

## In the Supreme Court of Ohio

Mason Companies, Inc.,	:	
	:	Case No. 2015-0794
	:	
Appellant,	:	
	:	Appeal from the Ohio
v.	:	Board of Tax Appeals
	:	
Joseph W. Testa,	:	
Tax Commissioner of Ohio,	:	
	:	BTA Case Nos. 2012-1169,
Appellee.	:	2012-2806

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**APPELLANT MASON COMPANIES, INC.'S RESPONSE IN OPPOSITION TO  
APPELLEE'S MOTION TO DISMISS APPELLANT'S ASSIGNMENTS OF ERROR  
NUMBERS 1 AND 4**

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The Tax Commissioner of Ohio (“Commissioner”) has moved to dismiss the first and fourth Statements of Error and Propositions of Law Presented (“Errors”) asserted by the Appellant, Mason Companies, Inc. (“Mason”) (“Motion to Dismiss”). He does so on the grounds that these Errors allege an as-applied constitutional challenge to the nexus provisions of the Commercial Activity Tax (“CAT”) that, according the Commissioner’s motion, was not raised below—either with the Commissioner himself or the Board of Tax Appeals (“Board”). Mason opposes the Commissioner’s motion. As demonstrated by a plain reading of Mason’s filings below, as well as the statements of the Commissioner and the Board in their respective rulings below, and as underscored by the *admissions of the Commissioner himself in multiple filings with the Board*, Mason has at all times properly raised and asserted an as-applied constitutional challenge to the CAT. The Commissioner’s Motion to Dismiss should be denied.<sup>1</sup>

#### I. PRELIMINARY STATEMENT

It is important to note from the outset that the Commissioner’s contention that Mason failed to assert (and thereby preserve) its as-applied constitutional challenge to the CAT is a concoction of recent vintage. In fact, on August 20, 2014, when the instant case was fast approaching a hearing before the Board, the Commissioner filed a motion representing to the Board that “this appeal challenges the *constitutionality* of the Commercial Activity Tax (“CAT”) nexus provisions *as applied to the appellant*.” (Emphasis added.) (Appx. 1, Joint Motion to Continue Evidentiary Hearing, August 20, 2014 (“Motion to Continue”), at p. 1).<sup>2</sup> Such an

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<sup>1</sup>Mason understands that the Commissioner has filed identical motions to dismiss in cases involving Newegg, Inc., Supreme Court Case No. 2015-0483, and Crutchfield Corporation, Supreme Court Case No. 2015-0386.

<sup>2</sup> A copy of this motion, written by the same attorneys representing the Commissioner in the instant appeal, is included in Mason’s appendix filed in support of this opposition (the “Appendix”) as Exhibit 1.

acknowledgement of the constitutional issue being presented to the Board was nothing new.

Nearly two years earlier, in the parties' successful joint motion to consolidate, the Commissioner likewise admitted that:

The appeals challenge the constitutionality of the Commercial Activity Tax ("CAT") nexus provisions *as applied to the appellant* under virtually identical assignments of error. The same parties are involved. Both appeals entail "*as applied*" challenges to the constitutionality of the Ohio CAT assessments. Thus, the hearings before the [Board] will entail similar questions of law and fact.

(Emphasis added.) (Appx. 5, Joint Motion to Consolidate And To Amend Case Management Schedule, November 2, 2012 ("Motion to Consolidate")).<sup>3</sup>

In fact, the Commissioner himself left no doubt regarding the nature of the constitutional challenge asserted by Mason. In his successful motion to designate Mason's appeal as complex litigation, which was filed for the sole and express purpose of obtaining far-reaching discovery *on Mason's constitutional claim alone*, the Commissioner represented to the Board as follows:

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

(Emphasis added.) (Appx. 8, Motion to Designate Case As Complex Litigation, Extend Discovery And To Set a Case Management Schedule, June 12, 2012 ("Motion to Designate"), at p. 2).<sup>4</sup> In that same motion, the Commissioner told the Board that Mason:

seeks a determination *that the commissioner's finding that it has substantial nexus with Ohio is an unconstitutional violation of the dormant commerce clause*. In seeking the constitutional invalidation of Ohio tax law, appellant faces the heavy burden of establishing beyond a reasonable doubt that the CAT nexus provisions are unconstitutional \* \* \*. *Discovery of the various means and methods employed*

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<sup>3</sup> A copy of this motion, also written by the attorneys representing the Commissioner in the instant appeals, is included in the Appendix as Exhibit 2.

<sup>4</sup> A copy of this motion, written by the same attorneys, is included in the Appendix as Exhibit 3.

*by appellant in exploiting the Ohio marketplace will be necessary, as well as the activities conducted by agents on appellant's behalf that might establish a physical presence in Ohio.*

(Emphasis added.) (Appx. 9, Ex. 3, Motion to Designate, at p. 3).<sup>5</sup>

In each of these motions filed with the Board, the Commissioner accurately described the nature of Mason's contention that the application of the CAT by the Commissioner to Mason violates the Commerce Clause. Indeed, as demonstrated herein, through direct quotations from key record documents, Mason clearly raised and preserved its as-applied Commerce Clause challenge to the CAT at all times below. Further, the Commissioner himself—and, later, the Board—expressly acknowledged Mason's assertion of an as-applied challenge in written decisions denying Mason relief. The Commissioner, in fact, ruled on Mason's as-applied claim in his Final Determinations.

Because the grounds upon which the Commissioner bases his Motion to Dismiss are plainly false—and contradict his own prior findings, rulings, and representations to the Board—Mason respectfully asks the Supreme Court of Ohio to deny the Commissioner's motion.

Against this backdrop, Mason turns to the procedural background.

## **II. STATEMENT OF THE CASE**

### **A. Background**

For periods beginning July 1, 2005 and ending on September 30, 2011, Mason received CAT assessments from the State of Ohio. It is undisputed that, for each CAT assessment, Mason timely filed a Petition for Reassessment (collectively, the "Petitions for Reassessment"). These

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<sup>5</sup>The Commissioner further advised the Board in this motion that "there are also several appeals of this same nature now pending before this Board, raising 'as applied' constitutional challenges similar to the present one." (Appx. 10, Ex. 3, Motion to Designate, at p. 4). It is Mason's understanding that two of these cases, involving the aforementioned Newegg, Inc. and Crutchfield Corporation, are also on appeal to the Supreme Court of Ohio and raise the precisely same as-applied Commerce Clause challenge as Mason.

Petitions for Reassessment each explicitly referenced and included a materially identical six-page attachment entitled, “BASES FOR PETITION,” an example of which is included in Mason’s Appendix as Exhibit 4. (Appx. 12-17). The Commissioner ruled on Mason’s Petitions for Reassessment in two separate, but substantively identical, written decisions that are also included in Mason’s Appendix as Exhibit 5 and Exhibit 6 (the “Final Determinations”). (Appx. 18-28). Mason timely filed with the Board separate Notices of Appeal from the Commissioner’s Final Determinations, copies of which are included in the Appendix as Exhibit 7 and Exhibit 8 (the “Notices of Appeal”). (Appx. 29-55).

With the consent of Mason and the Commissioner, Mason’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 raised identical claims. The Board decided Mason’s consolidated appeals in a single Decision and Order that is included in Mason’s Appendix as Exhibit 9 (the “Decision and Order”). (Appx. 56-60). Tellingly, in its Decision and Order, the Board confirmed that Mason’s as-applied constitutional challenge was, in fact, the focus of the hearing, during which both Mason 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 could not decide the as-applied challenge, because it lacked the authority to do so:

As we held 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. 59, Ex. 9, Decision and Order, at p. 4).<sup>6</sup>

This appeal timely followed. The Commissioner does not dispute that Mason’s appeal to this Court includes an as-applied Commerce Clause challenge based upon Mason’s lack of a “substantial nexus” with the state. (Errors ¶¶ 1 & 4). In fact, this claim was properly raised and preserved by Mason 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 its Petitions for Reassessment filed with the Commissioner, Mason raised an as-applied challenge. The Petitions for Reassessment stated, in part, as follows:

*Application of the CAT to the Company 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.). (Appx. 16-17, Ex. 4, BASES FOR PETITION, ¶ 7, pp. 5-6). Moreover, the Petitions for Reassessment also provided a detailed narrative discussion of Mason’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 Mason “has been, and remains, protected from the imposition of Ohio’s state and local taxes under the Commerce

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<sup>6</sup>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 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).

Clause of the United States Constitution” as a result of its lack of a physical presence in Ohio. (Appx. 12-14, Ex. 4, BASES FOR PETITION, at pp. 1-3 (“Petitioner (the ‘Company’) is a direct marketer with no connection to the State of Ohio. It sells goods by mail and telephone order and through the Internet from locations entirely outside of the state. While some of the Company’s customers reside in Ohio, the Company itself has no personnel, agents, or property of any kind in Ohio, makes no sales within the State of Ohio, and fulfills all orders from locations outside of Ohio by means of interstate common carriers.”)).

Separately, Mason argued that the CAT assessments were invalid under the CAT statute itself on multiple grounds, noting that, [i]n addition to its constitutional protections, the Company also submits that it does not satisfy the statutory requirements for imposition of Ohio’s Commercial Activity Tax.” (Appx. 13, Ex. 4, BASES FOR PETITION, at p. 2). In this alternative challenge, Mason argued that, properly construed to avoid running afoul of constitutional infirmities, the CAT should be interpreted so as not to apply to Mason. 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 Mason. (Appx. 15-16, Ex. 4, BASES FOR PETITION, at ¶¶ 2-4, pp. 4-5). It is clear from the face of the Petitions for Reassessment that these alternative arguments in no way negated Mason’s primary, constitutional challenge. Moreover, at no point in connection with its Petitions for Reassessment did Mason waive or abandon its as-applied challenge to the CAT assessments, a fact confirmed by the Commissioner’s Final Determinations denying both of Mason’s Petitions for Reassessment, to which we turn next.

**C. The Commissioner's Final Determinations**

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

*[Mason]'s overriding assertion is that the Commerce Clause of the United States Constitution precludes the State of Ohio from subjecting it to the commerce 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. 20, Ex. 5, Final Determination, at p. 3; Appx. 24, Ex. 6, Final Determination, at p. 2). The Commissioner also recognized and explained that:

*[Mason] 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. 20, Ex. 5, Final Determination, at p. 3; Appx. 25, 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 Mason's "continuous and significant exploitation of the commercial marketplace in Ohio is sufficient for this purpose." (Appx. 21, Ex. 5, Final Determination, at p. 4; Appx. 25-26, Ex. 6, Final Determination, at pp. 3-4).

The Commissioner, in his motion to this Court, makes no mention of either the Commissioner's prior acknowledgement and acceptance of Mason'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 Mason’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. Mason’s Notice of Appeal to The Board**

Presented with Final Determinations by the Commissioner rejecting the as-applied constitutional challenge to the CAT assessments issued against it, Mason timely appealed to the Board. (Appx. 29-55, Exs. 7 & 8, Notices of Appeal). Far from providing a cursory statement of the grounds for its appeal, Mason submitted a 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, Mason explained the nature of and authority for its as-applied Commerce Clause challenge to the CAT assessments, citing applicable U.S. Supreme Court authority defining the appropriate Commerce Clause standards. (Appx. 29-31, Ex. 7, Notice of Appeal, at ¶¶ 1-4, pp. 1-3; Appx. 43-45, Ex. 8, Notice of Appeal, at ¶¶ 1-4, pp. 1-3). Mason then explained that, “in addition to its constitutional protections,” it asserted that the CAT statute, properly read, should be construed so as not to apply to Mason. (Appx. 32, Ex. 7, Notice of Appeal, at ¶¶ 5-7, p. 4; Appx. 45-46, Ex. 8, Notice of Appeal, at ¶¶ 5-7, pp. 3-4).

Next, Mason identified the specific bases on which the Commissioner rested in making his Final Determinations. (Appx. 33, Ex. 7, Notice of Appeal, at ¶¶ 9-13, p. 5; Appx. 46-47, Ex. 8, Notice of Appeal, at ¶¶ 9-13, pp. 4-5). The very first basis for the Commissioner’s Final Determinations was that “Mason 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. 33, Ex. 7, Notice of Appeal, at ¶ 10, p. 5; Appx. 46, Ex. 8, Notice of Appeal, at ¶ 10, p. 4). Mason 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. 33, Ex. 7, Notice of Appeal, at ¶ 12, p. 5; Appx. 47, Ex. 8, Notice of Appeal, at ¶ 12, p. 5). Mason 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. 33, Ex. 7, Notice of Appeal, at ¶ 13, p. 5; Appx. 47, Ex. 8, Notice of Appeal, at ¶ 13, p. 5).

In light of the background and the specific grounds for the Final Determinations challenged by Mason in its Notices of Appeal, Mason 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. 33-35, Ex. 7, Notice of Appeal, at ¶¶ 1-5, pp. 5-7; Appx. 47-48, Ex. 8, Notice of Appeal, at ¶¶ 1-5, pp. 5-6). The CAT statute, Mason suggested, “should be interpreted to avoid the imposition of the CAT on Mason, inasmuch as imposing the tax on Mason would violate the Company’s rights under the Commerce Clause.” (Appx. 34, Ex. 7, Notice of Appeal, at ¶ 5, p. 6; Appx. 48, Ex. 8, Notice of Appeal, at ¶ 5, p. 6).

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

*Application of the CAT to Mason would violate the Company’s rights under the Commerce Clause of the United States Constitution since Mason does not possess the requisite “bright-line” physical presence in Ohio. \* \* \* Since the bright line physical presence test applies to taxes like the CAT, the assessments are void in their entirety, and the Determination should be vacated.*

(Emphasis added.) (Appx. 35, Ex. 7, Notice of Appeal, at ¶ 6, p. 7; Appx. 48-49, Ex. 8, Notice of Appeal, at ¶ 6, pp. 6-7).

In addition, at no point during proceedings before the Board did Mason 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 G, below. That challenge, in fact, was the central focus of the evidentiary hearing below, as the Board explained in its Decision and Order, to which we turn next.

#### **E. The Board's Decision and Order**

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

6. Application of the CAT to Mason would violate the Company's rights under the Commerce Clause of the United States Constitution since Mason did not possess the requisite "bright-line" physical presence in Ohio. \* \* \* *Since the bright-line physical presence test applies to taxes like the CAT, the assessments are void in their entirety, and the Determination should be vacated.*

(Emphasis added.) (Appx. 58, Ex. 9; Decision and Order, at p. 3). The Board further explained, accurately, that Mason's claim was that "[t]he CAT assessments imposed against Mason are a tax on gross receipts generated by a company that lacks any in-state business activity," and that "[t]he Company's gross receipts, therefore, simply cannot be taxed consistent with the Constitution." (*Id.*).

Although, as the Board recognized, Mason clearly asserted an as-applied challenge, the Board in its Decision and Order concluded that it lacked authority to address Mason's constitutional claims. The Board, therefore, made no findings "with regard to the constitutional questions presented." (Citation omitted.) (Appx. 59, Ex. 9; Decision and Order, at p. 4). "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.) (*Id.* (noting that such arguments “may only be addressed on appeal by a court which has the authority to resolve constitutional challenges”)).

### **III. DISCUSSION**

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

Indeed, at each and every step in the administrative review process below—from Mason’s Petitions for Reassessment to its Notices of Appeal—Mason meticulously set forth its express claim that application of the CAT to Mason 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 Mason’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],” Mason 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 Mason filed its appeals, called upon a party contesting final determination of the

Commissioner to “specify the errors therein complained of.” R.C. 5717.02 (2012). In general, the Court has explained that:

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

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

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

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

(Bracketed material 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.

Mason’s Notices of Appeal clearly satisfies these standards. The Notices allege how the Commissioner erred, identify specific statutory provisions and case authority for Mason’s contentions, and assert precisely what action the Commissioner should have taken. Moreover, when viewed in context, there can be absolutely no doubt that Mason 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 Mason’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 Mason’s as-applied Commerce Clause challenge, a claim it now contends was never raised. (Appx. 7-11, Ex. 3, Motion to Designate).

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

**First**, the Commissioner’s claim that Mason 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 both joint and opposed motions, that Mason’s appeal asserted (and thereby preserved) an as-applied constitutional challenge under the Commerce Clause. (*See* Appx. 1-11, Exs. 1-3; *see also* Section I, Preliminary Statement, *supra*, at pp. 1-3). These statements not only resulted in the Commissioner obtaining extraordinary relief from the Board (including far-ranging discovery from Mason *related solely to its constitutional claim*), but demonstrated that the Commissioner at all times understood fully the true nature of Mason’s claims.

**Second**, the Commissioner blatantly mischaracterizes the Board’s Decision and Order, stating flatly—and falsely—that the Board “agreed that Mason 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 directs this Court, the Board lists among Mason’s specified (and, thus, preserved) errors that “[a]pplication

of the CAT to Mason would violate the Company's rights under the Commerce Clause of the United States Constitution since Mason does not possess the requisite 'bright-line' physical presence in Ohio. \* \* \* Since the bright-line physical presence test applies to taxes like the CAT, the assessments are void in their entirety, and the [Final] Determination should be vacated." (Appx. 58, Ex. 9, Decision and Order, at p. 3).

If the Board had not made it sufficiently clear, on the very next page the Board explained 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. 59, Ex. 9, Decision and Order, at p. 4). Nowhere in the Decision and Order does the Board suggest, even remotely, that Mason failed to preserve this constitutional claim. In fact, the Decision and Order states the opposite.

**Third**, the Commissioner does not include in his Appendix Mason'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 Mason'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 Mason 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 Mason timely asserted

and preserved an as-applied constitutional challenge in its own challenge to the CAT assessments.<sup>7</sup>

**Fourth**, while stating flatly that Mason’s as-applied challenge was not “raised with the Tax Commissioner,” the Commissioner withholds from the Court the clear language in Mason’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 Mason had presented an as-applied Commerce Clause challenge, but, in fact, issued a substantive ruling on that constitutional challenge. (Appx. 18-28, Exs. 5 & 6).

**Fifth**, the Commissioner presents only selective, confusing, and misleading quotations from Mason’s Notices of Appeal to the Board to make it appear that Mason’s challenge to the CAT assessments was limited to a statutory challenge. (*See, e.g.*, Motion to Dismiss, at pp. 5-7). While Mason 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, Mason’s urging of the Commissioner and the Board to construe the CAT statutes so as to avoid their application to Mason, and thereby avoid any constitutional infirmities under the Commerce Clause, neither waived nor limited Mason’s clearly and separately stated as-applied Commerce Clause claim.

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<sup>7</sup>In resorting to an irrelevant filing from an appeal filed by L.L. Bean (and which has since settled), the Commissioner mischaracterizes 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 pp. 2-17 (discussing the Commerce Clause limitations on state authority to impose gross receipts taxes)).

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, 960 (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”).<sup>8</sup>

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

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<sup>8</sup>Mason’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*, or to none. 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 Mason of the underlying constitutional challenge is specious.

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 interstate business must have a substantial nexus with the State before any tax may be levied on it”). This physical presence standard derives from constitutional principles and authorities set forth by the Court in *National Bellas Hess* and subsequently affirmed in *Quill*. The Supreme Court relied upon *Tyler Pipe*, *Standard Pressed Steel*, and *Commonwealth Edison* in upholding the physical presence test for sales and use taxes in *Quill*, and the Court has never held that a state has the power under the Commerce Clause to impose gross receipts tax on a company 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. 35, Ex. 7, Notice of Appeal, at ¶ 6, p. 7; Appx. 48-49, Ex. 8, Notice of Appeal, at ¶ 6, pp. 6-7). Mason’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, Mason respectfully requests that the Court deny the Commissioner’s Motion to Dismiss Errors 1 and 4 of Mason’s Notice of Appeal. After five years of carefully and consistently presenting and preserving its contention that any application of the CAT to Mason would fall afoul of the Commerce Clause’s bright-line physical presence standard, and having spent time and resources establishing a full evidentiary record for this Court, it respectfully submits that the time has finally arrived for Mason to have its day in court on this important constitutional claim.

Respectfully submitted,

s/ Edward J. Bernert

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**CERTIFICATE OF SERVICE**

This is to certify that a true copy of the Brief was sent via the Court's electronic filing system and served by email and U.S. mail to counsel of record for Appellee Tax Commissioner, Daniel W. Fausey and Christine T. Mesirov, Assistant Attorneys General, State of Ohio, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3428, on this 1st day of July, 2015.

s/ Edward J. Bernert \_\_\_\_\_

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