Supreme Court of Ohio Clerk of Court - Filed December 08, 2015 - Case No. 2015-0794

In the Supreme Court of Ohio

MASON COMPANIES, INC.,	:	
	:	Case No. 15-0794
Appellant,	:	
v.	:	Appeal from Ohio Board of Tax Appeals
JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO	:	BTA Case Nos. 2012-1169, 2012-2806
Appellee/Cross-Appellant.	:	

CROSS-APPELLANT TAX COMMISSIONER'S REPLY BRIEF

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INTRODUCTION

Mason never raised a constitutional challenge in its Notice of Appeal to the BTA to the statutes that require Mason to register and pay CAT because it has "substantial nexus" in Ohio, R.C. 5751.01(H)(3) and (I)(3).

Under 5717.02, as applied in well-settled precedent of this Court, Mason's failure to raise a constitutional challenge in a BTA Notice of Appeal means that the issue was never jurisdictionally before the BTA or this Court. R.C. 5717.02; R.C. 5717.04; *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 231 (1988); *South-Western City Sch. v. Kinney*, 24 Ohio St.3d 184, 185-187 (1986).

What Mason *actually* raised was an issue of statutory interpretation. Before the BTA, Mason asserted that a *different* statute R.C. 5751.01(F)(2)(kk)[1], must be interpreted in a certain way to avoid the unconstitutional application of R.C. 5751.01(H)(3) and (I)(3). *See*, Supp. D1 and D-2, Mason's BTA Notices of Appeal, Assignments of Error ¶ 4-6. This is a classic example of the principle of statutory construction that is referred to as the "avoidance doctrine." *See*, *Chambers v. Owens–Ames–Kimball Co.*, 146 Ohio St. 559, 566 (1946).

Mason did *not* set forth any constitutional challenge to R.C. 5751.01(H)(3) or (I)(3). Instead, its references to these statutes in its Notice of Appeal existed only to describe the constitutional implications on those statutes, if the BTA did not adopt Mason's "avoidance" interpretation of R.C. 5751.01(F)(2)(kk). Still, Mason tries to cobble together a constitutional challenge from the scattered references to R.C. 5751.01(H)(3) and (I)(3) in its Notice of Appeal.

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[1] This statute was numbered R.C. 5751.01(F)(2)(aa) when Mason filed its BTA appeal, was renumbered as R.C. 5751.01(F)(2)(jj) during the pendency of this appeal, and, in September 29, 2015, was renumbered again to R.C. 5751.01(F)(2)(kk).

But this Court has repeatedly explained that constitutional challenges must be set forth "in full and explicit terms." *Lovell v. Levin*, 2007-Ohio-6054, ¶ 35 (quoting *Queen City Valves v. Peck*, 161 Ohio St. 579, 583 (1954) (quoting Black's Law Dictionary (4th Ed. 1951)). Mason's failure to specifically address the constitutionality R.C. 5751.01(H)(3) and (I)(3) resulted in a failure to meet the jurisdictional requirements of R.C. 5717.02. *See, Castle Aviation, Inc. v. Wilkins*, 2006-Ohio-2420, ¶ 39; *Brown v. Levin*, 2008-Ohio-4081, ¶ 17.

In a last-ditch effort to resurrect some aspect of its constitutional challenge, Mason attempts to raise a so-called "facial challenge" pursuant to this Court's holding in *Cleveland Gear*, 35 Ohio St.3d 229. In *Cleveland Gear*, this Court recognized an "exception" to the Court's revisory jurisdiction over BTA appeals. In that case, the Court allowed certain "facial challenges" to be raised for the first time in the Supreme Court when the challenges require no "extrinsic" facts to resolve. *Cleveland Gear Co.*, 35 Ohio St.3d at 231. This Court subsequently explained that in such "facial" claims, the challenger must set forth that the statutes "'always operate [ ] unconstitutionally.'" *Lovell*, 2007-Ohio-6054 at ¶ 36 (quoting Black's Law Dictionary (8th Ed. 2004) 244 (defining "facial challenge")(brackets in original).

Under Mason's own terms, it cannot meet the *Cleveland Gear* exception, because under Mason's own imaginary "standard of review" for facial challenges, the Court should not evaluate the statute to see whether it will "always operate unconstitutionally." Instead, Mason's hypothetical standard of review for facial challenges expressly requires this Court to exclude those against whom the statute would operate constitutionally, and only consider the statute against those for whom it might pose constitutional problems. See Mason Merit Brief at 24. But Mason's "standard" is not supported by the case it cites in support. See Sec. 3, below.

More fundamentally, Mason's "facial challenge standard" is nothing more than a re-constituted as-applied challenge. Of course, such challenges require extrinsic facts to resolve—they must—in order for the Court to find a "class" or "group" of persons against whom the statute would potentially operate unconstitutionally. Moreover, Mason asks this Court to ignore the well-settled principle that it is the burden of the challenger to demonstrate that a law operates unconstitutionally in all possible circumstances. *See, United States v. Salerno*, 481 U.S. 739, 745 (1987). ("the challenger must establish that no set of circumstances exists under which the Act would be valid."); *Wymsylo v. Bartec, Inc.*, 2012-Ohio-2187, ¶ 21 (same); *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, ¶ 26 (same). But, that very standard is *required* by *Lovell* in order of a claim to qualify for consideration under the *Cleveland Gear* exception. *Lovell*, 2007-Ohio-6054 at ¶ 36.

Mason and its amicus also raise brand-new issues and constitutional claims in their respective reply briefs, to which the Tax Commissioner is unable to respond. This Court forbids parties from raising new issues in their reply briefs. *Am. Fiber Sys., Inc. v. Levin*, 2010-Ohio-1468, ¶ 21; *State ex rel. Colvin v. Brunner*, 2008-Ohio-5041, ¶ 61. Because these new claims were never raised previously at any time in the history of these appeals, this Court should not consider them. *Id.*

For those reasons, as explained in greater detail below, this Court lacks jurisdiction over Mason's constitutional claims, and should dismiss them. Further, this Court should address the issue only issue actually raised by Mason in this appeal—Mason's statutory interpretation of R.C. 5751.01(F)(2)(kk), and affirm that the BTA and Tax Commissioner correctly applied the plain language of that statute in this case.

LAW AND ARGUMENT

Tax Commissioner's Proposition of Law No. 2:

> *As-applied constitutional challenges must be raised before the Board of Tax Appeals in order for this Court to obtain jurisdiction over those issues. When, as here, an appellant fails to raise a constitutional challenge to the Board of Tax Appeals, this Court lacks jurisdiction to review such clams under R.C. 5717.04.*

As explained in the Tax Commissioner's Notice of Cross Appeal, Motion to Dismiss, and Merit brief, Mason never raised its constitutional challenges before the BTA in its Notices of Appeal. Accordingly, the BTA lacked jurisdiction over the purported as-applied challenge, as does this Court. R.C. 5717.02; R.C. 5717.04; *Cleveland Gear*, 35 Ohio St.3d at 231; *South-Western City Sch.*, 24 Ohio St.3d at 185-187.

1. Mason's constitutional challenges were never raised below.

Mason's appeal to this Court is an attempt to tailor wolf's clothing to dress the sheep in its BTA Notice of Appeal. Mason did not raise a constitutional challenge to the nexus provisions of the CAT, or to the statute imposing the CAT, in its BTA Notice of Appeal, but instead cloaked a statutory interpretation assignment of error in the terms of "constitutional avoidance." Before the BTA, Mason only asserted that a particular statute, R.C. 5751.01(F)(2)(kk), must be interpreted in a certain way to *avoid* the unconstitutional application of R.C. 5751.01(H)(3) and (I)(3).

R.C. 5751.01(F)(2)(kk) excludes, from the definition of taxable gross receipts, "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."[2]

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[2] In his merit brief, the Tax Commissioner has already refuted Mason's erroneous interpretation of this statute, and will not engage in an extended discussion herein. *See,* Tax Commissioner's Merit Brief At Proposition of Law No. 1. Suffice it to say, Mason's proposed reading of R.C. 5751.01(F)(2)(kk) would place the statute squarely at odds with other CAT statutes, including

In its BTA appeal, Mason merely sought a "limiting" construction of R.C. 5751.01(F)(2)(kk) that would incorporate the Supreme Court's dormant Commerce Clause jurisprudence into the statute's definition of "excluded" gross receipts—an application of the "avoidance doctrine." See, *Chambers*, 146 Ohio St. at 566.[3]

In Mason's view, R.C. 5751.01(F)(2)(kk) includes a consideration whether a taxpayer may be taxed consistent with the US Constitution, and in particular, the dormant Commerce Clause. Mason admitted that its appeal was based merely on statutory construction in its BTA Notice of Appeal, wherein Mason explains its issues on appeal thusly:

> 4. Mason's receipts are not subject to taxation because, under R.C. 5751.01(F)(2)([kk]), such tax is "prohibited by the Constitution or laws of the United States ..."
>
> 5. Ohio statutes *should be **interpreted** to avoid* the imposition of 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 the 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 statute be preserved.
>
> 6. Application of the CAT to Mason ***would*** violate the Company's rights under the Commerce Clause * * *"

Supp. D-1 and D-2, Mason's BTA Notice of Appeal, Assignments of Error 4-6, at pages 5-6, respectively (emphasis added). There are no separate assignments of errors alleging that any

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R.C. 5751.02, which provides that the CAT may be levied against a taxpayer whether or not they have "substantial nexus" with the state. It would also supplant, and therefore render meaningless, Ohio's own definition of "substantial nexus" under R.C. 5751.01(H)(3) and R.C. 5751.01(I)(3). Most fundamentally, Mason's reading is at odds with the plain language of the exclusion, which governs the exclusion of receipts in the taxable base, and does not pertain to the taxability of persons at all.

[3] As the Tax Commissioner explained in his Merit Brief, an "avoidance" argument cannot be applied to a statute that is unambiguous and clear on its face, like R.C. 5751.01(F)(2)(kk). *Chambers*, 146 Ohio St. at 566. In that case, this Court has a duty to simply apply the statute's plain terms. *Id.*

Ohio statute is unconstitutional, as applied or facially. Mason's appeal only alleges that the BTA must interpret R.C. 5751.01(F)(2)(kk) in a way that would *avoid* constitutional infirmities.

As Mason's Notice of Appeal makes clear, under its argument, R.C.5751.01(H)(3) and (I)(3) are implicated only *as a consequence if the BTA did not adopt Mason's "avoidance" interpretation of R.C. 5751.01(F)(2)(kk).* This is a classical "avoidance" argument—if a limiting reading was not placed on R.C. 5751.01(F)(2)(kk) then, under Mason's view, other statutes would face potential constitutional infirmities. *See, Chambers*, 146 Ohio St. at 566.

The lack of a head-on constitutional challenge was no accident—it was Mason's litigation strategy. Mason originally sought to avoid the rocks and shoals of a true constitutional challenge—with its attendant presumptions and heavy burdens—by couching its appeal as a matter of statutory interpretation

This litigation strategy is confirmed by the history of this appeal. Mason's Assignments of Error to the BTA in this appeal are cookie-cutter copies of the exact same claims made by other out-of-state businesses, represented by the same counsel as Mason, in BTA appeals from their own respective CAT assessments. See Supp. A and compare to Supp. B 1-3, Supp. C, and Supp. D 1-2 (substantially identical BTA Notices of Appeal filed by the same law firm on behalf of L.L. Bean, Inc, Crutchfield, Inc., Newegg, Inc., and Mason Companies, Inc., respectively).

The first appeal by one of these out-of-state retailers to go to hearing was the appeal of *L.L. Bean, Inc. v. Levin*, Case No.2014-0456, which was settled in mediation before this Court. See, Supp. A, E, and F. The Notice of Appeal to the BTA in Bean's case read virtually identically to those filed by Mason, differing only to conform to the particular facts of Bean's assessment—the legal arguments were identical. See Supp. A and compare to Supp. B 1-3, Supp. C, and Supp. D 1-2 (substantially identical BTA Notices of Appeal filed by the same law

firm on behalf of L.L. Bean, Inc, Crutchfield, Inc., Newegg, Inc., and Mason Companies, Inc., respectively)[4].

Tellingly, in its Pre-hearing Statement filed with the BTA, L.L. Bean *expressly disavowed* having raised any constitutional challenge to any CAT provision in its BTA Notice of Appeal. See Supp. E, L.L. Bean's Pre-hearing Statement at 1. In no uncertain terms, Bean gratuitously announced that **"[t]his case does not involve a challenge to the constitutionality of an Ohio statute**." *Id.* (Emphasis added). Instead, Bean raised the identical "avoidance" interpretation argument regarding R.C. 5751.01(F)(2)(kk) that is now asserted by Mason in this appeal. *Id.* Thus, Bean's assignments of legal issues in its Notice of Appeal, which are identical to those filed by Mason, did not include an as-applied dormant Commerce Clause challenge to the constitutionality of the CAT "bright-line nexus" provisions, or to the constitutionality of any other CAT provision *by Bean's own admission.*

And, in this case, the BTA recognized that Mason had not raised an as-applied constitutional challenge, but merely tried to incorporate the federal Commerce Clause jurisprudence as an issue of statutory construction. The BTA had no difficulty recognizing that Mason raised only an "avoidance" argument of statutory construction: "Specifically, Mason claims its gross receipts are *excluded* from the CAT, pursuant to the U.S. Constitution, Commerce Clause, and the 'substantial nexus' and corresponding 'in-state presence analysis encountered thereunder." *BTA Decision and Order* at unnumbered page 3 (citing See R.C. 5751.01(F)(2)(kk).

The BTA did recognize a limit to its own jurisdiction, that "[a]ny constitutional implications of the relevant statutory authority must be considered by a tribunal that has

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[4] Interestingly, these parties continued their "one size fits all" approach in their appeals to this Court—the Notices of Appeal of L.L. Bean, Crutchfield, Newegg, and Mason are all identical.

jurisdiction over such questions of constitutional interpretation." *Id.* at unnumbered page 3. However, in light of the BTA's understanding that the statutory interpretation advanced by Mason was an incorrect reading of the statutes, this statement merely referred to the determination of any constitutional consequences of Mason's "avoidance" argument.

Realizing the futility of its "avoidance" argument, Mason belatedly claims that it raised a constitutional challenge in its Notice of Appeal. But its BTA Notices of Appeal do not contain an as-applied challenge to the constitutionality of Ohio's CAT statutes. As explained above, Mason's BTA Assignments of Error actually confirm that it was Mason's litigation strategy to *not* raise a constitutional challenge, but to instead merely seek a limiting construction of R.C. 5751.01(F)(2)(kk).

Indeed, Mason cannot point to a single statement in its Notice of Appeal to the BTA wherein it alleges that an Ohio statute was unconstitutionally applied. Instead, it contorts its own argument that *if* R.C. 5751.01(F)(2)(kk) *were not* construed to incorporate Mason's interpretation of the dormant Commerce Clause, then R.C. 5751.01(H)(3) and (I)(3) *would* be unconstitutionally applied. Assignment of Error 5 in its BTA Notices of Appeal. But that paragraph cannot bear the strain of Mason's reading.

More telling is a reading of Mason's Notices of Appeal for what they *don't* contain—a head-on constitutional challenge. Such a challenge would be fairly easy to make—all it would have taken would have been a simple sentence like "application of R.C. 5751.01(H)(3) and (I)(3) to Mason violates the Commerce Clause of the US Constitution." Indeed, Mason's Notice of Appeal to this Court is a model for how easy it is to raise an as-applied challenge:

> 4. The Board's Decision affirming the final determination should be reversed, and the assessments cancelled, because the CAT statute is unconstitutional as applied to Mason. In particular, if interpreted to require the

> imposition of the CAT against Mason, R.C. 5751.01(H)(3), (1)(3), (1)(4) & (F)(2)([kk]), and R.C. 5751.02, or any of them, are unconstitutional as applied.

Notice of Appeal at 9.

Yet in the nine pages of its BTA Notices of Appeal, no single sentence sets forth an as-applied challenge. By framing its arguments as a question of statutory interpretation, Mason may have hoped to avoid the consequences of raising a true constitutional challenge, such as the presumption of constitutionality and the heavy burden on challengers. Mason may also have hoped for a "statutory interpretation" decision that the BTA *could* provide, inasmuch as that tribunal lacks the authority to declare statutes unconstitutional. But whatever the impetus for the strategy was, Mason must bear the consequences of choosing such a litigation approach, which includes forgoing the right to raise an as-applied challenge on appeal to this Court. R.C. 5717.02; R.C. 5717.04; *South-Western City Sch.*, 24 Ohio St.3d at 185-187.

2. When a constitutional challenge is not raised before the BTA in a taxpayer's Notice of Appeal, the BTA and this Court lack jurisdiction to consider it.

The absence of any constitutional challenge in Mason's Notices of Appeal to the BTA means that this Court has no jurisdiction over such challenges. In a long and unbroken line of decisions, this Court has held that a party must raise as-applied constitutional challenges in its Notice of Appeal to the BTA in order to jurisdictionally preserve them for this Court's review. See, *Cleveland Gear*, 35 Ohio St.3d at 229, syllabus at 2; see also, *South-Western City Sch.*, 24 Ohio St.3d at 185-187, citing *Sun Finance & Loan Co. v. Kosydar* (1976), 45 Ohio St.2d 283, 284, fn. 1. Otherwise, it would be "impossible to develop the factual record necessary for the resolution of the case." *South-Western City Sch.*, 24 Ohio St.3d at 186, citing *Petrocon v. Kosydar*, 38 Ohio St.2d 264 (1974).

A failure to properly raise such a constitutional challenge before the BTA in a taxpayer's Notice of Appeal fails to vest jurisdiction in the BTA to consider that issue. R.C. 5717.02; *South-Western City Sch.*, 24 Ohio St.3d at 186. Likewise, when the Tax Commissioner's Final Determination does not resolve a particular error (because it was not raised by the taxpayer), then there is no basis for appeal regarding that error. *CNG Dev. Co. v. Limbach*, 63 Ohio St.3d 28, 32 (1992). Accordingly, this Court lacks jurisdiction over those challenges now, and must dismiss them. R.C. 5717.02; R.C. 5717.04; *Cleveland Gear*, 35 Ohio St.3d at 231; *South-Western City Sch.*, 24 Ohio St.3d at 185-187.

As explained above, Mason's Notices of Appeal to the BTA contained no challenges to the constitutionality of any CAT statutes. R.C. 5717.02; *Cleveland Gear*, 35 Ohio St.3d at 229; *South-Western City Sch.*, 24 Ohio St.3d at 185-187. By failing to raise the as-applied challenge before the Commissioner and at the BTA, Mason cannot raise it now.

Mason's attempts to summon a constitutional challenge from scattered portions of its Notice of Appeal cannot salvage that failure. The language peppered throughout Mason's Notice of Appeal, and related to Mason's "avoidance" argument, cannot be cobbled together as a constitutional challenge—because the statements lack "specificity." By statute and precedent, a taxpayer must "specify"—i.e., set forth in specific terms—the error in the Tax Commissioner's Final Determination to be resolved. R.C. 5717.02; R.C. 5717.04; *Norandex, Inc. v. Limbach*, 69 Ohio St.3d 26, 31,(1994) fn.1; *Richter Transfer Co. v. Bowers*, 174 Ohio St. 113, 114 (1962).

"R.C. 5717.02 requires the appellant to 'specify' any alleged errors, and 'specify' means "'to mention specifically; to state in full and explicit terms; to point out; to tell or state precisely or in detail; to particularize; or to distinguish by words one thing from another'")." *Lovell*, 2007-

Ohio-6054 at ¶ 35 (quoting *Queen City Valves*, 161 Ohio St. at 583 (quoting Black's Law Dictionary (4th Ed. 1951)).

To be sure, Mason prefaces its BTA Notices of Appeal with a discussion of dormant Commerce Clause jurisprudence. But the sections of Mason's BTA Notices of Appeal in which these arguments appear do not specify any error with the Tax Commissioner's Final Determination. Instead, they are in the Section of the Notice of Appeal entitled "Background," not the section entitled "Assignments of Error." See, Ex. D_1 and D-2 at pages 2-4 and compare with pages 5-8. Mason's discussion of this precedent is moored only to its "avoidance" statutory construction argument in paragraphs 4-6 of its BTA Notice of Appeal, and does not constitute a free-standing constitutional challenge. Mason provided this jurisprudence merely to inform its asserted interpretation of the phrase "prohibited by the Constitution or laws of the United States" in R.C. 5751.01(F)(2)(kk).

Mason did not specify that any statute was unconstitutional, facially or as applied. This failure to specify which, if any, statutory provision is unconstitutional fails to meet the jurisdictional requirements of R.C. 5717.02. *See*, *Castle Aviation*, 2006-Ohio-2420 at ¶ 39; *Brown*, 2008-Ohio-4081 at ¶ 17 (although the notice of appeal may create "jurisdiction over one or more issues that have been sufficiently specified," the BTA "lacks jurisdiction to grant relief from a final determination based on other alleged errors that were not sufficiently specified in the notice of appeal").

Because Mason failed to specify any challenge to the constitutionality of any CAT statutes in its Notices of Appeal to the BTA, this Court lacks jurisdiction over those challenges now, and must dismiss them. R.C. 5717.02; R.C. 5717.04; *Cleveland Gear*, 35 Ohio St.3d at 229; *South-Western City Sch.*, 24 Ohio St.3d at 185-187.

3. This Court does not have inherent jurisdiction over administrative appeals from the BTA, but only such jurisdiction as provided by the General Assembly. Under R.C. 5717.04, this Court has only "revisory" jurisdiction over BTA decisions, and cannot consider new issues.

This Court's holdings unequivocally establish that this Court does not have any "inherent" jurisdiction over appeals from administrative agencies like the BTA. As this Court explained "Our authority to review decisions issued by the BTA emanates from Section 2(B)(2)(d), Article IV of the Ohio Constitution, which states that this court's appellate jurisdiction encompasses '[s]uch revisory jurisdiction of the proceedings of administrative officers or agencies *as may be conferred by law.*' [Emphasis sic]. The General Assembly conferred such appellate power on this court through R.C. 5717.04, and that statute strictly defines our authority to correct alleged errors committed by the BTA." *Polaris Amphitheater Concerts, Inc. v. Delaware Cty. Bd. of Revision,* 2008-Ohio-2454, ¶ 13. *See, also, Wheeling Steel Corp. v. Evatt*, 143 Ohio St. 71, 77 (1944); *PPG Indus., Inc. v. Kosydar*, 65 Ohio St.2d 80, 81 (1981)(same); *Monsanto Co. v. Lindley*, 56 Ohio St.2d 59, 61 (1978); *Aluminum Co. of Am. v. Kosydar*, 54 Ohio St.2d 477, 479 (1978).

Instead, as this Court has explained, its jurisdiction over such appeals is limited to the review authority that has been statutorily provided by the General Assembly. *Id.* In this case, the Court's review authority stems from R.C. 5717.04. Under that statute, "[t]he revisory jurisdiction of this court is limited to determining whether the decision of the Board of Tax Appeals is reasonable and lawful or unreasonable or unlawful." *Wheeling Steel Corp. v. Evatt*, 143 Ohio St. 71, 77 (1944).

As explained above, this standard is fatal to Mason's as-applied challenges. Because this Court has only revisory jurisdiction, limited to issues raised and considered by the BTA, the as-applied challenges cannot be raised for the first time now.

The same analysis applies to Mason's facial challenges. Because this Court has only revisory jurisdiction over the correctness of the BTA's decisions, it cannot consider Mason's facial challenges for the first time on appeal.

To save its facial challenges, Mason relies on the *Cleveland Gear* exception for certain facial challenges. In *Cleveland Gear*, this Court allowed certain facial challenges to be raised for the first time in this Court, because those challenges required no "extrinsic facts" for resolution. *Cleveland Gear*, 35 Ohio St.3d at 231 ("since extrinsic facts are not needed to determine that a statute is unconstitutional on its face, the question of whether a tax statute is unconstitutional on its face may be raised initially in the Supreme Court").

The *Cleveland Gear* exception applies only in facial challenges wherein a determination of the facial constitutionality of a given statute can be derived *from the text of the statute alone*. *Global Knowledge Training, L.L.C. v. Levin*, 2010-Ohio-4411, ¶ 18 ("for purposes of the *Cleveland Gear* exception, only the text of the statute itself may be considered when evaluating a "facial" challenge."). As this Court has explained:

> In *Cleveland Gear*, we required that a challenge to the constitutionality of a statute based on a particular state of facts be raised in the notice of appeal to the BTA, so that the BTA could receive evidence concerning that question. Moreover, this allowed the opponent notice and opportunity to offer competing evidence. All this would accommodate the court's need for extrinsic evidence to decide the case. We also held that a challenge to the constitutionality of a statute on its face could be raised initially in the courts.

ComTech Sys., Inc. v. Limbach, 59 Ohio St.3d 96, 101 (1991). The crucial question for this Court was whether the challenge "require[s] extrinsic evidence." *Id.*

In *Global Knowledge*, this Court held that an appellant's free speech and equal protection claims could *not* be considered for the first time by this Court as "facial challenges," even though the appellant assigned them as such, because they required extrinsic facts for resolution. *Global*

Knowledge, 2010-Ohio-4411 at ¶ 18. The Court explained that the statute at issue was facially neutral, and that what the taxpayer actually had challenged was the Tax Commissioner's application of the statute and administrative rules regarding it. *Id.* For this Court, that was a step too far, that took the challenges outside of the *Cleveland Gear* exception. *Id.*

Accordingly, this Court held that those challenges were not "facial challenges * * * as contemplated by *Cleveland Gear*" and this Court " lack[ed] jurisdiction to consider them because they were never presented to the BTA." *Global Knowledge*, 2010-Ohio-4411 at ¶ 20.

Similarly, in *Lovell*, this Court faced a so-called challenge not to statutes, but to assessments issued by the Tax Commissioner. *Lovell*, 2007-Ohio-6054 at ¶ 36. This Court held that such challenges did not meet the C*leveland Gear* exception because "those assessments reflect the Tax Commissioner's application of state tax laws to their particular circumstances. The appellants are not claiming that the state or federal tax statutes * * * 'always operate [ ] unconstitutionally.'" *Lovell*, 2007-Ohio-6054 at ¶ 36 (quoting Black's Law Dictionary (8th Ed.2004) 244 (defining "facial challenge").

Tellingly, this Court in *Lovell* explained that, in order to constitute a facial challenge, so as to avail itself of the *Cleveland Gear* exception, the challenger must set forth that the statutes "always operate [ ] unconstitutionally." *Id.*; *see*, *also*, *Salerno*, 481 U.S. at 745. ("the challenger must establish that no set of circumstances exists under which the Act would be valid."); *Wymsylo*, 2012-Ohio-2187 at ¶ 21 (same); *Arbino*, 2007-Ohio-6948 at¶ 26 (same). When a challenger's claim seeks to examine *application* of the statute to a given taxpayer, it cannot be considered "facial" for purposes of the *Cleveland Gear* exception. *Lovell*, 2007-Ohio-6054 at ¶ 35-36.

Mason's so-called "facial" challenge fails to meet the *Cleveland Gear* exception. Mason's "facial" challenge depends on *more than* the text of the statute alone; it depends on extrinsic facts. Indeed, under Mason's view, the Court must consider the effect of the statute on *the class of persons challenging the statute.*[5] This is a "classic" as-applied challenge.

According to Mason, the proper focus for this Court's consideration would be to consider the effect of the statute on persons against whom the statute might operate unconstitutionally, disregarding all of the possible constitutional applications of the statute. Mason Merit Brief at 24. This challenge fails the *Lovell* holding that a challenger must allege that a statute "'always operates unconstitutionally.'" *Lovell*, 2007-Ohio-6054 at ¶ 36. The real problem with this wholly imaginary standard of review is that Mason is advocating that the Court look at extrinsic facts to resolve its case.

Of course, such an undertaking would naturally require an understanding of the given facts of Mason's situation. In order to operate under Mason's "facial" review, this Court would first have to determine that there is a class of persons to whom the law *applies unconstitutionally*. In the context of a gross receipts tax, with a threshold of $500,000, and uniform application to all businesses, such an undertaking would naturally involve extrinsic facts, and would *not* demonstrate that the statute always operates unconstitutionally, as required by *Lovell*. Because, as Mason cannot deny, there are many potential constitutional applications of R.C. 5751.01(H)(3) and (I)(3).[6]

Moreover, Mason materially misrepresents *City of Los Angeles*, the sole case upon which it has founded its novel "facial" standard. *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443,

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[5] The Tax Commissioner disagrees with Mason's purported standard for facial challenges, as explained in his Merit Brief. The point is used here merely in an illustrative manner.
[6] See Tax Commissioner's Merit Brief at 29.

2451 (2015). The *City of Los Angeles* case does not create a new standard for facial challenges. Indeed, the case strongly supports the Tax Commissioner's position—it quotes *Salerno* for the proposition that "to obtain facial relief the party seeking it 'must establish that no set of circumstances exists under which the [statute] would be valid'." *City of Los Angeles*, 135 S. Ct. at 2450 (quoting *Salerno*, 481 U.S. at 745).

Nor does *City of Los Angeles* stand for the proposition for which Mason advances it—that a court must only evaluate a statute against those for whom it operates unconstitutionally. Instead, that case stands for the proposition that an unconstitutional statute cannot be *defended* from facial challenge *on the grounds that there are people who would voluntarily comply with it. Id.* In other words, it would not save a facially unconstitutional statute to point out that there are people for whom the statute was "irrelevant" because they would voluntarily comply. *Id.*

The case relied upon by *City of Los Angeles* for its holding in this regard provides examples of "irrelevance," demonstrating that what the Court meant was that it is no defense to argue that some people would voluntarily comply with an unconstitutional law. As explained by the Court:

> a provision of Pennsylvania's abortion law [] required a woman to notify her husband before obtaining an abortion. Those defending the statute argued that facial relief was inappropriate because most women voluntarily notify their husbands about a planned abortion and for them the law would not impose an undue burden. The Court rejected this argument, explaining: The "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.... The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."

Id. At 2451 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). Tellingly, Mason cut out this example from its block quote to the *City of Los Angeles* decision. See, Appellant's Reply Brief at 9.

And the *Planned Parenthood* decision provided another example of "irrelevance": "we would not say that a law which requires a newspaper to print a candidate's reply to an unfavorable editorial is valid on its face because most newspapers would adopt the policy even absent the law." *Planned Parenthood*, 505 U.S. at 894. Thus, Mason's proposed "facial" challenge standard is completely inapposite. Perhaps, if Mason had raised a proper facial challenge (it didn't) and the Tax Commissioner defended on the basis that most taxpayers voluntarily comply with the CAT (he didn't, although most do), then these cases would have been apposite. But they do not transform Mason's as-applied challenge into a facial challenge.

In short, Mason's "facial" challenge is just an as-applied challenge in disguise. But even if this Court did recognize it as a "facial" challenge, it would still not meet the *Cleveland Gear* exception and is jurisdictionally improper. *Cleveland Gear*, 35 Ohio St.3d at 231.

4. The Tax Commissioner did not, and could not, consent to the jurisdiction of the BTA or this Court over Mason's constitutional claims. Every tribunal has the duty to inquire into its own jurisdiction and jurisdictional defects may be raised at any time in the proceedings, including appeal.

In its reply to this Court, Mason does not meaningfully dispute the material arguments advanced by the Tax Commissioner for dismissal. Instead, Mason attempts to play gotcha" by pointing out all of the times when the Tax Commissioner's counsel filed something at the BTA stating that the case involved a constitutional challenge.

In reality, the Tax Commissioner has always argued that Mason had not properly raised a constitutional challenge. See, Tax Commissioner's BTA Merit Brief at 4, 21-23. Still, because the matter was before the BTA, the Tax Commissioner had to "cover his bases" and address all possible claims, even those that were not properly asserted. But even if the Tax Commissioner had "admitted" that a constitutional challenge existed at the BTA, it wouldn't matter.

Failure to raise a challenge in a BTA Notice of Appeal results in a lack of subject matter jurisdiction at the BTA as explained exhaustively above. *Queen City Valves*, 161 Ohio St. at 583. And, as a result, this Court lacks subject matter jurisdiction too. See, *Colonial Village Ltd. v. Washington Cty. Bd. of Revision*, 2007-Ohio-4641, ¶ 2.

This Court has repeatedly explained that subject matter jurisdiction can be raised at any time. *Buckeye Foods v. Cuyahoga County Bd. of Revision*, 78 Ohio St.3d 459, 460 (1997) (citing *New Boston Coke Corp. v. Tyler*, 32 Ohio St.3d 216, 218 (1987); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 197 (1956)); *H.R. Options, Inc. v. Zaino*, 2004-Ohio-1, ¶ 8 (court considered jurisdictional issue raised by appellant for the first time in his brief to the court). Indeed, a tribunal has an independent duty to inquire into its own jurisdiction. *State v. Noling*, 2013-Ohio-1764, ¶ 10. Nor can subject matter jurisdiction be waived. *Id.*; *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 75 (1998).

Thus, Mason's "gotcha" is little more than a distraction, an attempt to paint the Tax Commissioner in a bad light, and should be disregarded by this Court.

5. Mason and its Amicus have raised new issues in their Reply Briefs that this Court should not consider.

This Court forbids parties from raising new issues in their reply briefs. *Am. Fiber Sys.*, 2010-Ohio-1468 at ¶ 21; *State ex rel. Colvin*, 2008-Ohio-5041 at ¶ 61. When a party sets forth new issues and arguments in its brief, this Court will disregard them. *Id.*

Mason and its amicus have set forth several new arguments in their briefs, including:

- A challenge to the "fairly related" prong of *Complete Auto* was raised by Mason's amicus, COST. See, Reply Brief of Amicus at 15-17 ("The fourth prong of the Complete Auto test (i.e., a tax must be fairly related to the services provided by the state) informs the decision in this case.") This prong of the *Complete Auto* test was not raised at any time in these proceeding previously, as Mason admits in its Merit Brief at 16, fn. 6 ("as a constitutional matter, the degree to which an out-of-state company's tax obligations correspond to government services is the subject of a

different part of the *Complete Auto* test, i.e., the "fair relation" test under *Complete Auto's* fourth-prong. * * * Appellant asserts that the CAT gross receipts provision violates a different prong of *Complete Auto*, substantial nexus.")

- Although not designated as such, Mason asserts an Equal Protection "rational basis" challenge in relation to application of the CAT's $500,000 threshold to different types of business entities. See Third Brief of Mason at 15-16 and fn. 9 ("Moreover, the $500,000 level of gross receipts that the Commissioner claims has been deemed a 'proxy' or 'measuring stick' for assumed in-state activities reflects nothing more than a subjective legislative decision with no indication as to how it was chosen." And, "[a] foreign boat builder that makes a single sale of over $500,000 to an Ohio customer is subject to the CAT in the same manner as an in-state landlord of multiple properties bringing in rents of over $500,000, or a mail order retailer of bumper stickers that makes 25,000 deliveries to customers making purchases of $20 each.") This issue was never raised previously by any party. Had it been properly raised in this appeal, the Tax Commissioner would have been able to introduce the factual evidence and legal argument to rebut it.

- Although not designated as such, Mason asserts a Supremacy Clause "federal preemption" challenge in relation to Ohio's power to define "substantial nexus." See Merit Brief of Mason at 29-30 ("In an area where Congress is actively considering legislation, judicial action to expand state authority to impose tax obligations on interstate commerce would be particularly inappropriate.") This issue was never raised previously by any party. Had it been properly raised in this appeal, the Tax Commissioner would have been able to introduce the factual evidence and legal argument to rebut it.

The Tax Commissioner respectfully requests that this Court forbid Mason and its amicus from raising these issues in this appeal. As Mason admits, its purported challenge is only to the "substantial nexus" prong of the *Complete Auto* test. See Mason Third Brief at 16, fn. 9. It is unfair to the Tax Commissioner for Mason and its amicus to bring new issues at this point in the litigation, for which the Tax Commissioner has no ability to reply.

CONCLUSION

For all the foregoing reasons, the final determination of the Tax Commissioner upholding the assessments of CAT issued to Mason, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Tax Commissioner's Reply Brief was served upon the following by U.S. regular mail on this 8 day of December, 2015:

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