

In the Supreme Court of Ohio

Crutchfield, Inc.,	:	
	:	Case No. 15-0386
	:	
Appellant,	:	
	:	Appeal from the Ohio
v.	:	Board of Tax Appeals
	:	
Joseph W. Testa,	:	
Tax Commissioner of Ohio,	:	
	:	BTA Case Nos. 2012-926,
Appellee.	:	2012-3068, 2013-2021

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

I. PRELIMINARY STATEMENT

It is important to note from the outset that the Commissioner’s contention that Crutchfield failed to assert (and thereby preserve) its as-applied constitutional challenge to the CAT is a concoction of recent vintage. In fact, less than two months after Crutchfield filed with the Board the Notice of Appeal, the Commissioner filed a motion representing to the Board that the appeal of Crutchfield “challenges the constitutionality

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

of the Commercial Activity Tax (“CAT”) nexus provisions *as applied to the appellant.*”² (Emphasis added.) (Appx. 2, Ex. 1, Commissioner’s Motion to Designate Case as Complex Litigation And To Set a Case Management Schedule, May 21, 2012, Case No. 2012-A-926 (“Motion to Designate”), at p. 2). As the Commissioner wrote in that pleading, because of “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.’” (Appx. 3, Ex. 1, Motion to Designate, at p. 3).

Similarly, in another motion before the Board, seven months after the last motion, the Commissioner repeated his understanding that Crutchfield had raised an as-applied challenge to the constitutionality of the statute:

This appeal challenges *the constitutionality of the Commercial Activity Tax (“CAT”) nexus provisions as applied to the appellant.* No dormant Commerce Clause nexus challenge to the CAT has yet been reviewed or decided by any Ohio tribunal or court, and is of great importance to the scope and vitality of Ohio’s principal business tax.

(Emphasis added.) (Appx. 7, Ex. 2, Commissioner’s Motion to Designate Case as Complex Litigation And To Set a Case Management Schedule, May 21, 2012, Case No. 2012-A-3068 (collectively with Ex. 1, “Motions to Designate”), at p. 3).³

In each of these motions filed with the Board, the Commissioner accurately described the nature of Crutchfield’s contention that the application of the CAT by the Commissioner to Crutchfield violates the Commerce Clause. Indeed, as demonstrated

² A copy of this motion, written by the attorneys representing the Commissioner in the instant appeal, is included in a separately filed appendix (the “Appendix”) as Exhibit 1.

³It is Crutchfield’s understanding that two cases pending before the Court, involving Newegg, Inc., Supreme Court Case No. 2015-0483, and Mason Companies, Inc., Supreme Court Case No. 2015-0794, involve precisely the same as-applied Commerce Clause challenge as in this case. Similar motions to dismiss have been filed in connection with all three appeals.

herein, through direct quotations from key record documents, Crutchfield clearly raised and preserved its as-applied Commerce Clause challenge to the CAT at all times below—namely, in its Petitions for Reassessment filed with the Commissioner and in its Notices of Appeal to the Board from the Commissioner’s Final Determinations. What is more, the Commissioner himself—and, later, the Board—expressly acknowledged Crutchfield’s assertion of an as-applied challenge in written decisions denying Crutchfield relief.

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

Against this backdrop, Crutchfield turns to the procedural background.

II. STATEMENT OF THE CASE

A. Background

For periods beginning July 1, 2005 and ending on June 30, 2012, Crutchfield received three CAT Assessments from the State of Ohio. It is undisputed that, for each of the three CAT Assessments, Crutchfield timely filed a Petition for Reassessment (collectively, the “Petitions for Reassessment”). These Petitions for Reassessment each explicitly referenced and included a five page attachment entitled, “BASES FOR PETITION,” true and accurate representative examples of which are included in Crutchfield’s Appendix as Exhibit 3. (Appx. 11-20, Ex. 3, BASES FOR PETITION). The Commissioner ruled on Crutchfield’s Petitions for Reassessment in separate, but

substantively identical written decisions, that are also included in Crutchfield's Appendix as Exhibits 4, 5, and 6 (the "Final Determinations"). (Appx. 21-33). Crutchfield timely filed with the Board separate Notices of Appeal from the Commissioner's Final Determinations, copies of which are included in Crutchfield's Appendix as Exhibits 7, 8 and 9 (the "Notices of Appeal"). (Appx. 34-73).

With the consent of Crutchfield and the Commissioner, Crutchfield's appeals to the Board were consolidated so as to permit a single evidentiary hearing and a single set of filings by both of the parties in appeals that raise identical claims. The Board decided Crutchfield's consolidated appeals in a single Decision and Order that is included in Crutchfield's Appendix as Exhibit 10 (the "Decision and Order"). (Appx. 74-78).

Tellingly, in its Decision and Order, the Board confirmed that Crutchfield's as-applied constitutional challenge was, in fact, the focus of the hearing, during which both Crutchfield and the Commissioner had the opportunity to present testimony and documentary evidence and make a record for appeal on this issue. The Board, however, further ruled that it would not decide the as-applied challenge, because as an administrative tribunal it lacked the authority to do so:

As we stated in *L.L. Bean* [BTA No. 2010-2853 and Supreme Court Case No. 2014-0456], "this board makes no findings with regard to the constitutional questions presented. The parties through the presentation of evidence and testimony and the submission of briefs to this board, have set forth their respecting positions regarding the constitutional validity of the commissioner's application of the statutory provisions in question * * * and we find such arguments may only be addressed on appeal by a court which has the authority to resolve constitutional challenges."

(Citations omitted.) (Appx. 77, Ex. 10, Decision and Order, at p. 4).⁴

⁴ Each of the cases cited by the Board in its Decision and Order provided that the role of the Board was to take evidence on the constitutional question, but to decline to resolve

This appeal timely followed. The Commissioner does not dispute that Crutchfield’s appeal to this Court includes an as-applied Commerce Clause challenge based upon Crutchfield’s lack of “substantial nexus” with the state. In fact, this claim was properly raised and preserved by Crutchfield, beginning with its Petitions for Reassessment to the Commissioner, and again in its Notices of Appeal to the Board.

B. The Petitions for Reassessment

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

Application of the CAT to Crutchfield would violate the Company’s rights under the Commerce Clause of the United States Constitution since the Company does not possess the requisite “bright-line” physical presence in Ohio. See, e.g., National Bellas Hess v. Ill. Rev. Dep’t, 386 U.S. (1967) (establishing a “bright-line” physical presence requirement before taxes can be imposed on remote sellers); Quill Corp. v. North Dakota, 504 U.S. 298 (1992) (upholding the bright-line rule). See also Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (applying the bright-line rule to a general revenue tax on the value of coal extracted from the state, and finding that “the interstate business must have a substantial nexus with the State before any tax may be levied on it”). Since the bright-line physical presence test applies to taxes like the CAT, the assessment is void in its entirety.

(Emphasis added.) (See, e.g., Appx. 14-15, Ex. 3, BASES FOR PETITION, ¶¶ 6-7, pp. 4-5). Moreover, the Petitions for Reassessment also provided a detailed narrative discussion of Crutchfield’s as-applied Commerce Clause challenge in a three page introduction, with citations to and discussions of governing U.S. Supreme Court precedent, and carefully describing how Crutchfield is protected from imposition of the

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

CAT under the Commerce Clause of the United States Constitution as a result of its lack of a physical presence in Ohio. (Appx. 11-13, Ex. 3, BASES FOR PETITION, pp. 1-3).

Separately, Crutchfield argued that the CAT Assessments were invalid under the CAT statute itself on multiple grounds, noting that, “[i]n addition to its constitutional protections, Crutchfield also submits that it does not satisfy the statutory requirements for imposition of Ohio’s Commercial Activity Tax.” (Appx. 12, Ex. 3, BASES FOR PETITION, at p. 2). Crutchfield argued that, properly construed to avoid running afoul of constitutional infirmities, the CAT should be interpreted so as not to apply to Crutchfield. The company further argued that the CAT’s statutory “substantial nexus” provisions, its “bright-line presence” provisions, and the limitation that the CAT does not apply to “[a]ny receipts for which the tax imposed by this chapter is prohibited by the constitution or laws of the United States or the constitution of this state,” each should be read so as not to apply the CAT to Crutchfield. (Appx. 13-14, Ex. 3, BASES FOR PETITION, at ¶¶ 2-4). But these alternative arguments in no way negated Crutchfield’s primary, constitutional challenge. Indeed, at no point in connection with its Petitions for Reassessment did Crutchfield waive or abandon its as-applied challenge to the CAT assessments, a fact confirmed by the Commissioner’s Final Determinations denying each of Crutchfield’s Petitions, to which we turn next.

C. The Commissioner’s Final Determinations

That the Commissioner fully understood the nature of Crutchfield’s as-applied constitutional challenge is clear from his rulings denying Crutchfield’s Petitions for Reassessment. In each of his Final Determinations, the Commissioner expressly recognized and explained that:

The petitioner's overriding assertion is that the Commerce Clause of the United States Constitution precludes the State of Ohio from subjecting it to the commercial activity tax under the authority of R.C. 5751.01(H)(3) or (4). The petitioner contends that the imposition of the tax pursuant to either (H)(3) or (H)(4) is improper because the petitioner allegedly does not have the nexus with Ohio that is required under the Commerce Clause. The Petitioner asserts that the nexus required is a "physical presence" in the taxing state, which it alleges it did not have during the assessed periods.

(Emphasis added.) (Appx. 23, Ex. 4, Final Determination, at p. 3; Appx. 28, Ex. 5, Final Determination, at p. 3; Appx. 32, Ex. 6, Final Determination, at p. 3). The Commissioner also recognized and explained that:

*The petitioner contends that the application of the commercial activity tax to it would violate the Commerce Clause since the petitioner allegedly does not possess the "bright-line" physical presence in Ohio required by *National Bellas Hess v. Ill. Rev. Dep't* (1967), 386 U.S. 753 and *Quill Corp. v. North Dakota* (1992), 504 U.S. 298.*

(Emphasis added.) (Appx. 24, Ex. 4, Final Determination, at p. 4; Appx. 29, Ex. 5, Final Determination, at p. 4; Appx. 32, Ex. 6, Final Determination, at p. 3). The Commissioner then expressly considered and rejected this clear as-applied challenge to the CAT Assessments, acknowledging that "[i]n order to be constitutionally valid, the assessments herein must still satisfy the 'substantial nexus' requirement of the Commerce Clause," but finding that Crutchfield's "continuous and significant exploitation of the commercial marketplace in Ohio is sufficient for this purpose." (Appx. 24, Ex. 4, Final Determination, at p. 4; Appx. 29, Ex. 5, Final Determination, at p. 4; Appx. 33, Ex. 6, Final Determination, at p. 4).

The Commissioner, in his motion to this Court, makes no mention of either the Commissioner's prior acknowledgement and acceptance of Crutchfield's as-applied claim or his substantive determination of that claim in each of the Final Determinations, instead baldly stating, without citation to the record, that Crutchfield's as-applied

challenge was “not raised to the Tax Commissioner or the Board of Tax Appeals.” (Motion to Dismiss, at p. 2). In fact, the Commissioner never cites to or quotes from the Final Determinations in his Motion to Dismiss, nor did he include these Final Determinations in the Appendix to his motion.

D. Crutchfield’s Notices of Appeal to The Board

Presented with a Final Determination by the Commissioner rejecting the as-applied constitutional challenge to the CAT assessments issued against it, Crutchfield timely appealed to the Board. Far from providing a cursory statement of the grounds for its appeal, Crutchfield submitted detailed, eight-page, twenty-plus paragraph Notices of Appeal cataloging the Commissioner’s errors. First, in a detailed Background section in each of its Notices of Appeal, Crutchfield explained the nature of and authority for its as-applied Commerce Clause challenge to the CAT Assessments, citing applicable Supreme Court authority defining the appropriate Commerce Clause standards. (Appx. 35-36, Ex. 7, Notice of Appeal, at ¶¶ 1-4, pp. 2-3; Appx. 49-50, Ex. 8, Notice of Appeal, at ¶¶ 1-4, pp. 2-3; Appx. 62-63, Ex.9, Notice of Appeal, at ¶¶ 1-4, pp. 2-3). Crutchfield then explained that, “in addition to its constitutional protections,” the CAT statute, properly read, should be construed so as not to apply to Crutchfield. (Appx. 36-37, Ex. 7, Notice of Appeal, at ¶¶ 5-7, pp. 3-4; Appx. 50-51, Ex. 8, Notice of Appeal, at ¶¶ 5-7, pp. 3-4; Appx. 63-64, Ex.9, Notice of Appeal, at ¶¶ 5-7, pp. 3-4).

Next, Crutchfield identified the specific bases on which the Commissioner rested in making his Final Determinations. (Appx. 37-38, Ex. 7, Notice of Appeal, at ¶¶ 9-13, pp.4-5; Appx. 51-52, Ex. 8, Notice of Appeal, at ¶¶ 9-13, pp.4-5; Appx. 64-65, Ex.9, Notice of Appeal, at ¶¶ 9-13, pp.4-5). The very first basis for the Commissioner’s Final Determinations was that “Crutchfield had ‘substantial nexus’ with Ohio as that term is

defined in the statute [*see* R.C. 5751.01(H)(3)], based on the ‘bright-line presence’ test set forth on R.C. 5751.03(I)(3).” (Appx. 38, Ex. 7, Notice of Appeal, at ¶ 10, p. 5; Appx. 51, Ex. 8, Notice of Appeal, at ¶ 10, p. 4; Appx. 64, Ex.9, Notice of Appeal, at ¶ 10, p. 4). Crutchfield further noted that the Commissioner had “concluded that ‘[u]nder established Commerce Clause jurisprudence, the imposition of the tax measured by [gross] receipts is not prohibited by the law or the Constitution of either the United States or Ohio.” (Appx. 38, Ex. 7, Notice of Appeal, at ¶ 12, p. 5; Appx. 52, Ex. 8, Notice of Appeal, at ¶ 12, p. 5; Appx. 65, Ex.9, Notice of Appeal, at ¶ 12, p. 5). Crutchfield then unequivocally informed the Board that “[e]ach of the grounds given by the Commissioner for the [Final] Determination is in error.” (Brackets added.) (Appx. 38, Ex. 7, Notice of Appeal, at ¶ 13, p. 5; Appx. 52, Ex. 8, Notice of Appeal, at ¶ 13, p. 5; Appx. 65, Ex.9, Notice of Appeal, at ¶ 13, p. 5).

In light of the background and the specific grounds for the Final Determination challenged by Crutchfield in its Notices of Appeal, Crutchfield then described several specific “Assignments of Error.” It began with its various statutory contentions, which it presented as alternatives that the Board could adopt to avoid forcing a conflict between the CAT statute and applicable constitutional requirements. (Appx. 38-39, Ex. 7, Notice of Appeal, at ¶¶ 1-5, pp. 5-6; Appx. 52-53, Ex. 8, Notice of Appeal, at ¶¶ 1-5, pp. 5-6; Appx. 65-66, Ex.9, Notice of Appeal, at ¶¶ 1-5, pp. 5-6). The CAT statute, Crutchfield suggested, “should be interpreted to avoid the imposition of the CAT on Crutchfield, inasmuch as imposing the tax on Crutchfield would violate the Company’s rights under the Commerce Clause.” (Appx. 39, Ex. 7, Notice of Appeal, at ¶ 5, p. 6; Appx. 53, Ex. 8, Notice of Appeal, at ¶ 5, p. 6; Appx. 66, Ex.9, Notice of Appeal, at ¶ 5, p. 6).

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

Application of the CAT to Crutchfield would violate the Company's rights under the Commerce Clause of the United States Constitution since Crutchfield 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 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 business must have a substantial nexus with the State before any tax may be levied on it"). This physical presence standard derives from constitutional principles and authorities set forth by the Court in National Bellas Hess and subsequently affirmed in Quill. The Supreme Court relied upon Tyler Pipe, Standard Pressed Steel, and Commonwealth Edison in upholding the physical presence test for sales and use taxes in Quill, and the Court has never held that a state has the power under the Commerce Clause to impose gross receipts tax on a company base on any lesser, or different standard than [the] physical presence test of Tyler Pipe and Quill. Since the bright line physical presence test applies to taxes like the CAT, the assessments are void in their entirety, and the Determination should be vacated.

(Underlining sic. Emphasis added.) (Appx. 39-40, Ex. 7, Notice of Appeal, at ¶ 6, pp. 6-7; Appx. 53-54, Ex. 8, Notice of Appeal, at ¶ 6, pp. 6-7; Appx. 66-67, Ex.9, Notice of Appeal, at ¶ 6, pp. 6-7).

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

E. The Board’s Decision and Order

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

6. Application of the CAT to Crutchfield would violate the Company’s rights under the Commerce Clause of the United States Constitution since Crutchfield 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.*

(Emphasis added.) (Appx. 76, Ex. 10, Decision and Order, at p. 3). The Board further explained, accurately, that Crutchfield’s claim was that:

[t]he main issue before the [Board] * * * is whether the Tax Commissioner * * * can imposed the [CAT] * * * – a tax on gross receipts imposed for ‘the privilege of doing business in this state’ – on Crutchfield, Inc. * * *, a company that did not have a ‘substantial nexus’ with the State of Ohio within the meaning of the U.S. Constitution.

(Appx. 76, Ex. 10, Decision and Order, at p. 3).

Although, as the Board recognized, Crutchfield clearly asserted an as-applied challenge, the Board in its Decision and Order concluded that it lacked authority to address Crutchfield’s constitutional claims. The Board, therefore, made no findings “with regard to the constitutional questions presented.” (Citation omitted.) (Appx. 76, Ex. 10, Decision and Order, at p. 3). “The constitutional implications of the relevant statutory provisions,” the Board explained, “must be considered by a tribunal that has jurisdiction over such questions of constitutional interpretation.” (Citations omitted.) (Appx. 77, Ex. 10, Decision and Order, at p. 4 (noting that such arguments “may only be addressed on appeal by a court which has the authority to resolve constitutional challenges”)).

III. DISCUSSION

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

Indeed, at each and every step in the administrative review process below—Crutchfield's Petitions for Reassessment and its Notices of Appeal—Crutchfield meticulously set forth its express claim that application of the CAT to Crutchfield violated the "substantial nexus" requirement of the Commerce Clause. The Commissioner and the Board each acknowledged this expressly in their written decisions below. Indeed, the Commissioner not only acknowledged Crutchfield's as-applied claim, he ruled on it. Thus, while the Supreme Court of Ohio has made clear that it can only consider claims of error that were "specified in the notice of appeal to the [Board]," Crutchfield has obviously met its burden to preserve these issues for appeal by clearly specifying them in its Notices of Appeal. *See, e.g., Abraitis v. Testa*, 137 Ohio St.3d 285, 2013-Ohio-4725, 998 N.E.2d 1149, ¶ 21; *see also* R.C. 5717.02 (effective March 22, 2012 to October 10, 2013) (requiring the party appealing a decision of the Commissioner to "specify the errors therein complained of").

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

a notice of appeal is sufficient to give notice of a particular error when it has "specified the commissioner's action that it questioned, cited the

statute under which it objected, and asserted the treatment that it believed the commissioner should have applied.”

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

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

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

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

Crutchfield’s Notices of Appeal clearly satisfy these standards. The Notices allege how the Commissioner erred, identify specific statutory provisions and case authority for Crutchfield’s contentions, and assert precisely what action the Commissioner should have taken. Moreover, when viewed in context, there can be absolutely no doubt that Crutchfield alleged an as-applied challenge, and that both the Commissioner and the Board were fully apprised and aware that its appeals presented an as-applied challenge. The Commissioner’s own motion practice before the Board makes that fact crystal clear, as does the Board’s acknowledgement in its Decision and Order that the parties presented

evidence on Crutchfield's constitutional challenge and made a record. Indeed, the Commissioner successfully moved to designate this case as complex for the express purpose of taking extensive discovery on Crutchfield's as-applied Commerce Clause challenge. (Appx. 1-10, Exs. 1 & 2, Motions to Designate).

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

First, the Commissioner's claim that Crutchfield failed to preserve its as-applied Commerce Clause challenge is flatly contradicted by numerous representations made by the Commissioner during proceedings before the Board, in which he stated in no uncertain terms, in his own motions, that Crutchfield's appeal asserted (and thereby preserved) an as-applied constitutional challenge under the Commerce Clause. (*See* Appx. 1-10, Exs. 1 & 2, Motions to Designate). These statements not only resulted in the Commissioner obtaining extraordinary relief from the Board (including far-ranging discovery from Crutchfield *related solely to its constitutional claim* under a complex case designation), but demonstrated that the Commissioner at all times understood fully the nature of Crutchfield's claims.

Second, the Commissioner mischaracterizes the Board's Decision and Order, stating that the Board "agreed that Crutchfield did not raise an as applied constitutional challenge." (Motion to Dismiss, at p. 15 (citing Decision and Order, at p. 3)). In the Decision and Order, however, on the very page to which the Commissioner cites, the Board lists among Crutchfield's specified errors that "[a]pplication of the CAT to Crutchfield would violate the Company's rights under the Commerce Clause of the United States Constitution since Crutchfield does not possess the requisite 'bright-line' physical presence in Ohio. * * * Since the bright-line physical presence test applies to

taxes like the CAT, the assessments are void in their entirety, and the [Final] Determination should be vacated.” (Appx. 76, Ex. 10, Decision and Order, at p. 3).

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

makes no findings with regard *to the constitutional questions presented*. The parties, through their presentations of evidence and testimony and the submission of briefs to this board, have set forth their respective positions *regarding the constitutional validity of the commissioner’s application of the statutory provisions in question * * ** and we find such arguments may only be addressed on appeal by a court which has the authority to resolve constitutional challenges.

(Citations omitted. Emphasis added.) (Appx. 76-77, Ex. 10, Decision and Order, at pp. 3-4). Nowhere in the Decision and Order does the Board suggest, even remotely, that Crutchfield failed to preserve this constitutional claim. In fact, the Decision and Order states the opposite.

Third, the Commissioner does not include in his Appendix Crutchfield’s Petitions for Reassessment (which plainly assert an as-applied Commerce Clause claim); the Commissioner’s own Final Determinations in this case (in which the Commissioner both accepts and rules upon Crutchfield’s as-applied Commerce Clause claim); the Commissioner’s various motions filed with the Board, acknowledging the as-applied claim; or the Board’s Decision and Order (quoted above) that is now on appeal to this Court (and which expressly recognizes that Crutchfield asserted and preserved its as-applied Commerce Clause argument). Instead, apart from the Notices of Appeal to the Board, the Commissioner’s lawyers chose solely to include a Pre-Hearing Statement and Decision and Order from *another* CAT appeal (involving L.L. Bean, Inc.), documents having no conceivable relevance to the question of whether Crutchfield timely asserted

and preserved an as-applied constitutional challenge in its own challenge to the CAT Assessments.⁵

Fourth, while stating that Crutchfield’s as-applied challenge was not “raised with the Tax Commissioner,” the Commissioner withholds from the Court the clear language in Crutchfield’s Petitions for Reassessment asserting (and thereby preserving) this challenge. More troubling still, the Commissioner fails to advise the Court of the fact that the Commissioner, in his written Final Determinations, not only acknowledged that Crutchfield had presented an as-applied Commerce Clause challenge, but, in fact, issued a substantive ruling on that constitutional challenge. (Appx. 21-33, Exs. 4-6).

Fifth, the Commissioner presents only selective, confusing, and misleading quotations from Crutchfield’s Notices of Appeal to the Board to make it appear that Crutchfield’s challenge to the CAT Assessments was limited to a statutory challenge. (*See, e.g.*, Motion to Dismiss, at pp. 5-7). While Crutchfield did make statutory claims, it plainly (and explicitly) did not do so in lieu of the as-applied Commerce Clause claims it clearly asserted, without reservation, in other parts in its Notices of Appeal. Likewise, despite the Commissioner’s representation to the contrary, Crutchfield’s urging of the Commissioner and the Board to construe the CAT statutes so as to avoid their application to Crutchfield, and thereby avoid constitutional infirmities under the Commerce Clause, neither waived nor limited Crutchfield’s clearly and separately stated as-applied

⁵In resorting to an irrelevant filing from an appeal filed by L.L. Bean (and which has since settled), the Commissioner mischaracterizes even that document. In the sentence immediately following the statement quoted by the Commissioner, and for all sixteen pages thereafter, the L.L. Bean Pre-Hearing Statement carefully explains the nature of its as-applied constitutional challenge to the CAT statute in that case. (*See* Commissioner’s Appendix, Ex. E, at 1 (the case “involves L.L. Bean’s claim that the imposition of the CAT on the company violates the Commerce Clause of the United States Constitution”) and 2-17 (discussing the Commerce Clause limitations on state authority to impose gross receipts taxes)).

Commerce Clause claim. Indeed, it is a well-established canon of statutory construction that statutes should be read, if possible, in a way that avoids their being applied in violation of the Constitution. *See, e.g., Buchman v. Wayne Trace Local Sch. Dist. Bd. of Edn.*, 73 Ohio St.3d 260, 269, 652 N.E.2d 952 (1995) (“where a statute reasonably allows for more than a single construction or interpretation, it is the duty of the court to choose that construction or interpretation which will avoid rather than raise serious questions as to its constitutionality”).⁶

Sixth, the Commissioner quotes only the first sentence of Crutchfield’s as-applied challenge contained in Paragraph 6 of its Notices of Appeal—which states that “[a]pplication of the CAT to Crutchfield would violate the Company’s rights under the Commerce Clause”—implying that it somehow precludes Crutchfield’s as-applied challenge because of its use of the word “would.” Putting aside this inscrutable semantic argument about the meaning and import of Crutchfield’s choice of verb tense, particularly in light of the background set forth in pages 1-4 of the Petition, we note that

⁶Crutchfield’s contentions regarding statutory construction were intended to present ways in which the constitutionality of the CAT provisions in question might be preserved. Seeking such a limiting construction is, indeed, the obligation of the tribunal (and, by extension, the parties) to explore. *Buchman, supra*. The Commissioner’s response is that such an interpretation of the CAT is impossible because the CAT, by its plain terms, permits only one interpretation: that the tax *must* apply to all companies that meet the \$500,000 sales threshold, *regardless of whether they have substantial nexus with the State*. In other words, the Commissioner is insisting that the General Assembly intended the CAT to be placed in the constitutional cross-hairs. This contention, by itself, contradicts the basic principle that the legislature should be presumed to have sought to comply with constitutional standards, if there is any reasonable construction of the law that permits it. *See, e.g., Hopkins v. Kissinger*, 31 Ohio App. 229, 233, 166 N.E. 916, 917 (1928) (courts “presume that the Legislature acted wisely, and with an honest purpose to keep within the restrictions and limitations laid down by our state and Federal Constitutions”). The Commissioner’s further insistence that any proposal by the Appellant that the CAT might be interpreted as consistent with the Constitution thereby results in a waiver by Crutchfield of the underlying constitutional challenge itself is without merit.

the Commissioner fails to quote the balance of the paragraph that makes absolutely clear that Crutchfield was presenting an as-applied constitutional challenge:

The Supreme Court has made clear that a state lacks the power under the Commerce Clause to impose a gross receipts tax on a company with no physical presence in the state. *Tyler Pipe*, 483 U.S. at 250 (1987) (“the crucial factor governing nexus is whether 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 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 business must have a substantial nexus with the State before any tax may be levied on it”). This physical presence standard derives from constitutional principles and authorities set forth by the Court in *National Bellas Hess* and subsequently affirmed in *Quill*. The Supreme Court relied upon *Tyler Pipe*, *Standard Pressed Steel*, and *Commonwealth Edison* in upholding the physical presence test for sales and use taxes in *Quill*, and the Court has never held that a state has the power under the Commerce Clause to impose gross receipts tax on a company base on any lesser, or different standard than [the] physical presence test of *Tyler Pipe* and *Quill*. *Since the bright line physical presence test applies to taxes like the CAT, the assessments are void in their entirety, and the Determination should be vacated.*

(Underlining sic. Emphasis added.) (Appx. 39-40, Ex. 7, Notice of Appeal, at ¶ 6, pp. 6-7; Appx. 53-54, Ex. 8, Notice of Appeal, at ¶ 6, pp. 6-7; Appx. 66-67, Ex.9, Notice of Appeal, at ¶ 6, pp. 6-7). Crutchfield’s Notices of Appeal could not have been clearer, in asserting an as-applied Commerce Clause challenge, and seeking the invalidation of those assessments (and the reversal of the Final Determinations) on that basis.

IV. CONCLUSION

For all of the reasons set forth above, Crutchfield respectfully requests that the Court deny the Commissioner’s Motion to Dismiss Errors 1 and 4 of Crutchfield’s Notice of Appeal. After five years of carefully and consistently presenting and preserving its contention that the application of the CAT to Crutchfield by the assessments of CAT runs

afoul of the Commerce Clause's physical presence standard, as set forth in *Tyler Pipe* and other U.S. Supreme Court cases, and having spent time and resources establishing a full evidentiary record for this Court, it respectfully submits that the time has finally arrived for Crutchfield to have its day in court on this important constitutional claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Appellant Newegg, Inc.'s Opposition to Appellee's Motion to Dismiss Appellant's Assignments of Error Numbers 1 and 3 (sic) was sent via the electronic mail and by U.S. mail to counsel of record for Appellee Tax Commissioner, Daniel W. Fausey and Christine T. Mesirov, Assistant Attorneys General, State of Ohio, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3428, on this 19th day of June, 2015.

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