

Division (F) of R.C. 5751.01 defines gross receipts as "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person * * * [including] [a]mounts realized from the sale, exchange, or other disposition of the taxpayer's property to or with another." Specifically excluded from gross receipts are "any receipts for which the tax imposed by this chapter is prohibited by the Constitution or laws of the United States or the Constitution of Ohio." R.C. 5751.01(F)(2)(aa) (formerly R.C. 5751.01(F)(2)(z)).

"Taxable gross receipts" is defined as gross receipts situated to this state under R.C. 5751.033. For purposes of the petitioner, division (E) applies:

Gross receipts from the sale of tangible personal property shall be situated to this state if the property is received in this state by the purchaser. In the case of delivery of tangible personal property by common carrier or by other means of transportation, the place at which such property is ultimately received after all transportation has completed shall be considered the place where the purchaser receives the property. * * *

There is no ambiguity. The petitioner had annual sales situated to Ohio in excess of \$500,000.00 and, therefore, met the bright-line presence requirement subjecting it to the commercial activity tax.

Further, gross receipts from the sale of tangible personal property are situated to Ohio if "such property is ultimately received in Ohio after all transportation has been completed * * * regardless of where title passes or other conditions of sale." R.C. 5751.033(E). Consequently, the Ohio commercial activity tax requires the property to be situated to Ohio because Ohio was the ultimate destination of the property. Therefore, the gross receipts were properly situated to Ohio.

The petitioner has more than \$500,000.00 in taxable gross receipts situated to Ohio for periods assessed and, thus has "bright-line presence." As such, the petitioner has "substantial nexus" with Ohio. Under established Commerce Clause jurisprudence, the imposition of the tax measured by those receipts is not prohibited by the laws or Constitution of either the United States or Ohio.

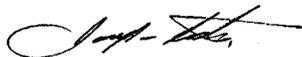
The petitioner is a person doing business in Ohio and, therefore, subject to the Ohio Commercial Activity tax. R.C. 5751.02. The petitioner failed to provide any support to show otherwise nor did it provide actual Ohio gross receipts for the periods assessed.

Accordingly, the assessments are affirmed and will stand as issued.

Current records indicate that no payments have been made on these assessments. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any tax balances unpaid after the assessment dates bear post-assessment interest for the period between the assessment dates and payments as provided by law, which is in addition to the above totals.** Payments shall be made payable to "Ohio Treasurer Josh Mandel." Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Commercial Activity Tax Division, P.O. Box 16678, Columbus, Ohio 43216-6678.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF THE FINAL DETERMINATION RECORDED IN THE TAX COMMISSIONER'S JOURNAL



JOSEPH W. TESTA
TAX COMMISSIONER

/s/ Joseph W. Testa

Joseph W. Testa
Tax Commissioner

Exhibit 5

RECEIVED

JAN 19 2012

DEPT. OF TAXATION OF OHIO
OFFICE OF TAX COMMISSIONER

BEFORE THE OHIO BOARD OF TAX APPEALS

NEWEGG, INC.,
16839 E. Gale Avenue
City of Industry, CA 91745

Appellant,

vs.

JOSEPH W. TESTA,
Tax Commissioner of Ohio
30 East Broad Street, 22nd Floor
Columbus, OH 43215,

Appellee.

BTA Case No. _____

(COMMERCIAL ACTIVITY TAX)

Amount in Controversy:
Approximately \$1,160,000 in Tax,
Penalties, and Pre-Assessment
Interest, Plus Post-Assessment
Interest.

RECEIVED
BOARD OF TAX APPEALS
2012 JAN 19 PM 12:47

NOTICE OF APPEAL

Martin I. Eisenstein (Maine Reg. 003027)
Matthew P. Schaefer (Maine Reg. 007992)

BRANN & ISAACSON
184 Main Street
P.O. Box 3070
Lewiston, ME 04243-3070
Tel. (207) 786-3566
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LEGAL COUNSEL FOR APPELLANT,
NEWEGG, INC.

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LEGAL COUNSEL FOR APPELLANT,
NEWEGG, INC.

Pursuant to Section 5717.02 of the Ohio Revised Code (“R.C.”), Newegg, Inc. (“Newegg” or the “Company”) hereby gives notice of appeal to the Ohio Board of Tax Appeals (“the Board”) from a final determination dated November 22, 2011 (“Determination”) issued by Joseph W. Testa, Tax Commissioner of the State of Ohio (“Commissioner”) that affirmed assessments of Ohio Commercial Activity Tax (“CAT”) against Newegg with respect to the following tax periods: (1) July 1, 2005 through December 31, 2009; (2) January 1, 2010 through March 31, 2010 (including 2010 estimated tax); (3) April 1, 2010 through June 30, 2010; (4) July 1, 2010 through September 30, 2010; (5) October 1, 2010 through December 31, 2010; and (6) January 1, 2011 through March 31, 2011 (including 2011 estimated tax) (together, the “Tax Periods”). A copy of the Determination is attached hereto as required by statute. See Exhibit A.

BACKGROUND

1. Newegg is an online retailer with no physical presence in the State of Ohio. It sells its goods through the Internet from locations entirely outside of the state.
2. While some of Newegg’s customers reside in Ohio, Newegg itself has no personnel, agents, representatives, or property of any kind in Ohio, and makes no sales from within the State of Ohio.
3. As a result, Newegg is protected from imposition of the Commercial Activity Tax (“CAT”) under the Commerce Clause of the United States Constitution. The United States 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 Industries, Inc. v. Wash. Dep’t of Revenue*, 483 U.S. 232, 250 (1987). This “bright line,” physical presence standard derives from constitutional principles and authorities set forth by the

Court in *National Bellas Hess v. Ill. Dep't of Revenue*, 386 U.S. 753 (1967), and subsequently reaffirmed in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

4. As it applies to gross receipts taxes like the CAT, the Supreme Court has held that the physical presence standard is only satisfied through in-state activities by, or on behalf of, the taxpayer that are significantly associated with its ability to establish and maintain a market in the state. *Tyler Pipe*, 483 U.S. at 250; *Standard Pressed Steel, Inc. v. Wash. Dep't of Revenue*, 419 U.S. 560, 562-64 (1975) (sufficient nexus for gross receipts tax established through presence of full-time employee in the state calling on customers); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617, 626 (1981) (citing *Bellas Hess* for threshold of state taxing power for gross receipts tax purposes, and finding sufficient presence); see also *Norton Co. v. Ill. Dep't of Revenue*, 340 U.S. 534, 537 (state lacks authority to impose gross receipts tax on a company with no "local incident" in the state). 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 "bright line," physical presence test of *Tyler Pipe* and *Quill*. Because Newegg lacks the necessary physical presence in Ohio required under the Commerce Clause, it is not subject to the CAT, and the assessments against it should be cancelled.

5. In addition to its constitutional protections, Newegg also submits that it does not satisfy the statutory requirements for imposition of Ohio's Commercial Activity Tax (the "CAT") inasmuch as it does not satisfy the in-state activity requirements that underpin the imposition of such tax.

6. Read as a whole, the CAT seeks to tax in-state business activities, not those between Ohio residents and those companies, like Newegg, having no in-state presence

whatsoever. Moreover, even if it were to be held that the CAT statutes were ambiguous as to their application to out-of-state companies like Newegg, “there is one fundamental precept which still obtains in the interpretation of taxation statutes, to wit, that in case of doubt, such doubt is to be resolved in favor of the taxpayer.” *Stephens v. Glander*, 151 Ohio St. 62, 84 N.E.2d 279, 281 (1949).

7. Newegg submits that, when all doubts are resolved in its favor as required by law, the Determination against it should be vacated in its entirety and the assessment cancelled.

8. Further, Newegg submits that any penalty sought to be imposed on the Company should be rescinded because: (1) it was reasonable for Newegg to conclude that Ohio’s attempt to export a domestic tax to a foreign corporation with no in-state presence violated state and federal law; and (2) Newegg’s reliance on well established legal principles, including the United States Supreme Court bright-line “substantial nexus” rule was justified and appropriate in light of Ohio’s unprecedented attempt to impose the CAT on non-resident mail order and Internet sellers.

THE FINAL DETERMINATION

9. In support of his finding that Newegg was subject to the CAT, despite its lack of physical presence in Ohio, for each of the Tax Periods, the Commissioner rested the Determination on the following grounds:

10. First, the Determination concluded that Newegg had “substantial nexus” with Ohio as that term is defined in the statute [*see* R.C. 5751.01(H)], based on the “bright-line presence” test set forth in R.C. 5751.03(I)(3). [Determination at 3.] The Commissioner stated that Newegg “had annual sales situated to Ohio in excess of \$500,000.00 and, therefore, met the bright-line presence requirement subjecting it to the commercial activity tax.” [*Id.*]

11. There was no other “bright-line” statutory basis for the Determination’s conclusion that Newegg owed CAT for the Tax Period.

12. At the same time, the Commissioner found that there is no ambiguity in the application of the CAT to an out-of-state retailer with no physical presence in the State of Ohio, such as Newegg. According to the Commissioner, despite the physical presence requirement of the Commerce Clause, the terms of the CAT dictate that it applies to Newegg, based solely on Newegg’s annual gross receipts from sales to Ohio purchasers. [*Id.*]

13. Finally, the Commissioner stated that “[u]nder established Commerce Clause jurisprudence, the imposition of the tax measured by those receipts is not prohibited by the laws or the Constitution of either the United States or Ohio.” [*Id.*]

14. Each of the grounds given by the Commissioner for the Determination is in error.

ASSIGNMENTS OF ERROR

1. Because Newegg 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. Newegg 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. Newegg 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, Newegg was not “domiciled in this state as an individual or for corporate, commercial, or other business purposes.” [R.C. 5751.01(I)(5)].

4. Newegg’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 Newegg, inasmuch as imposing the tax on Newegg would violate the Company’s rights under the Commerce Clause of the United States Constitution, as discussed below. It is the duty of those charged with interpreting and applying a law to construe it so as to “prevent a declaration of unconstitutionality.” *Conold v. Stern*, 138 Ohio St. 352, 25 N.E.2d 133, 143 (1941) (citation omitted). Only by excluding Newegg from the reach of the CAT can the constitutionality of the tax be preserved.

6. 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 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”) (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 the 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 reaffirmed 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 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.

7. The penalty should be abated. The Commissioner erred in arbitrarily and capriciously asserting penalties for each of the aforesaid reasons, and in light of Newegg’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.

REQUEST FOR HEARING

Appellant Newegg requests that the Board of Tax Appeals or its attorney examiners conduct a *de novo* hearing in Columbus, Ohio in connection with these assignments of error.

REQUEST FOR RELIEF

Newegg respectfully asks that the Determination be vacated in its entirety, that the assessments against Newegg for the Tax Periods cancelled, that the Commissioner be barred from asserting CAT liability against Newegg for the Tax Periods, and that Newegg be awarded such other relief as is just and equitable.

Respectfully submitted,

*Martin I. Eisenstein by ROA per e-mail
authorized on 1/19/12*

Martin I. Eisenstein (Maine Reg. 0017878)

Matthew P. Schaefer (Maine Reg. 007992)

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slsmiseck@vorys.com

LEGAL COUNSEL FOR APPELLANT,
NEWEGG, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this Notice of Appeal has been filed, via hand delivery, with Joseph W. Testa, Tax Commissioner of Ohio, 30 East Broad Street, 22nd Floor, Columbus, Ohio, on this 19th day of January, 2012.


Steven L. Smiseck (0061615)



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FINAL DETERMINATION

Date: NOV 22 2011

Newegg Inc.
16839 E. Gale Avenue
City of Industry, CA 91745

Re: Six Assessments
Commercial Activity Tax

This is the final determination of the Tax Commissioner with regard to the petitions for reassessment under R.C. 5751.09 concerning the following commercial activity tax assessments:

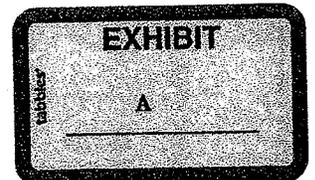
| <u>Assessment No.</u> | <u>Period</u> | <u>Tax</u> | <u>Interest</u> | <u>Late Filing Penalty</u> | <u>Late Payment Penalty</u> | <u>Total</u> |
|-----------------------|--------------------------------|--------------|-----------------|--------------------------------|---------------------------------|--------------|
| 17201034126112 | 7/1/2005 - 12/31/2009 | \$447,580.00 | \$54,081.00 | \$156,655.00 | \$111,895.00 | \$770,211.00 |
| 17201034427316 | 2010 1st quarter/2010 estimate | \$50,000.00 | \$1,117.81 | \$17,500.00 | \$10,000.00 | \$78,617.81 |
| 17201034427317 | 2010 2nd quarter | \$50,000.00 | \$630.14 | \$17,500.00 | \$10,000.00 | \$78,130.14 |
| 17201034427318 | 2010 3rd quarter | \$50,000.00 | \$126.03 | \$17,500.00 | \$10,000.00 | \$77,626.03 |
| 17201106110042 | 2010 4th quarter | \$50,000.00 | \$71.23 | \$17,500.00 | \$10,000.00 | \$77,571.23 |
| 17201114476189 | 2011 1st quarter/2011 estimate | \$50,000.00 | \$38.36 | \$17,500.00 | \$10,000.00 | \$77,538.36 |

The petitioner was assessed as the result of an audit which was commenced because it failed to register for the Ohio commercial activity tax. The petitioner is the second largest on-line only retailer in the United States selling information technology and consumer electronic products. Most orders are fulfilled through on-line processing centers in California and New Jersey. The petitioner conducts the majority of its marketing efforts on-line through targeted marketing via affiliates, search engines, shopping comparison sites and e-mail programs. Its off-line marketing activities include advertisements in various technology publications, print and electronic catalogs, box inserts, event participation, public relations and targeted broadcast and major media print and broadcast activities designed to increase its brand awareness. The petitioner fulfills its orders from warehouses located in New Jersey and Tennessee.

The audit results clearly determined that the petitioner had more than \$500,000 in sales to customers in Ohio. Consequently, it was required to file and pay the commercial activity tax required by R.C. 5751.02(A) which it failed to do. The petitioner was assessed and it submitted petitions for reassessment, requesting a hearing which was duly held.

The petitioner makes the following contention:

* * * Newegg is protected from imposition of the Commercial Activity Tax ("CAT") under the Commerce Clause of the United States Constitution. 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 Industries,*



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Inc. v. Wash. Dep't of Revenue, 483 U.S. 232, 250 (1987). * * * In addition to its constitutional protections, Newegg also submits that it does not satisfy the statutory requirements for imposition of Ohio's Commercial Activity Tax (the "CAT") inasmuch as it does not satisfy the in-state activity requirements that underpin the imposition of such tax. Read as a whole, the CAT seeks to tax in-state business activities, not those between Ohio residents and those companies like Newegg, having no in-state presence whatsoever. Moreover, even if it were to be held that the CAT statutes were ambiguous as to their application to out-of-state companies like Newegg, "there is one fundamental precept which still obtains in the interpretation of taxation statutes, to wit, that in case of doubt, such doubt is to be resolved in favor of the taxpayer." *Stephens v. Glander*, 151 Ohio St. 62, 84 N.E.2nd 279, 281 (1949).

While the petitioner has customers in Ohio to which it sells and ships goods, it asserts that it has no activities or contacts in Ohio which rise to the level necessary for Ohio to constitutionally impose the tax.

The petitioner's contention is not well taken. The petitioner is subject to the tax because it has "substantial nexus with this state," as that phrase is defined in R.C. 5751.01(H). The petitioner satisfies the third condition in that division, and therefore is a person on whom the tax is levied.

Effective June 30, 2005, R.C. 5751.02(A) levies the commercial activity tax

* * * on each person with taxable gross receipts for the privilege of doing business in this state. For the purposes of this chapter, "doing business" means engaging in any activity, whether legal or illegal, that is conducted for, or results in, gain, profit, or income, at any time during the calendar year. Persons on which the commercial activity tax is levied include, but are not limited to, persons with substantial nexus with this state.

Pursuant to R.C. 5751.01(H), a person has "substantial nexus with this state" if the person meets any of the following conditions:

- (1) Owns or uses a part or all of its capital in this state;
- (2) Holds a certificate of compliance with the laws of this state authorizing the person to do business in this state;
- (3) Has bright-line presence in this state;
- (4) Otherwise has nexus with this state to an extent that the person can be required to remit the tax imposed under this chapter under the Constitution of the United States.

Pursuant to R.C. 5751.01(I), a person "has bright-line presence" in this state for a reporting period if the person meets any of the following conditions:

- (1) Has at any time during the calendar year property in this state with an aggregate value of at least fifty thousand dollars. * * *
 - (2) Has during the calendar year payroll in this state of at least fifty thousand dollars. *
- * *

- (3) Has during the calendar year taxable gross receipts of at least five hundred thousand dollars.
- (4) Has at any time during the calendar year within this state at least twenty-five percent of the person's total property, total payroll, or total gross receipts.
- (5) Is domiciled in this state as an individual or for corporate, commercial, or other business purposes.

Division (F) of R.C. 5751.01 defines gross receipts as "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person * * * [including] [a]mounts realized from the sale, exchange, or other disposition of the taxpayer's property to or with another." Specifically excluded from gross receipts are "any receipts for which the tax imposed by this chapter is prohibited by the Constitution or laws of the United States or the Constitution of Ohio." R.C. 5751.01(F)(2)(aa) (formerly R.C. 5751.01(F)(2)(z)).

"Taxable gross receipts" is defined as gross receipts situated to this state under R.C. 5751.033. For purposes of the petitioner, division (E) applies:

Gross receipts from the sale of tangible personal property shall be situated to this state if the property is received in this state by the purchaser. In the case of delivery of tangible personal property by common carrier or by other means of transportation, the place at which such property is ultimately received after all transportation has completed shall be considered the place where the purchaser receives the property. *
* *

There is no ambiguity. The petitioner had annual sales situated to Ohio in excess of \$500,000.00 and, therefore, met the bright-line presence requirement subjecting it to the commercial activity tax.

Further, gross receipts from the sale of tangible personal property are situated to Ohio if "such property is ultimately received in Ohio after all transportation has been completed * * * regardless of where title passes or other conditions of sale." R.C. 5751.033(E). Consequently, the Ohio commercial activity tax requires the property to be situated to Ohio because Ohio was the ultimate destination of the property. Therefore, the gross receipts were properly situated to Ohio.

The petitioner has more than \$500,000.00 in taxable gross receipts situated to Ohio for periods assessed and, thus has "bright-line presence." As such, the petitioner has "substantial nexus" with Ohio. Under established Commerce Clause jurisprudence, the imposition of the tax measured by those receipts is not prohibited by the laws or Constitution of either the United States or Ohio.

The petitioner is a person doing business in Ohio and, therefore, subject to the Ohio Commercial Activity tax. R.C. 5751.02. The petitioner failed to provide any support to show otherwise nor did it provide actual Ohio gross receipts for the periods assessed.

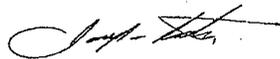
Accordingly, the assessments are affirmed and will stand as issued.

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Current records indicate that no payments have been made on these assessments. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any tax balances unpaid after the assessment dates bear post-assessment interest for the period between the assessment dates and payments as provided by law, which is in addition to the above totals.** Payments shall be made payable to "Ohio Treasurer Josh Mandel." Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Commercial Activity Tax Division, P.O. Box 16678, Columbus, Ohio 43216-6678.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF THE FINAL DETERMINATION RECORDED IN THE TAX COMMISSIONER'S JOURNAL



JOSEPH W. TESTA
TAX COMMISSIONER

/s/ Joseph W. Testa

Joseph W. Testa
Tax Commissioner

Exhibit 6

BEFORE THE BOARD OF TAX APPEALS

STATE OF OHIO

- - -

| | | |
|-----------------------|---|-------------------|
| Newegg, Inc., |) | |
| Appellant, |) | |
| vs. |) | Case No. 2012-234 |
| Joseph W. Testa, Tax |) | |
| Commissioner of Ohio, |) | |
| Appellee. |) | |

- - -

Hearing Room E
Rhodes State Office Tower
30 East Broad Street
24th Floor
Columbus, Ohio 43215
Tuesday, May 13, 2014

Met, pursuant to assignment, at 9:30
o'clock a.m.

BEFORE:

Carrie C. Young, Attorney-Examiner.

- - -

VOLUME I

- - -

| Page 2 | Page 4 |
|---|---|
| <p>1 APPEARANCES: 2 3 ON BEHALF OF THE APPELLANT: 4 Martin I. Eisenstein, Esq. 5 Matthew P. Schaefer, Esq. 6 Brann & Isaacson 7 184 Main Street 8 Lewiston, Maine 04243-3070 9 (207) 786-3566 10 11 Steven L. Smiseck, Esq. 12 Vorys, Sater, Seymour and Pease 13 52 East Gay Street 14 Columbus, Ohio 43215 15 (614) 464-5438 16 17 Matthew Strathman, Esq. 18 General Counsel & Vice President 19 Newegg, Inc. 20 16839 East Gale Avenue 21 City of Industry, California 91745 22 (626) 271-9700 23 24 25</p> | <p>1 INDEX 2 --- 3 WITNESSES PAGE 4 Maihua (Aaron) Yin 5 Direct examination by Mr. Schaefer I-14 6 Cross-examination by Mr. Fausey I-72 7 Cross-examination (cont'd.) by Mr. Fausey I-148 8 Redirect examination by Mr. Schaefer I-214 9 Rong Huo 10 Direct examination by Mr. Schaefer I-230 11 Cross-examination by Mr. Fausey I-237 12 James Wu 13 Direct examination by Mr. Eisenstein I-245 14 Cross-examination by Ms. Mesirov I-269 15 Redirect examination by Mr. Eisenstein I-301 16 --- 17 18 19 20 21 22 23 24 25</p> |
| Page 3 | Page 5 |
| <p>1 APPEARANCES (continued): 2 3 ON BEHALF OF THE APPELLEE: 4 Mike DeWine, Esq. 5 Attorney General of Ohio 6 By: Christine T. Mesirov, Esq. 7 Section Chief 8 Daniel W. Fausey, Esq. 9 Assistant Section Chief 10 Daniel G. Kim, Esq. 11 Associate Assistant Attorney General 12 Taxation Section 13 State Office Tower 14 30 East Broad Street - 25th Floor 15 Columbus, Ohio 43215 16 (614) 466-5967 17 (614) 995-9032 18 (614) 644-6725 19 --- 20 21 22 23 24 25</p> | <p>1 PROCEEDINGS 2 --- 3 Tuesday, May 13, 2014 4 Morning Session 5 --- 6 THE EXAMINER: This is a hearing before 7 the Board of Tax Appeals, State of Ohio, relative 8 to an appeal styled: Newegg, Inc., versus Joseph 9 W. Testa, Tax Commissioner of Ohio; BTA Case 10 No. 2012-234. 11 This case is being heard in Hearing 12 Room E in the offices of the Board of Tax Appeals, 13 30 East Broad Street, 24th Floor, on May 13, 2014, 14 at approximately 9:30 a.m., pursuant to assignment 15 before Carrie C. Young, Attorney-Examiner for the 16 Board of Tax Appeals. 17 The subject case is an appeal from a 18 Final Determination of the Tax Commissioner 19 relating to six commercial activity tax 20 assessments. 21 At this time will the Appellant's 22 representative or representatives, plural, please 23 enter an appearance? 24 MR. EISENSTEIN: This is Martin 25 Eisenstein of the law firm of Brann & Isaacson for</p> |

| Page 6 | Page 8 |
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| <p>1 Newegg. 2 MR. SCHAEFER: Matthew Schaefer, also of 3 the law firm of Brann & Isaacson, for Newegg, Inc. 4 MR. SMISECK: Steven Smiseck with the law 5 firm of Vorys, Sater, Seymour and Pease, also on 6 behalf of Newegg. 7 THE EXAMINER: Okay. If I could just ask 8 you gentlemen to give your addresses and telephone 9 numbers. 10 MR. EISENSTEIN: Oh, sure. Our e-mail 11 addresses? 12 THE EXAMINER: Actual old-fashioned 13 street addresses. 14 MR. EISENSTEIN: 184 Main Street, 15 Lewiston, Maine 04243-3070, and the phone number 16 is (207) 786-3566. 17 MR. SCHAEFER: Matthew Schaefer, the 18 address information and telephone information is 19 the same, 184 Main Street, Lewiston, Maine 04243. 20 Telephone number (207) 786-3566. 21 THE EXAMINER: Thank you. 22 Mr. Smiseck. 23 MR. SMISECK: I thank the Board. 24 Vorys, Sater, Seymour and Pease, 52 East 25 Gay Street, Columbus, Ohio 4322- -- 43215. Phone</p> | <p>1 to pull any extra chairs over to the table, you 2 can. 3 MR. KIM: No; I'm fine. 4 MS. MESIROW: We'll rotate. 5 THE EXAMINER: Okay. Before we get into 6 opening statements, I want to do a couple of 7 housekeeping items. 8 The Appellant has filed a motion to place 9 trade secret documents under seal prior to today's 10 proceedings. 11 I will indicate at the outset that the 12 Board will not be sealing this Board's hearing 13 record, so that portion of the motion has been 14 addressed, and the request is denied. 15 With regard to the actual placing of 16 documents under seal, I've discussed this with the 17 parties prior to going on the record, and we will 18 address that as we get to the point of offering 19 documents into evidence, and probably address some 20 of those issues as the documents, themselves, are 21 identified and offered as we go. 22 Also, I understand that the parties have 23 submitted a binder containing joint stipulations 24 that everyone has signed off on, and the Board 25 will certainly be receiving those into evidence</p> |
| Page 7 | Page 9 |
| <p>1 number (614) 464-5438. 2 THE EXAMINER: Thank you. 3 And will the Commissioner's 4 representatives please enter an appearance? 5 MS. MESIROW: For Attorney General Mike 6 DeWine, Christine Mesrirow, 30 East Broad Street, 7 25th Floor, Columbus, Ohio 43215. Phone is 8 (614) 466-5967. 9 MR. FAUSEY: Thank you, your Honor. 10 Dan -- Daniel Fausey, F-a-u-s-e-y, 11 Assistant Attorney General, the office of the Ohio 12 Attorney General Mike DeWine, here on behalf of 13 Joseph W. Testa, Tax Commissioner of Ohio. Office 14 address is 30 East Broad Street, 25th Floor, 15 Columbus, Ohio 43215. My phone number is 16 (614) 995-9032. 17 THE EXAMINER: Thank you. 18 Before we get into the -- 19 MR. FAUSEY: We've got one more. 20 THE EXAMINER: I'm sorry. I apologize. 21 MR. KIM: No problem. 22 Daniel Kim, also on behalf of the 23 Commissioner, 30 East Broad Street, Columbus, Ohio 24 43215. My number is (614) 644-6725. 25 THE EXAMINER: And, Mr. Kim, if you want</p> | <p>1 and considering those as part of the record of the 2 proceedings. 3 For purposes -- I assume that maybe 4 counsel is shifting duties as we go through the 5 proceedings, so I don't know who wants to offer an 6 opening statement, but I will ask for that from 7 the Appellant. 8 MR. EISENSTEIN: So I'll deliver the 9 opening statement, which will be a statement -- 10 THE EXAMINER: Okay. 11 MR. EISENSTEIN: -- and not many 12 statements. 13 So we represent Newegg, Inc., which has 14 been assessed the commercial activity tax for 15 several periods, the period of time of July 1, 16 2005 through March 31st, 2011. That's the 17 relevant time period. 18 Newegg is a company based in California, 19 without a physical presence here in the State of 20 Ohio, that sells solely on the Internet, and it's 21 product lines are information technology products, 22 such as computers and software, as well as 23 consumer electronic products, such as games, 24 et cetera. 25 I'll defer any argument until the end of</p> |

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| <p style="text-align: right;">Page 10</p> <p>1 the proceedings, if that. 2 Thank you. 3 THE EXAMINER: Thank you. 4 And on behalf of the Commissioner. 5 MS. MESIROW: In the interest of brevity, 6 we'll say that we -- we believe that the 7 Commissioner's assessments against Newegg are 8 supported by Ohio statutory law imposing the CAT 9 under the bright-line nexus standard. 10 We also believe that the assessments are 11 supportable under the United States Constitution 12 in that Newegg has extensive economic and, 13 perhaps, even physical connections with Ohio, and 14 those connections have enabled Newegg to grow and 15 expand its market here. 16 MR. EISENSTEIN: I should have identified 17 our arguments for the record, which are certainly 18 in our petition, but we have -- you know, we 19 challenge the constitutionality of the statute as 20 applied to Newegg, and we do think that the 21 statute should not apply. Even though the gross 22 receipts of Newegg are well in excess of the 23 \$500,000 minimum, we believe that the bright-line 24 nexus standard doesn't apply to those receipts 25 which the Commissioner was not able to impose</p> | <p style="text-align: right;">Page 12</p> <p>1 hope we get through Professor Turow today, because 2 he's not going to be here tomorrow, so if we can't 3 get through him today, we may need to either work 4 out another date, and whether the Board is 5 amenable to us coming back or whether we do it by 6 deposition and submit the deposition transcript, 7 if that's agreeable to everybody, in case we don't 8 get through him today, we can sort that out, I 9 guess, at the end. My sincere hope is that we get 10 there, but, you know, wish for the best and plan 11 for the worst. 12 THE EXAMINER: I appreciate the heads up 13 on that issue. 14 You may call your first witness. 15 MR. SCHAEFER: Our first witness is 16 Mr. Aaron Yin. 17 MS. MESIROW: Oh. Pardon me. One 18 quick -- We move for a separation of witnesses, 19 please. 20 THE EXAMINER: Okay. I would ask that 21 the remaining witnesses in the room, if you would 22 step out in the lobby and take your seats. 23 MR. EISENSTEIN: Including experts? 24 MR. FAUSEY: Experts can stay. 25 THE EXAMINER: Yes. Thank you.</p> |
| <p style="text-align: right;">Page 11</p> <p>1 because of the strictures of the commerce clause 2 of the U.S. Constitution. 3 We will have -- I should also mention 4 that we will have four witnesses today and 5 tomorrow. 6 The first witness will be Aaron Yin, 7 Y-i-n; the second witness will be Rong, R-o-n-g, 8 Huo -- or, Huo, sorry, and H-u-o is the spelling 9 of the last name; the third witness is James Wu, 10 W-u; and the fourth witness is Professor Eric 11 Goldman. 12 Mr. Schaefer will be examining Mr. Yin 13 and Mr. -- Ms. Huo, and I'll be examining Mr. Wu 14 and Mr. Goldman. 15 THE EXAMINER: Okay. Thank you. 16 MR. EISENSTEIN: Oh. And the other point 17 we should raise is that we've agreed to take out 18 of order Professor Turow, who's here today as 19 well, and he will be the fourth witness of today, 20 because he has a flight, I believe, to catch this 21 evening, so we want to accommodate his schedule, 22 and so Professor Goldman will be the next witness 23 after Professor Turow, so we'll go a little bit 24 out of order, if that's acceptable to you. 25 MR. FAUSEY: Just for the record, I sure</p> | <p style="text-align: right;">Page 13</p> <p>1 MR. EISENSTEIN: I should have introduced 2 also, this is Matt Strathman, who's General 3 Counsel for Newegg, Inc. I apologize for not 4 introducing him. 5 THE EXAMINER: Thank you. 6 Mr. Yin -- 7 MR. YIN: Yes. 8 THE EXAMINER: -- before we begin, would 9 you raise your right hand, please? 10 (Witness placed under oath.) 11 THE EXAMINER: Thank you. 12 --- 13 14 15 16 17 18 19 20 21 22 23 24 25</p> |

Exhibit 7

OHIO BOARD OF TAX APPEALS

NEWEGG, INC., (et. al.),

CASE NO(S). 2012-234

Appellant(s),

(COMMERCIAL ACTIVITY TAX)

vs.

DECISION AND ORDER

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

Appellee(s).

APPEARANCES:

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Entered Thursday, February 26, 2015

Mr. Williamson and Mr. Harbarger concur.

This matter is considered by the Board of Tax Appeals upon a notice of appeal filed on behalf of appellant Newegg, Inc. ("Newegg"). Newegg appeals from a final determination of the Tax Commissioner in which the commissioner affirmed six commercial activity tax assessments against Newegg. The subject assessments relate to periods from July 1, 2005 through December 31, 2009, the first through fourth quarters of 2010, and the first quarter of 2011. This matter is considered by the Board of Tax Appeals upon the notice of appeal, the statutory transcript ("S.T.") certified to this board by the Tax Commissioner, the record of this board's hearing ("H.R."), and any written argument filed by the parties. We note that Appellee's exhibits 4-11, 22-24, 30, 36, and 39-43, as jointly redacted by the parties, are received into evidence.

In its brief, Newegg, which is headquartered in Industry, California, describes itself as selling

"computer-related products, including gaming products, to consumers across the United States, including consumers residing in the State of Ohio. *** Newegg is a pure online retailer, meaning that it sells its products *only* online. *** It does so via an Internet website *** located on the Company's servers in California and New Jersey. *** Separate legal entities operate a Newegg website in China ***. Customers located anywhere in the world other than China and Canada access the same website to purchase Newegg products ***. *** The Company has warehouses and other physical locations only in Tennessee, California, and New Jersey. ***" (Emphasis sic.). Newegg Brief at 8. Before this board, Newegg presented extensive testimony and evidence relating to the operations of its website, its email promotions and online advertising, and its participation in comparison websites and an internet affiliate program, as well as its non-internet based marketing efforts. Newegg Brief at 10-23.

In its notice of appeal to this board, Newegg specified the following:

"1. Because Newegg 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 the state' under R.C. 5751.02. The Commercial Activity Tax, therefore, does not apply.

"2. Newegg 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. Newegg 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 of the person's total property, total payroll, or total receipts.' [R.C. 5751.01(I)(4)]. In addition, Newegg was not 'domiciled in this state as an individual or for corporate, commercial, or other business purposes.' [R.C. 5751.01(I)(5)].

"4. Newegg'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 Newegg, inasmuch as imposing the tax on Newegg would violate the

Company's rights under the Commerce Clause of the United States Constitution. ***

"6. 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. *** 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 penalty should be abated. The Commissioner erred in arbitrarily and capriciously assessing penalties for each of the aforesaid reasons, and in light of Newegg'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." Notice of Appeal at 5-7.

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.

The parties hereto agree that Newegg has not challenged the constitutionality of the relevant statutes, but has instead, challenged the commissioner's conclusion that Newegg is liable for the commercial activity tax, which Newegg argues is prohibited by the U.S. Constitution. Specifically, Newegg claims its gross receipts are excluded from the CAT, pursuant to the U.S. Constitution, Commerce Clause, and the "substantial nexus" and corresponding "in-state presence" analysis thereunder. See R.C. 5751.01(F)(2)(z) (as such section was numbered in July 2005).

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, to be controlling, to the extent Newegg raises constitutional claims. 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. Any 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, Newegg was assessed commercial activity tax for the periods in question. R.C. 5751.02(A). The commissioner determined that Newegg 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). Newegg, as L.L. Bean before it, contends that its gross receipts cannot be taxed under the commercial activity statutes under consideration herein because it lacks an "in-state presence," as required by the Commerce Clause, necessary to establish "substantial nexus." See *Quill Corp. v. North Dakota* (1992), 504 U.S. 298 (1992), *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987). Newegg Brief at 24, et seq. Even without considering any constitutional claims, 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, it is the decision of the Board of Tax Appeals that the final order of the Tax Commissioner must be, and hereby is, affirmed.

| BOARD OF TAX APPEALS | | |
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| | | |
| RESULT OF VOTE | YES | NO |
| Mr. Williamson |  | |
| 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