

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

**APPENDIX OF EXHIBITS IN SUPPORT OF 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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Respectfully submitted,

s/ Edward J. Bernert

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served upon Christine T. Mesirow 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 1st day of July, 2015.

s/ Edward J. Bernert _____
Edward J. Bernert

Exhibit 1

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.

Discovery into the various means and methods employed by appellant in exploiting the Ohio marketplace has been necessary, as well as an examination of activities conducted by agents on appellant's behalf that might establish a physical presence in Ohio. The parties continue to cooperatively engage in such discovery, including fact witness depositions that are currently scheduled to take place on August 27-28, less than 60 days prior to hearing. The results of these depositions may require further discovery. Moreover, the information obtained during deposition will be incorporated into written expert opinions for this appeal, which will require additional time to prepare.

Accordingly, the Tax Commissioner and Mason respectfully request the hearing be continued for 90 days.

Respectfully Submitted,

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Exhibit 2

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**BEFORE THE BOARD OF TAX APPEALS
STATE OF OHIO**

MASON COMPANIES, INC.,	:		
	:		
Appellant,	:		
	:		
v.	:	Case Nos.	2012-K-1169
	:	and	2012-K-2806
JOSEPH W. TESTA,	:		
TAX COMMISSIONER OF OHIO,	:		
	:		
Appellee.	:		

**JOINT MOTION TO CONSOLIDATE AND
TO AMEND CASE MANAGEMENT SCHEDULE**

Pursuant to Ohio Adm. Code 5717-1-07 and 5717-1-08, Appellant Mason Companies, Inc. and Appellee Joseph W. Testa, Tax Commissioner of Ohio, hereby move the Board to consolidate these appeals for purposes of hearing only and to correspondingly amend the case management schedule for case number 2012-K-1169. The reasons in support of this motion and a proposed case management schedule are set forth in the accompanying memorandum.

Respectfully submitted,

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per authority

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Counsel for Appellee

MEMORANDUM IN SUPPORT

These appeals should be consolidated for purposes of hearing

The parties request that this Board consolidate these appeals for purposes of hearing. Appeals may be consolidated if they present common questions of law or fact. O.A.C. 5717-1-08.

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 BTA will entail similar questions of law and fact.

The current case management schedule should be modified if the appeals are consolidated.

The existing case management schedule for case number 2012-K-1169 should be modified if these cases are consolidated. Because the second appeal was filed four months after the original appeal, the current deadlines should be moved out for four additional months. In addition, the parties have agreed that, subsequent to consolidation, the number of interrogatories that may be served for the consolidated cases shall total 80 (40 for each appeal per Civ.R. 33).

Therefore, the parties request that the Board amend the case management schedule for both cases as follows:

Initial Disclosure of Lay and Expert Witnesses*	Thursday, January 9, 2014
Exchange Initial Expert Reports	Friday, February 7, 2014
Supplement Witness Disclosure*	Thursday, November 07, 2014
Exchange Rebuttal Expert Reports	Tuesday, April 8, 2014
Discovery Cut-off**	Monday, June 9, 2014
Joint Stipulation of Facts	Monday, August 18, 2014
Exchange of Exhibits and Witness Lists	28 days prior to hearing

* Witness Disclosure, including name, addresses, and business phone number (or home phone number, if no business number is available) of each witness. For lay witnesses, the disclosure shall include a brief description of witness' relevant knowledge. For experts, the disclosure shall include: (1) a brief description of the expert's qualifications and summary of the expert's opinions; (2) the basis or theory of that opinion; (3) a list of all publications; (4) a list of cases in which the expert has testified (at trial or by deposition) or submitted an expert report; and (5) facts upon which the expert relies (in addition to the expert's specific opinions and the basis/theory for each) .

** The filing of any motion by either party regarding discovery matters stays these proposed discovery dates for the period of time that the motions are pending, and moves the remaining dates accordingly. Motions to compel, if any, must be filed within 30 days after a response to a written discovery request.

In addition, the parties request that the Board's order reflect the parties' agreement to a total of 80 interrogatories for these combined appeals.

Respectfully submitted,

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Exhibit 3

BEFORE THE BOARD OF TAX APPEALS
STATE OF OHIO

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TAX APPEALS
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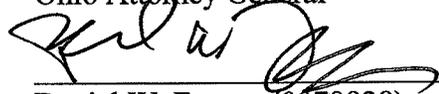
MASON COMPANIES, INC., :
Appellant, :
v. : Case No. 2012-K-1169
JOSEPH W. TESTA, :
TAX COMMISSIONER OF OHIO, :
Appellee. :

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

Pursuant to Ohio Adm. Code 5717-1-07, Appellee Joseph W. Testa, Tax Commissioner of Ohio, moves the Board to extend the discovery deadline for 180 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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*Counsel for Appellee,
Joseph W. Testa, Tax Commissioner of Ohio*

MEMORANDUM IN SUPPORT

The Tax Commissioner requests that this Board 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 Board'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 originally estimated based on the information available to the Tax Commissioner. Appellant has provided gross receipts to the Tax Commissioner, as reflected in the final determination. However, Appellant has not filed any return based upon those receipts, and the amounts are still subject to audit and assessment of additional tax. Because the appellant has not previously filed returns, 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).

This appeal is not a simple challenge based on uncontested facts. Appellant 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. It cannot limit that examination only to those facts that it wishes to present, but must be willing to allow examination of all relevant facts upon which the court's determination must be made. In that vein, consideration of whether appellant has nexus such that it is required to register and pay the CAT is not limited to the bright-line nexus standards of R.C. 5751.01(I); substantial nexus with Ohio may be established in a number of other ways, as set forth in R.C. 5751.01(H). And the Tax Commissioner is not limited in his inquiry at the Board to those arguments addressed in his final determination and raised in appellant's notice of appeal. *Key Services Corp. v. Zaino*, 95 Ohio St.3d 11, 2002-Ohio-1488. Discovery into the various means and methods employed by appellant in exploiting the Ohio marketplace will be necessary, as well as an examination of activities conducted by agents on appellant's behalf that might establish a physical presence in Ohio.

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

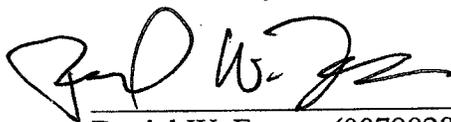
management procedures.” In addition to the foregoing explanation of the complexity of legal and factual issues, there are also several appeals of this same nature now pending before this Board, raising “as applied” constitutional challenges similar to the present one. Board supervision and/or case management procedures will aid in the progression of these appeals through the hearing process.

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

In the alternative, and at a minimum, based upon the complexity of the case and the importance of the issue as described above, this Board should extend the discovery period in this case by 180 days. The current discovery cut off is August 22, 2012. An additional 180 days would be Monday, February 18, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

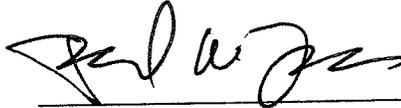
I hereby certify that a true copy of this motion to designate case as complex litigation, extend discovery and to set a case management schedule was served upon the following by regular U.S. Mail on this 12 day of June, 2012:

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Daniel W. Fausey
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Exhibit 4

ATTACHMENT A

BASES FOR PETITION

I. Introduction

Petitioner (the "Company") is a direct marketer with no connection to the State of Ohio. It sells its 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.

As a result, the Company has been, and remains, protected from the imposition of Ohio's state and local taxes under the Commerce Clause of the United States Constitution. *See, e.g., National Bellas Hess v. Ill. Rev. Dep't*, 386 U.S. 753 (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").

The United States Supreme Court has long, and consistently, held that a company does not fall under the tax powers of a foreign state absent "local incident" on the part of the company that brings it within the tax authority of that state. *See, e.g., Norton Co. v. Ill. Rev. Dep't*, 340 U.S. 534, 537 (1951)(explaining that states can "more easily" meet the "local incident" requirement in sales and use tax cases, "because the impact of those taxes is on the local buyer or user"); *National Geographic Society v. Cal. Bd. of Equalization*, 430 U.S. 551, 558 (1977)(noting that the requirement of a "local incident" is higher in gross receipts tax cases since, unlike sales and use taxes, they involve a direct tax, rather than simply "the administrative [burden] of collecting it"); *see also Standard Pressed Steel Co. v. Wash. Dep't of Rev.*, 419 U.S. 560, 562-63 (1975)(a gross receipts tax case citing, with approval, the "local incident" requirement of *Norton*); *accord Tyler Pipe Industries, Inc. v. Wash. Dept. of Rev.*, 483 U.S. 232, 251 (1987)(requiring an in-state physical presence before a business and occupations tax could be imposed).

In 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 (the "CAT") inasmuch as

it does not meet 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 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 with no physical presence in the state, "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).

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

Alternatively, the Company submits that any penalty sought to be imposed on the Company should be rescinded because: (1) it was reasonable for the Company 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) the Company relied on well-established legal principles, including the United States Supreme Court bright-line "substantial nexus" rule in response to Ohio's attempt to impose the CAT on nonresident mail order and Internet sellers.

II. Specific Grounds

1. Because the Company 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 (the "CAT"), therefore, does not apply.

2. The Company 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. The Company 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 percent of the person's total property, total payroll, or total

receipts, and was not "domiciled in this state as an individual or for corporate, commercial, or other business purposes."

4. The Company's receipts are not subject to taxation because, under R.C. § 5751(F), such tax is "prohibited by the constitution [sic] or laws of the United States ..."

5. The Company's receipts are not subject to taxation because it lacks a "substantial nexus with this state" under R.C. § 5751.02(A).

6. Ohio statutes should be interpreted to avoid the imposition of the CAT on the Company, inasmuch as imposing the tax on the Company 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 the Company from the reach of the CAT can the constitutionality of the tax be preserved.

7. 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. 753 (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.

8. Even if it were held, contrary to clear United States Supreme Court precedent, that the “bright-line” rule applied in numerous cases such as *National Bellas Hess*, *Quill*, and *Commonwealth Edison* 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 the Company 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 have been subjected to Commerce Clause scrutiny.” *Commonwealth Edison*, 453 U.S. at 616.

9. The tax imposed upon the Company was excessive because it was based upon an inaccurate, excessive calculation of taxable gross sales made to Ohio residents.

Exhibit 5



181000000

FINAL DETERMINATION

Date: FEB 16 2012

Mason Companies, Inc.
425 Well Street, Suite 100
Chippewa Falls, WI 54774

Re: 18 Assessments
Commercial Activity Tax
Taxpayer ID No. 96060720
Tax Period: 2005-2010

The final determination of the Tax Commissioner issued on January 26, 2012 pertaining to this taxpayer is hereby vacated and is replaced by the following:

This is the final determination of the Tax Commissioner on a petition for reassessment filed pursuant to 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>Penalty</u>	<u>Payments</u>	<u>Total</u>
17201019728458	07/01/05-12/31/05	\$20,000.00	\$5,677.26	\$12,000.00	\$0.00	\$37,677.26
17201019728459	01/01/06-03/31/06	\$10,000.00	\$2,692.33	\$5,500.00	\$0.00	\$18,192.33
17201019728460	04/01/06-06/30/06	\$10,000.00	\$2,542.74	\$5,500.00	\$0.00	\$18,042.74
17201019728461	07/01/06-09/30/06	\$10,000.00	\$2,391.51	\$5,500.00	\$0.00	\$17,891.51
17201019728462	10/01/06-12/31/06	\$10,000.00	\$2,251.07	\$5,500.00	\$0.00	\$17,715.07
17201019728463	01/01/07-03/31/07	\$10,000.00	\$2,017.81	\$5,500.00	\$0.00	\$17,517.81
17201019728391	04/01/07-06/30/07	\$10,000.00	\$1,818.36	\$5,500.00	\$0.00	\$17,318.36
17201019728392	07/01/07-09/30/07	\$10,000.00	\$1,616.71	\$5,500.00	\$0.00	\$17,116.71
17201019728393	10/01/07-12/31/07	\$10,000.00	\$1,415.07	\$5,500.00	\$0.00	\$16,915.07
17201019728394	01/01/08-03/31/08	\$10,000.00	\$1,215.62	\$5,500.00	\$0.00	\$16,715.62
17201019728395	04/01/08-06/30/08	\$10,000.00	\$1,016.16	\$5,500.00	\$0.00	\$16,516.16
17201019728396	07/01/08-09/30/08	\$10,000.00	\$814.52	\$5,500.00	\$0.00	\$16,314.52
17201019728397	10/01/08-12/31/08	\$10,000.00	\$650.68	\$5,500.00	\$0.00	\$16,150.68
17201019728398	01/01/09-03/31/09	\$10,000.00	\$527.40	\$5,500.00	\$0.00	\$16,027.40
17201019728399	04/01/09-06/30/09	\$10,000.00	\$402.74	\$5,500.00	\$0.00	\$15,902.74
17201019728400	07/01/09-09/30/09	\$10,000.00	\$275.34	\$5,500.00	\$0.00	\$15,775.34
17201019728401	10/01/09-12/31/09	\$10,000.00	\$162.19	\$5,500.00	\$0.00	\$15,662.19
17201019728402	01/01/10-03/31/10	\$10,000.00	\$62.47	\$5,500.00	\$0.00	\$15,562.47
Total		\$190,000.00	\$27,549.98	\$105,500.00	\$0.00	\$323,013.98

The petitioner contends that it is not subject to the commercial activity tax, and requests cancellation of the assessments. This contention is not well taken. In summary, 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 and/or fourth conditions in that division, and therefore is a person on whom the tax is levied. The petitioner sells goods through orders received via telephone, mail, and the Internet. While the petitioner admits that it has customers in Ohio to which it sells and ships these 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.

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 sitused 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 sitused 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. *

**

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 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.

To the extent that the petitioner is challenging the constitutionality of R.C. 5751.01(H)(3), (4) and/or R.C.5751.01(I)(3), the Commissioner is without jurisdiction to adjudicate the constitutionality of those statutes. However, the laws of Ohio are presumed to be constitutional. See *State ex rel. Swetland v. Kinney* (1982), 69 Ohio St.2d 567. Moreover, a discussion of the constitutional issues is particularly warranted for two reasons. First, R.C. 5751.01(H)(4) requires the commercial activity tax to be imposed to the fullest extent permissible under the Constitution. Second, regardless of R.C. 5751.01(H)(4), compliance with constitutional limitations on state taxation is the sine qua non of any tax assessment.

The Tax Commissioner’s assessments have been computed based on the petitioner’s representations of the amounts realized from its selling of goods to Ohio consumers. By the petitioner’s own admission, the goods sold were delivered by common carrier to their ultimate destination in Ohio. Thus, they were “received in this state” and were “taxable gross receipts” within the meaning of R.C. 5751.033(E) and R.C. 5751.01(I)(3). For each calendar year at issue, taxable gross receipts greatly exceeded \$500,000.00, so the petitioner had “bright-line presence” pursuant to R.C. 5751.01 (H)(3) and R.C. 5751.01(I)(3). Therefore, the petitioner had “substantial nexus with this state” and was subject to the tax because it had taxable gross receipts exceeding \$500,000.00 in each calendar year.

The petitioner contends that 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. In *Quill*, the Court held that North Dakota’s attempt to require an out-of-state mail order company with no physical presence in the state to collect and remit use tax violated the “substantial nexus” requirement of the Commerce Clause. However, in the years since *Quill*, the Court has not extended its holding to other taxes,

including income taxes or gross receipts taxes. The highest court in most, but not all, states that have considered the issue, including Ohio, has found that *Quill* applies only to sales and use taxes. See *Couchot v. State Lottery Commission* (1996), 74 Ohio St.3d 417 (finding that the physical-presence requirement of *Quill* was not applicable to taxation of Ohio Lottery winnings of a nonresident, because *Quill* applied only to sales and use taxes, although the requirement would have been satisfied anyway by virtue of the winner's purchase and redemption of the winning ticket in Ohio in a prior year). See also, for example, *Geoffrey v. South Carolina* (1993), 437 S.E.2d 13, *A & F Trademark, Inc. v. Tolson* (2004), 167 N.C. App. 150, *LANCO, Inc. v. Dir., Div. of Taxation* (2006), 908 A.2d 176, *Tax Comm'r v. MBNA America Bank* (2006), 220 W.Va. 163, and *Capital One Bank v. Commissioner* (2009), 453 Mass. 1.

The petitioner contends that even if the holding of *Quill* is limited to the sales and use tax context, that holding should apply to the commercial activity tax. However, the Supreme Court of Ohio recently found that the commercial activity tax is not, as the petitioner asserts, the functional equivalent of a sales tax. See *Ohio Grocers Ass'n v. Levin* (2009), 123 Ohio St.3d 303 (holding that the tax is not an excise tax "upon the sale or purchase of food"). Therefore, the *Quill* requirement of physical presence does not apply to the commercial activity tax.

In order to be constitutionally valid, the assessments herein must still satisfy the "substantial nexus" requirement of the Commerce Clause. The petitioner's continuous and significant exploitation of the economic marketplace in Ohio is sufficient for this purpose. Therefore, 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.

Lastly, the petitioner contends that even if it was subject to the tax and required to file returns and pay the amounts due, the assessed penalties should be abated in full due to its reasonable reliance on its interpretation of constitutional principles limiting state taxation. The petitioner was assessed penalty pursuant to R.C. 5751.06(A), (B)(1), and (D). The Tax Commissioner may abate these penalties pursuant to R.C. 5751.06(F). The petitioner's contention is not well taken, although as shown below the penalties are reduced herein because each of the assessed penalties is calculated as a percentage of tax due.

Therefore, in accordance with the actual gross receipts figures supplied, the assessments are modified as follows¹:

¹ The assessments are modified to reflect the tax due on the taxable gross receipts supplied by the petitioner. Since the petitioner has not filed returns reflecting these amounts, the figures are subject to audit and assessment of additional tax. See R.C. 5751.09(F).

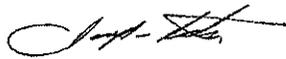
FEB 16 2012

Assessment No.	Period	Tax	Interest	Penalty	Payments	Total
17201019728458	07/01/05-12/31/05	\$1,579.00	\$448.22	\$1,868.45	\$0.00	\$3,895.67
17201019728459	01/01/06-03/31/06	\$901.00	\$242.58	\$495.55	\$0.00	\$1,639.13
17201019728460	04/01/06-06/30/06	\$1,674.00	\$425.65	\$920.70	\$0.00	\$3,020.35
17201019728461	07/01/06-09/30/06	\$1,428.00	\$341.51	\$785.40	\$0.00	\$2,554.91
17201019728462	10/01/06-12/31/06	\$1,572.00	\$348.21	\$864.60	\$0.00	\$2,784.81
17201019728463	01/01/07-03/31/07	\$1,657.00	\$334.35	\$911.35	\$0.00	\$2,902.70
17201019728391	04/01/07-06/30/07	\$2,828.00	\$514.23	\$1,555.40	\$0.00	\$4,897.63
17201019728392	07/01/07-09/30/07	\$2,293.00	\$370.71	\$1,261.15	\$0.00	\$3,924.86
17201019728393	10/01/07-12/31/07	\$2,695.00	\$381.36	\$1,482.25	\$0.00	\$4,558.61
17201019728394	01/01/08-03/31/08	\$2,266.00	\$275.46	\$1,246.30	\$0.00	\$3,787.76
17201019728395	04/01/08-06/30/08	\$3,874.00	\$393.66	\$2,130.70	\$0.00	\$6,398.36
17201019728396	07/01/08-09/30/08	\$3,316.00	\$270.10	\$1,823.80	\$0.00	\$5,409.90
17201019728397	10/01/08-12/31/08	\$3,476.00	\$226.18	\$1,911.80	\$0.00	\$5,613.98
17201019728398	01/01/09-03/31/09	\$2,812.00	\$148.30	\$1,546.60	\$0.00	\$4,506.90
17201019728399	04/01/09-06/30/09	\$3,992.00	\$160.77	\$2,195.60	\$0.00	\$6,348.37
17201019728400	07/01/09-09/30/09	\$4,073.00	\$112.15	\$2,240.15	\$0.00	\$6,425.30
17201019728401	10/01/09-12/31/09	\$4,252.00	\$68.96	\$2,338.60	\$0.00	\$6,659.56
17201019728402	01/01/10-03/31/10	\$4,329.00	\$27.04	\$2,380.95	\$0.00	\$6,736.99
Total		\$49,017.00	\$5,089.44	\$27,959.35	\$0.00	\$82,065.79

Current records indicate that no additional 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 unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total. 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, OH 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



0000000222

FINAL DETERMINATION

Date: JUN 28 2012

Mason Companies, Inc.
425 Well Street, Suite 100
Chippewa Falls, WI 54774

JUL 6 2012

Re: 6 Assessments
Commercial Activity Tax
Taxpayer ID No. 96060720
Tax Period: 2010-2011

This is the final determination of the Tax Commissioner on six petitions for reassessment filed pursuant to 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>Penalty</u>	<u>Payments</u>	<u>Total</u>
17201131920709	04/01/10-06/30/10	\$10,000.00	\$498.63	\$5,500.00	\$0.00	\$15,998.63
17201131920707	07/01/10-09/30/10	\$10,000.00	\$397.81	\$5,500.00	\$0.00	\$15,897.81
17201131920706	10/01/10-12/31/10	\$10,000.00	\$295.89	\$5,500.00	\$0.00	\$15,795.89
17201131920704	01/01/11-03/31/11	\$10,000.00	\$199.45	\$5,500.00	\$0.00	\$15,699.45
17201131920710	04/01/11-06/30/11	\$10,000.00	\$98.63	\$5,500.00	\$0.00	\$15,598.63
17201133443985	07/01/11-09/30/11	\$10,000.00	\$14.25	\$5,500.00	\$0.00	\$15,514.25
Total		\$60,000.00	\$1,504.66	\$33,000.00	\$0.00	\$94,504.66

The petitioner contends that it is not subject to the commercial activity tax, and requests cancellation of the assessments. This contention is not well taken. In summary, 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 and/or fourth conditions in that division, and therefore is a person on whom the tax is levied. The petitioner sells goods through orders received via telephone, mail, and the Internet. While the petitioner admits that it has customers in Ohio to which it sells and ships these 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.

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.

JUN 28 2012

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. * * *

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 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.

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To the extent that the petitioner is challenging the constitutionality of R.C. 5751.01(H)(3), (4) and/or R.C.5751.01(I)(3), the Commissioner is without jurisdiction to adjudicate the constitutionality of those statutes. However, the laws of Ohio are presumed to be constitutional. See *State ex rel. Swetland v. Kinney* (1982), 69 Ohio St.2d 567. Moreover, a discussion of the constitutional issues is particularly warranted for two reasons. First, R.C. 5751.01(H)(4) requires the commercial activity tax to be imposed to the fullest extent permissible under the Constitution. Second, regardless of R.C. 5751.01(H)(4), compliance with constitutional limitations on state taxation is the sine qua non of any tax assessment.

The Tax Commissioner's assessments will be adjusted and will be computed based on the petitioner's representations of the amounts realized from its selling of goods to Ohio consumers. By the petitioner's own admission, the goods sold were delivered by common carrier to their ultimate destination in Ohio. Thus, they were "received in this state" and were "taxable gross receipts" within the meaning of R.C. 5751.033(E) and R.C. 5751.01(I)(3). For each calendar year at issue, taxable gross receipts greatly exceeded \$500,000.00, so the petitioner had "bright-line presence" pursuant to R.C. 5751.01(H)(3) and R.C. 5751.01(I)(3). Therefore, the petitioner had "substantial nexus with this state" and was subject to the tax because it had taxable gross receipts exceeding \$500,000.00 in each calendar year.

The petitioner contends that 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. In *Quill*, the Court held that North Dakota's attempt to require an out-of-state mail order company with no physical presence in the state to collect and remit use tax violated the "substantial nexus" requirement of the Commerce Clause. However, in the years since *Quill*, the Court has not extended its holding to other taxes, including income taxes or gross receipts taxes. The highest court in most, but not all, states that have considered the issue, including Ohio, has found that *Quill* applies only to sales and use taxes. See *Couchot v. State Lottery Commission* (1996), 74 Ohio St.3d 417 (finding that the physical-presence requirement of *Quill* was not applicable to taxation of Ohio Lottery winnings of a nonresident, because *Quill* applied only to sales and use taxes, although the requirement would have been satisfied anyway by virtue of the winner's purchase and redemption of the winning ticket in Ohio in a prior year). See also, for example, *Geoffrey v. South Carolina* (1993), 437 S.E.2d 13, *A & F Trademark, Inc. v. Tolson* (2004), 167 N.C. App. 150, *LANCO, Inc. v. Dir., Div. of Taxation* (2006), 908 A.2d 176, *Tax Comm'r v. MBNA America Bank* (2006), 220 W.Va. 163, and *Capital One Bank v. Commissioner* (2009), 453 Mass. 1.

The petitioner contends that even if the holding of *Quill* is limited to the sales and use tax context, that holding should apply to the commercial activity tax. However, the Supreme Court of Ohio recently found that the commercial activity tax is not, as the petitioner asserts, the functional equivalent of a sales tax. See *Ohio Grocers Ass'n v. Levin* (2009), 123 Ohio St.3d 303 (holding that the tax is not an excise tax "upon the sale or purchase of food"). Therefore, the *Quill* requirement of physical presence does not apply to the commercial activity tax.

In order to be constitutionally valid, the assessments herein must still satisfy the "substantial nexus" requirement of the Commerce Clause. The petitioner's continuous and significant

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exploitation of the economic marketplace in Ohio is sufficient for this purpose. Therefore, 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.

Lastly, the petitioner contends that even if it was subject to the tax and required to file returns and pay the amounts due, the assessed penalties should be abated in full due to its reasonable reliance on its interpretation of constitutional principles limiting state taxation. The petitioner was assessed penalty pursuant to R.C. 5751.06(A), (B)(1), and (D). The Tax Commissioner may abate these penalties pursuant to R.C. 5751.06(F). The petitioner's contention is not well taken, although as shown below the penalties are reduced herein because each of the assessed penalties is calculated as a percentage of tax due.

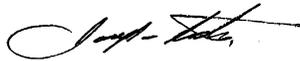
Therefore, in accordance with the actual gross receipts figures supplied, the assessments are modified as follows¹:

<u>Assessment No.</u>	<u>Period</u>	<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Payments</u>	<u>Total</u>
17201131920709	04/01/10-06/30/10	\$4,559.79	\$227.37	\$2,507.89	\$0.00	\$7,295.05
17201131920707	07/01/10-09/30/10	\$4,824.93	\$191.94	\$2,653.71	\$0.00	\$7,670.58
17201131920706	10/01/10-12/31/10	\$6,502.20	\$192.39	\$3,576.21	\$0.00	\$10,270.80
17201131920704	01/01/11-03/31/11	\$5,450.42	\$108.71	\$2,997.73	\$0.00	\$8,556.86
17201131920710	04/01/11-06/30/11	\$4,816.60	\$47.51	\$2,649.13	\$0.00	\$7,513.24
17201133443985	07/01/11-09/30/11	\$5,804.27	\$8.27	\$3,192.35	\$0.00	\$9,004.89
	Total	\$31,958.22	\$776.19	\$17,577.02	\$0.00	\$50,311.42

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 unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** 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, OH 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

¹ The assessments are modified to reflect the tax due on the taxable gross receipts supplied by the petitioner. Since the petitioner has not filed returns reflecting these amounts, the figures are subject to audit and assessment of additional tax. See R.C. 5751.09(F).



Dear Taxpayer:

Enclosed is the Tax Commissioner's final determination regarding your case. The title is captioned either "Journal Entry" or "Final Determination."

You have the right to appeal this decision to the Board of Tax Appeals. Unlike appeals to the Tax Commissioner, proceedings before the Board of Tax Appeals are very formal, and the Board's procedures must be carefully followed. An appeal to the Board may be done in the following way:

- You have only **60 days** from the date you received this final determination to appeal.
- If you choose to appeal, you must send the Board of Tax Appeals your original notice of appeal and two copies. A copy of the enclosed final determination should also be attached to each notice of appeal. Your notice of appeal must **clearly** state why you are appealing. The law requires you to describe carefully each error which you believe the Tax Commissioner made.
- You must also send the Tax Commissioner a copy of your notice of appeal **and** a copy of the enclosed final determination.
- The Board of Tax Appeals and the Tax Commissioner **must each receive** the notice of appeal and the copy of the final determination within 60 days of your receipt of this final determination. In order to file your appeal on time, you must mail the notices by certified mail, express mail, or authorized delivery service and make sure that the recorded date is within 60 days of your receipt of the enclosed final determination. Ordinary mail delivery is not considered received until each agency actually receives your notice of appeal. Alternatively, you may personally deliver the notices before the 60 days are up to be sure both agencies receive it within the 60-day time limit. Appeals which are received late do not meet the requirements of the law and cannot be considered.

For your information, Ohio Revised Code Section 5717.02 appears on the back of this letter. This is the section of the Code stating the requirements for a proper appeal to the Board of Tax Appeals. You **must** follow all of these **mandatory** requirements in order to appeal. If you don't, you may lose your right to appeal.

The mailing address of the Board of Tax Appeals is:

30 East Broad Street
24th Floor State Office Tower
Columbus, OH 43215

The Tax Commissioner's mailing address is:

30 East Broad Street, 22nd Floor
P.O. Box 530
Columbus, OH 43216-0530

5717.02 Appeals from final determination of the tax commissioner; notice; procedure; hearing.

Except as otherwise provided by law, appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be taken to the board of tax appeals by the taxpayer, by the person to whom notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner is required by law to be given, by the director of budget and management if the revenues affected by such decision would accrue primarily to the state treasury, or by the county auditors of the counties to the undivided general tax funds of which the revenues affected by such decision would primarily accrue. Appeals from the redetermination by the director of development under division (B) of section 5709.64 or division (A) of section 5709.66 of the Revised Code may be taken to the board of tax appeals by the enterprise to which notice of the redetermination is required by law to be given. Appeals from a decision of the tax commissioner concerning an application for a property tax exemption may be taken to the board of tax appeals by a school district that filed a statement concerning such application under division (C) of section 5715.27 of the Revised Code.

Such appeals shall be taken by the filing of a notice of appeal with the board, and with the tax commissioner if the tax commissioner's action is the subject of the appeal or with the director of development if the director's action is the subject of the appeal, within sixty days after service of the notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner or redetermination by the director has been given as provided in section 5703.37 of the Revised Code. The notice of such appeal may be filed in person or by certified mail, express mail, or authorized delivery service. If the notice of such appeal is filed by certified mail, express mail, or authorized delivery service as provided in section 5703.056 of the Revised Code, the date of the United States postmark placed on the sender's receipt by the postal service or the date of receipt recorded by the authorized delivery service shall be treated as the date of filing. The notice of appeal shall have attached thereto and incorporated therein by reference a true copy of the notice sent by the commissioner or director to the taxpayer or enterprise of the final determination or redetermination complained of, and shall also specify the errors therein complained of, but failure to attach a copy of such notice and incorporate it by reference in the notice of appeal does not invalidate the appeal.

Upon the filing of a notice of appeal, the tax commissioner or the director, as appropriate, shall certify to the board a transcript of the record of the proceedings before the commissioner or director, together with all evidence considered by the commissioner or director in connection therewith. Such appeals or applications may be heard by the board at its office in Columbus or in the county where the appellant resides, or it may cause its examiners to conduct such hearings and to report to it their findings for affirmation or rejection. The board may order the appeal to be heard upon the record and the evidence certified to it by the commissioner or director, but upon the application of any interested party the board shall order the hearing of additional evidence, and it may make such investigation concerning the appeal as it considers proper.

As amended by H.B. 612, 123rd G.A.

Exhibit 7

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BOARD OF TAX APPEALS

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BOARD OF TAX APPEALS

BEFORE THE OHIO BOARD OF TAX APPEALS
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FILED
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BOARD OF TAX APPEALS
COLUMBUS, OHIO

MASON COMPANIES, INC.,)
425 Well Street, Suite 100)
Chippewa Falls, WI 54774)

Appellant,)

vs.)

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

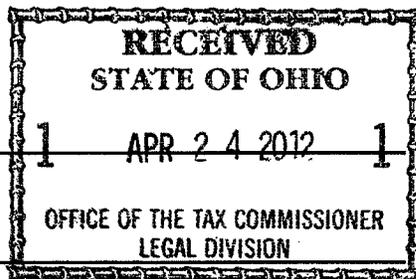
Appellee.)

BTA Case No. _____

(COMMERCIAL ACTIVITY TAX)

Amount in Controversy:
Approximately \$82,065.79 in Tax,
Penalties, and Pre-Assessment
Interest, Plus Post-Assessment
Interest.

NOTICE OF APPEAL



George S. Isaacson (Maine Reg. 001878)
David W. Bertoni (Maine Reg. 006993)

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LEGAL COUNSEL FOR APPELLANT,
MASON COMPANIES, INC.

Pursuant to Section 5717.02 of the Ohio Revised Code (“R.C.”), Mason Companies, Inc. (“Mason” or the “Company”) hereby gives notice of appeal to the Ohio Board of Tax Appeals (“the Board”) from a final determination dated February 16, 2012 (“Determination”) issued by Joseph W. Testa, Tax Commissioner of the State of Ohio (“Commissioner”) that affirmed assessments of Ohio Commercial Activity Tax (“CAT”) against Mason with respect to the following tax periods:

07/01/05 – 12/31/05
01/01/06 – 03/31/06
04/01/06 – 06/30/06
07/01/06 – 09/30/06
10/01/06 – 12/31/06
01/01/07 – 03/31/07
04/01/07 – 06/30/07
07/01/07 – 09/30/07
10/01/07 – 12/31/07
01/01/08 – 03/31/08
04/01/08 – 06/30/08
07/01/08 – 09/30/08
10/01/08 – 12/31/08
01/01/09 – 03/31/09
04/01/09 – 06/30/09
07/01/09 – 09/30/09
10/01/09 – 12/31/09
01/01/10 – 03/31/10

(together, the “Tax Periods”). A copy of the Determination is attached hereto as required by statute. See Exhibit A.

BACKGROUND

1. Mason 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 Mason’s customers reside in Ohio, Mason 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, Mason 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 Mason 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, Mason 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 Mason, 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 Mason, "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. Mason 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, Mason submits that any penalty sought to be imposed on the Company should be rescinded because: (1) it was reasonable for Mason 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) Mason'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 Mason 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 Mason 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 Mason’s “taxable gross receipts greatly exceeded \$500,000.00, so the petitioner had a ‘bright-line presence’ . . . and was subject to [commercial activity] tax.” [*Id.*]

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

12. According to the Commissioner, despite the physical presence requirement of the Commerce Clause, the terms of the CAT dictate that it applies to Mason, based solely on Mason’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. at 4.*]

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

ASSIGNMENTS OF ERROR

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

4. Mason’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 Mason, inasmuch as imposing the tax on Mason 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 Mason from the reach of the CAT can the constitutionality of the tax be preserved.

6. 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. 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.

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 24th day of April, 2012.


Steven L. Smiseck

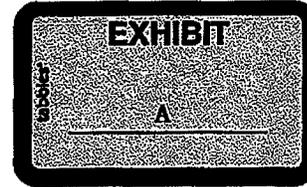


RECORDED

FINAL DETERMINATION

Date: FEB 16 2012

Mason Companies, Inc.
425 Well Street, Suite 100
Chippewa Falls, WI 54774



Re: 18 Assessments
Commercial Activity Tax
Taxpayer ID No. 96060720
Tax Period: 2005-2010

The final determination of the Tax Commissioner issued on January 26, 2012 pertaining to this taxpayer is hereby vacated and is replaced by the following:

This is the final determination of the Tax Commissioner on a petition for reassessment filed pursuant to 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>Penalty</u>	<u>Payments</u>	<u>Total</u>
17201019728458	07/01/05-12/31/05	\$20,000.00	\$5,677.26	\$12,000.00	\$0.00	\$37,677.26
17201019728459	01/01/06-03/31/06	\$10,000.00	\$2,692.33	\$5,500.00	\$0.00	\$18,192.33
17201019728460	04/01/06-06/30/06	\$10,000.00	\$2,542.74	\$5,500.00	\$0.00	\$18,042.74
17201019728461	07/01/06-09/30/06	\$10,000.00	\$2,391.51	\$5,500.00	\$0.00	\$17,891.51
17201019728462	10/01/06-12/31/06	\$10,000.00	\$2,251.07	\$5,500.00	\$0.00	\$17,715.07
17201019728463	01/01/07-03/31/07	\$10,000.00	\$2,017.81	\$5,500.00	\$0.00	\$17,517.81
17201019728391	04/01/07-06/30/07	\$10,000.00	\$1,818.36	\$5,500.00	\$0.00	\$17,318.36
17201019728392	07/01/07-09/30/07	\$10,000.00	\$1,616.71	\$5,500.00	\$0.00	\$17,116.71
17201019728393	10/01/07-12/31/07	\$10,000.00	\$1,415.07	\$5,500.00	\$0.00	\$16,915.07
17201019728394	01/01/08-03/31/08	\$10,000.00	\$1,215.62	\$5,500.00	\$0.00	\$16,715.62
17201019728395	04/01/08-06/30/08	\$10,000.00	\$1,016.16	\$5,500.00	\$0.00	\$16,516.16
17201019728396	07/01/08-09/30/08	\$10,000.00	\$814.52	\$5,500.00	\$0.00	\$16,314.52
17201019728397	10/01/08-12/31/08	\$10,000.00	\$650.68	\$5,500.00	\$0.00	\$16,150.68
17201019728398	01/01/09-03/31/09	\$10,000.00	\$527.40	\$5,500.00	\$0.00	\$16,027.40
17201019728399	04/01/09-06/30/09	\$10,000.00	\$402.74	\$5,500.00	\$0.00	\$15,902.74
17201019728400	07/01/09-09/30/09	\$10,000.00	\$275.34	\$5,500.00	\$0.00	\$15,775.34
17201019728401	10/01/09-12/31/09	\$10,000.00	\$162.19	\$5,500.00	\$0.00	\$15,662.19
17201019728402	01/01/10-03/31/10	\$10,000.00	\$62.47	\$5,500.00	\$0.00	\$15,562.47
	Total	\$190,000.00	\$27,549.98	\$105,500.00	\$0.00	\$323,013.98

The petitioner contends that it is not subject to the commercial activity tax, and requests cancellation of the assessments. This contention is not well taken. In summary, 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 and/or fourth conditions in that division, and therefore is a person on whom the tax is levied. The petitioner sells goods through orders received via telephone, mail, and the Internet. While the petitioner admits that it has customers in Ohio to which it sells and ships these 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.

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. *

* *

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 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.

To the extent that the petitioner is challenging the constitutionality of R.C. 5751.01(H)(3), (4) and/or R.C.5751.01(I)(3), the Commissioner is without jurisdiction to adjudicate the constitutionality of those statutes. However, the laws of Ohio are presumed to be constitutional. See *State ex rel. Sweland v. Kinney* (1982), 69 Ohio St.2d 567. Moreover, a discussion of the constitutional issues is particularly warranted for two reasons. First, R.C. 5751.01(H)(4) requires the commercial activity tax to be imposed to the fullest extent permissible under the Constitution. Second, regardless of R.C. 5751.01(H)(4), compliance with constitutional limitations on state taxation is the sine qua non of any tax assessment.

The Tax Commissioner’s assessments have been computed based on the petitioner’s representations of the amounts realized from its selling of goods to Ohio consumers. By the petitioner’s own admission, the goods sold were delivered by common carrier to their ultimate destination in Ohio. Thus, they were “received in this state” and were “taxable gross receipts” within the meaning of R.C. 5751.033(E) and R.C. 5751.01(I)(3). For each calendar year at issue, taxable gross receipts greatly exceeded \$500,000.00, so the petitioner had “bright-line presence” pursuant to R.C. 5751.01 (H)(3) and R.C. 5751.01(I)(3). Therefore, the petitioner had “substantial nexus with this state” and was subject to the tax because it had taxable gross receipts exceeding \$500,000.00 in each calendar year.

The petitioner contends that 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. In *Quill*, the Court held that North Dakota’s attempt to require an out-of-state mail order company with no physical presence in the state to collect and remit use tax violated the “substantial nexus” requirement of the Commerce Clause. However, in the years since *Quill*, the Court has not extended its holding to other taxes,

including income taxes or gross receipts taxes. The highest court in most, but not all, states that have considered the issue, including Ohio, has found that *Quill* applies only to sales and use taxes. See *Couchot v. State Lottery Commission* (1996), 74 Ohio St.3d 417 (finding that the physical-presence requirement of *Quill* was not applicable to taxation of Ohio Lottery winnings of a nonresident, because *Quill* applied only to sales and use taxes, although the requirement would have been satisfied anyway by virtue of the winner's purchase and redemption of the winning ticket in Ohio in a prior year). See also, for example, *Geoffrey v. South Carolina* (1993), 437 S.E.2d 13, *A & F Trademark, Inc. v. Tolson* (2004), 167 N.C. App. 150, *LANCO, Inc. v. Dir., Div. of Taxation* (2006), 908 A.2d 176, *Tax Comm'r v. MBNA America Bank* (2006), 220 W.Va. 163, and *Capital One Bank v. Commissioner* (2009), 453 Mass. 1.

The petitioner contends that even if the holding of *Quill* is limited to the sales and use tax context, that holding should apply to the commercial activity tax. However, the Supreme Court of Ohio recently found that the commercial activity tax is not, as the petitioner asserts, the functional equivalent of a sales tax. See *Ohio Grocers Ass'n v. Levin* (2009), 123 Ohio St.3d 303 (holding that the tax is not an excise tax "upon the sale or purchase of food"). Therefore, the *Quill* requirement of physical presence does not apply to the commercial activity tax.

In order to be constitutionally valid, the assessments herein must still satisfy the "substantial nexus" requirement of the Commerce Clause. The petitioner's continuous and significant exploitation of the economic marketplace in Ohio is sufficient for this purpose. Therefore, 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.

Lastly, the petitioner contends that even if it was subject to the tax and required to file returns and pay the amounts due, the assessed penalties should be abated in full due to its reasonable reliance on its interpretation of constitutional principles limiting state taxation. The petitioner was assessed penalty pursuant to R.C. 5751.06(A), (B)(1), and (D). The Tax Commissioner may abate these penalties pursuant to R.C. 5751.06(F). The petitioner's contention is not well taken, although as shown below the penalties are reduced herein because each of the assessed penalties is calculated as a percentage of tax due.

Therefore, in accordance with the actual gross receipts figures supplied, the assessments are modified as follows¹:

¹ The assessments are modified to reflect the tax due on the taxable gross receipts supplied by the petitioner. Since the petitioner has not filed returns reflecting these amounts, the figures are subject to audit and assessment of additional tax. See R.C. 5751.09(F).

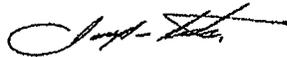
FEB 16 2012

<u>Assessment No.</u>	<u>Period</u>	<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Payments</u>	<u>Total</u>
17201019728458	07/01/05-12/31/05	\$1,579.00	\$448.22	\$1,868.45	\$0.00	\$3,895.67
17201019728459	01/01/06-03/31/06	\$901.00	\$242.58	\$495.55	\$0.00	\$1,639.13
17201019728460	04/01/06-06/30/06	\$1,674.00	\$425.65	\$920.70	\$0.00	\$3,020.35
17201019728461	07/01/06-09/30/06	\$1,428.00	\$341.51	\$785.40	\$0.00	\$2,554.91
17201019728462	10/01/06-12/31/06	\$1,572.00	\$348.21	\$864.60	\$0.00	\$2,784.81
17201019728463	01/01/07-03/31/07	\$1,657.00	\$334.35	\$911.35	\$0.00	\$2,902.70
17201019728391	04/01/07-06/30/07	\$2,828.00	\$514.23	\$1,555.40	\$0.00	\$4,897.63
17201019728392	07/01/07-09/30/07	\$2,293.00	\$370.71	\$1,261.15	\$0.00	\$3,924.86
17201019728393	10/01/07-12/31/07	\$2,695.00	\$381.36	\$1,482.25	\$0.00	\$4,558.61
17201019728394	01/01/08-03/31/08	\$2,266.00	\$275.46	\$1,246.30	\$0.00	\$3,787.76
17201019728395	04/01/08-06/30/08	\$3,874.00	\$393.66	\$2,130.70	\$0.00	\$6,398.36
17201019728396	07/01/08-09/30/08	\$3,316.00	\$270.10	\$1,823.80	\$0.00	\$5,409.90
17201019728397	10/01/08-12/31/08	\$3,476.00	\$226.18	\$1,911.80	\$0.00	\$5,613.98
17201019728398	01/01/09-03/31/09	\$2,812.00	\$148.30	\$1,546.60	\$0.00	\$4,506.90
17201019728399	04/01/09-06/30/09	\$3,992.00	\$160.77	\$2,195.60	\$0.00	\$6,348.37
17201019728400	07/01/09-09/30/09	\$4,073.00	\$112.15	\$2,240.15	\$0.00	\$6,425.30
17201019728401	10/01/09-12/31/09	\$4,252.00	\$68.96	\$2,338.60	\$0.00	\$6,659.56
17201019728402	01/01/10-03/31/10	\$4,329.00	\$27.04	\$2,380.95	\$0.00	\$6,736.99
Total		\$49,017.00	\$5,089.44	\$27,959.35	\$0.00	\$82,065.79

Current records indicate that no additional 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 unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total. 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, OH 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 8

2012 AUG 27 PM 3:16

BEFORE THE OHIO BOARD OF TAX APPEALS

MASON COMPANIES, INC.,)
425 Well Street, Suite 100)
Chippewa Falls, WI 54774)

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 \$50,311.42 in Tax,
Penalties, and Pre-Assessment
Interest, Plus Post-Assessment
Interest.

NOTICE OF APPEAL

David W. Bertoni (Maine Reg. 006993)

Anthony L. Ehler (0039304)
Steven L. Smiseck (0061615)

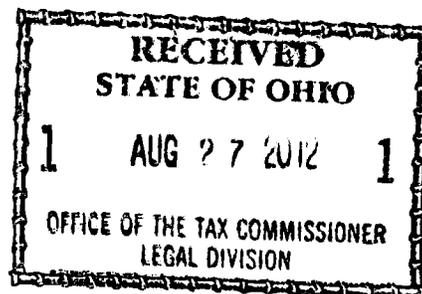
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LEGAL COUNSEL FOR APPELLANT,
MASON COMPANIES, INC.

LEGAL COUNSEL FOR APPELLANT,
MASON COMPANIES, INC.

HAND DELIVERED



Pursuant to Section 5717.02 of the Ohio Revised Code (“R.C.”), Mason Companies, Inc. (“Mason” or the “Company”) hereby gives notice of appeal to the Ohio Board of Tax Appeals (“the Board”) from a final determination dated June 28, 2012 (“Determination”) issued by Joseph W. Testa, Tax Commissioner of the State of Ohio (“Commissioner”) that affirmed assessments of Ohio Commercial Activity Tax (“CAT”) against Mason with respect to the following tax periods:

04/01/10 – 06/30/10
07/01/10 – 09/30/10
10/01/10 – 12/31/10
01/01/11 – 03/31/11
04/01/11 – 06/30/11
07/01/11 – 09/30/11

(together, the “Tax Periods”). A copy of the Determination is attached hereto as required by statute. See Exhibit A.

BACKGROUND

1. Mason 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 Mason’s customers reside in Ohio, Mason 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, Mason 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 Mason 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, Mason 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 Mason, 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 Mason, “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. Mason 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, Mason submits that any penalty sought to be imposed on the Company should be rescinded because: (1) it was reasonable for Mason 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) Mason’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 Mason 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 Mason 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. 5751.01(I)(3). [Determination at 3.] The Commissioner stated that Mason’s

“taxable gross receipts greatly exceeded \$500,000.00, so the petitioner had a ‘bright-line presence’ . . . and was subject to [commercial activity] tax.” [*Id.*]

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

12. According to the Commissioner, despite the physical presence requirement of the Commerce Clause, the terms of the CAT dictate that it applies to Mason, based solely on Mason’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. at 4.*]

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

ASSIGNMENTS OF ERROR

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

4. Mason’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 Mason, inasmuch as imposing the tax on Mason 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 Mason from the reach of the CAT can the constitutionality of the tax be preserved.

6. 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. 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 Commissioner's assessment of the "failing to register penalty" is erroneous and unlawful in that Mason was not required to register for the CAT because Mason was not a "person subject to" chapter 5751 of the Revised Code. R.C. 5751.04(B).

8. The penalty should be abated. The Commissioner erred in arbitrarily and capriciously asserting penalties for each of the aforesaid reasons, and in light of Mason'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 Mason 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

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

Respectfully submitted,



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Steven L. Smiseck (0061615)
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David W. Bertoni (ME Reg. 006993)
(Motion for Admission Pro Hac Vice to be filed)
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Email: dbertoni@brannlaw.com

LEGAL COUNSEL FOR APPELLANT,
MASON COMPANIES, 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 27th day of August, 2012.


Anthony L. Ehler



0000000222

FINAL DETERMINATION

Date: JUN 28 2012

Mason Companies, Inc.
425 Well Street, Suite 100
Chippewa Falls, WI 54774

JUL 6 2012

Re: 6 Assessments
Commercial Activity Tax
Taxpayer ID No. 96060720
Tax Period: 2010-2011

This is the final determination of the Tax Commissioner on six petitions for reassessment filed pursuant to 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>Penalty</u>	<u>Payments</u>	<u>Total</u>
17201131920709	04/01/10-06/30/10	\$10,000.00	\$498.63	\$5,500.00	\$0.00	\$15,998.63
17201131920707	07/01/10-09/30/10	\$10,000.00	\$397.81	\$5,500.00	\$0.00	\$15,897.81
17201131920706	10/01/10-12/31/10	\$10,000.00	\$295.89	\$5,500.00	\$0.00	\$15,795.89
17201131920704	01/01/11-03/31/11	\$10,000.00	\$199.45	\$5,500.00	\$0.00	\$15,699.45
17201131920710	04/01/11-06/30/11	\$10,000.00	\$98.63	\$5,500.00	\$0.00	\$15,598.63
17201133443985	07/01/11-09/30/11	\$10,000.00	\$14.25	\$5,500.00	\$0.00	\$15,514.25
Total		\$60,000.00	\$1,504.66	\$33,000.00	\$0.00	\$94,504.66

The petitioner contends that it is not subject to the commercial activity tax, and requests cancellation of the assessments. This contention is not well taken. In summary, 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 and/or fourth conditions in that division, and therefore is a person on whom the tax is levied. The petitioner sells goods through orders received via telephone, mail, and the Internet. While the petitioner admits that it has customers in Ohio to which it sells and ships these 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.

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.

JUN 28 2012

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. * * *

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 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.

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To the extent that the petitioner is challenging the constitutionality of R.C. 5751.01(H)(3), (4) and/or R.C.5751.01(I)(3), the Commissioner is without jurisdiction to adjudicate the constitutionality of those statutes. However, the laws of Ohio are presumed to be constitutional. See *State ex rel. Swetland v. Kinney* (1982), 69 Ohio St.2d 567. Moreover, a discussion of the constitutional issues is particularly warranted for two reasons. First, R.C. 5751.01(H)(4) requires the commercial activity tax to be imposed to the fullest extent permissible under the Constitution. Second, regardless of R.C. 5751.01(H)(4), compliance with constitutional limitations on state taxation is the sine qua non of any tax assessment.

The Tax Commissioner's assessments will be adjusted and will be computed based on the petitioner's representations of the amounts realized from its selling of goods to Ohio consumers. By the petitioner's own admission, the goods sold were delivered by common carrier to their ultimate destination in Ohio. Thus, they were "received in this state" and were "taxable gross receipts" within the meaning of R.C. 5751.033(E) and R.C. 5751.01(I)(3). For each calendar year at issue, taxable gross receipts greatly exceeded \$500,000.00, so the petitioner had "bright-line presence" pursuant to R.C. 5751.01(H)(3) and R.C. 5751.01(I)(3). Therefore, the petitioner had "substantial nexus with this state" and was subject to the tax because it had taxable gross receipts exceeding \$500,000.00 in each calendar year.

The petitioner contends that 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. In *Quill*, the Court held that North Dakota's attempt to require an out-of-state mail order company with no physical presence in the state to collect and remit use tax violated the "substantial nexus" requirement of the Commerce Clause. However, in the years since *Quill*, the Court has not extended its holding to other taxes, including income taxes or gross receipts taxes. The highest court in most, but not all, states that have considered the issue, including Ohio, has found that *Quill* applies only to sales and use taxes. See *Couchot v. State Lottery Commission* (1996), 74 Ohio St.3d 417 (finding that the physical-presence requirement of *Quill* was not applicable to taxation of Ohio Lottery winnings of a nonresident, because *Quill* applied only to sales and use taxes, although the requirement would have been satisfied anyway by virtue of the winner's purchase and redemption of the winning ticket in Ohio in a prior year). See also, for example, *Geoffrey v. South Carolina* (1993), 437 S.E.2d 13, *A & F Trademark, Inc. v. Tolson* (2004), 167 N.C. App. 150, *LANCO, Inc. v. Dir., Div. of Taxation* (2006), 908 A.2d 176, *Tax Comm'r v. MBNA America Bank* (2006), 220 W.Va. 163, and *Capital One Bank v. Commissioner* (2009), 453 Mass. 1.

The petitioner contends that even if the holding of *Quill* is limited to the sales and use tax context, that holding should apply to the commercial activity tax. However, the Supreme Court of Ohio recently found that the commercial activity tax is not, as the petitioner asserts, the functional equivalent of a sales tax. See *Ohio Grocers Ass'n v. Levin* (2009), 123 Ohio St.3d 303 (holding that the tax is not an excise tax "upon the sale or purchase of food"). Therefore, the *Quill* requirement of physical presence does not apply to the commercial activity tax.

In order to be constitutionally valid, the assessments herein must still satisfy the "substantial nexus" requirement of the Commerce Clause. The petitioner's continuous and significant

JUN 28 2012

exploitation of the economic marketplace in Ohio is sufficient for this purpose. Therefore, 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.

Lastly, the petitioner contends that even if it was subject to the tax and required to file returns and pay the amounts due, the assessed penalties should be abated in full due to its reasonable reliance on its interpretation of constitutional principles limiting state taxation. The petitioner was assessed penalty pursuant to R.C. 5751.06(A), (B)(1), and (D). The Tax Commissioner may abate these penalties pursuant to R.C. 5751.06(F). The petitioner's contention is not well taken, although as shown below the penalties are reduced herein because each of the assessed penalties is calculated as a percentage of tax due.

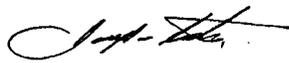
Therefore, in accordance with the actual gross receipts figures supplied, the assessments are modified as follows¹:

<u>Assessment No.</u>	<u>Period</u>	<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Payments</u>	<u>Total</u>
17201131920709	04/01/10-06/30/10	\$4,559.79	\$227.37	\$2,507.89	\$0.00	\$7,295.05
17201131920707	07/01/10-09/30/10	\$4,824.93	\$191.94	\$2,653.71	\$0.00	\$7,670.58
17201131920706	10/01/10-12/31/10	\$6,502.20	\$192.39	\$3,576.21	\$0.00	\$10,270.80
17201131920704	01/01/11-03/31/11	\$5,450.42	\$108.71	\$2,997.73	\$0.00	\$8,556.86
17201131920710	04/01/11-06/30/11	\$4,816.60	\$47.51	\$2,649.13	\$0.00	\$7,513.24
17201133443985	07/01/11-09/30/11	\$5,804.27	\$8.27	\$3,192.35	\$0.00	\$9,004.89
	Total	\$31,958.22	\$776.19	\$17,577.02	\$0.00	\$50,311.42

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 unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** 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, OH 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

¹ The assessments are modified to reflect the tax due on the taxable gross receipts supplied by the petitioner. Since the petitioner has not filed returns reflecting these amounts, the figures are subject to audit and assessment of additional tax. See R.C. 5751.09(F).

Exhibit 9

OHIO BOARD OF TAX APPEALS

MASON COMPANIES, INC., (et. al.),

CASE NO(S). 2012-1169, 2012-2806

Appellant(s),

(COMMERCIAL ACTIVITY TAX)

vs.

DECISION AND ORDER

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

Appellee(s).

APPEARANCES:

For the Appellant(s) - MASON COMPANIES, INC.
Represented by:
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STEVEN L. SMISECK
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For the Appellee(s) - JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO
Represented by:
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OFFICE OF OHIO ATTORNEY GENERAL
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COLUMBUS, OH 43215-3428

Entered Monday, April 20, 2015

Mr. Williamson, Ms. Clements, and Mr. Harbarger concur.

These matters are considered by the Board of Tax Appeals upon two notices of appeal filed on behalf of appellant Mason Companies, Inc. (“Mason”). Mason appeals from two final determinations of the Tax Commissioner in which the commissioner modified multiple commercial activity tax assessments against Mason, relating to periods from July 1, 2005 through September 30, 2011. This matter is considered by the Board of Tax Appeals upon the notices of appeal, the statutory transcripts (“S.T.”) certified to this board by the Tax Commissioner, the record of this board’s hearing (“H.R.”), the joint stipulations filed by the parties, which include depositions offered in lieu of live testimony before the board, and any written argument filed by the parties. We note that the commissioner, on his post hearing brief, referenced BTA No.

2014-495 as part of the group of appeals under consideration, which is not reflective of the record; accordingly, the commissioner's reference to such case number is hereby stricken and we reiterate that the only appeals determined herein are as set forth in the case caption above.

In its brief, Mason, which is "located exclusively" in Chippewa Falls, Wisconsin, describes itself as a "family-owned mail order and Internet footwear and apparel retailer. *** From Chippewa Falls, Mason promotes its business by mailing catalogs to consumers across the United States. Consumers, if they choose to do so, can also visit Mason's retail Internet sites that reside on the company's web servers located at its Chippewa Falls offices. It is undisputed that Mason's retail business is national in scope and does not target a particular geographic area, and all of its communications with consumers and all of its product shipments originate from its facilities in Wisconsin." Mason Brief at 2. Before this board, and through deposition, Mason presented extensive testimony and evidence relating to its database/internet operations and overall marketing efforts. Mason Brief at 8; Exs. KKK, LLL, MMM.

In its notices of appeal to this board, Mason essentially specified the same errors in each, in pertinent part, as follows:

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

"4. Mason'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 Mason, inasmuch as imposing the tax on Mason would violate the Company's rights under the Commerce Clause of the United States Constitution ***. ***

"6. 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.

"7. The Commissioner's assessment of the 'failing to register penalty' is erroneous and unlawful in that Mason was not required to register for the CAT because Mason was not a 'person subject to' chapter 5751 of the Revised Code. R.C. 5751.04(B).

"8. The penalty should be abated. The Commissioner erred in arbitrarily and capriciously asserting penalties for each of the aforesaid reasons, and in light of Mason'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." Notices of Appeal, at 5-7/5-8.

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.

Mason contends 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. The Company's gross receipts, therefore, simply cannot be taxed consistent with the Constitution. *** In addition to violating the Constitution, including both the Commerce Clause and the Due Process Clause, the assessment against Mason violates the express terms of the CAT statute. The CAT statute expressly provides that it cannot be imposed on gross receipts where doing so 'is prohibited by the constitution or laws of the United States or the constitution of this state.' R.C. 5751[.01](F)(1)(jj). Accordingly, in violating the United States Constitution, the assessments here violate the express provisions of the CAT statute itself." Mason Brief at 13-14. Specifically, Mason claims its gross receipts are excluded from the CAT, pursuant to the U.S. Constitution, Commerce Clause and Due Process Clause, and the "substantial nexus" and corresponding "in-state presence" analysis encountered thereunder.

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, as followed in *Crutchfield, Inc. v. Testa* (Feb. 26, 2015), BTA Nos. 2012-926, 3068, 2013-2021, unreported, appeal pending Sup. Ct. No. 2015-0386 and *Newegg, Inc. v. Testa* (Feb. 26, 2015), BTA No. 2012-234, unreported, appeal pending Sup. Ct. No. 2015-0483, to be controlling and dispositive of Mason's specifications of error. 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. The 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, Mason was assessed commercial activity tax for the periods in question. R.C. 5751.02(A). The commissioner determined that Mason 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). Mason, as *L.L. Bean* and others before it, argues that under the Commerce Clause of the U.S. Constitution, "a state lacks the power to impose a use tax collection obligation on a company located outside the state that has no 'physical presence' in the taxing state and communicates with its customers in the state solely via the instrumentalities of interstate commerce ***." Mason Brief at 16. It cites to several cases in support, including *Natl. Bellas Hess, Inc. v. Dept. of Revenue of Illinois* (1967), 386 U.S. 753, *Quill Corp. v. North Dakota* (1992), 504 U.S. 298 (1992) and *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987), contending "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." Mason Brief at 17. Even without considering the constitutional aspects of Mason's position, 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.

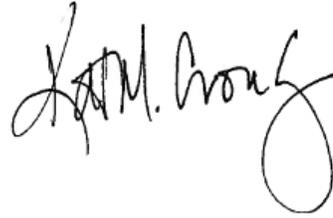
As we stated in *L.L. Bean*, supra, "[a] plain reading of the statutes under consideration provides that an entity has substantial nexus with this state if it has a bright-line presence in this state, which is defined as having taxable gross receipts of at least five hundred thousand dollars ***. While 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 and its progeny, it is the decision of the Board of Tax Appeals that the final determinations of the Tax Commissioner must

be, and hereby are, affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Ms. Clements		
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