

OHIO BOARD OF TAX APPEALS

CRUTCHFIELD, INC., (et. al.),

CASE NO(S). 2012-926, 2012-3068, 2013-2021

Appellant(s),

(COMMERCIAL ACTIVITY TAX)

vs.

DECISION AND ORDER

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

Appellee(s).

APPEARANCES:

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Entered Thursday, February 26, 2015

Mr. Williamson and Mr. Harbarger concur.

This matter is considered by the Board of Tax Appeals upon three notices of appeal filed on behalf of appellant Crutchfield, Inc. (“Crutchfield”). Crutchfield appeals from three final determinations of the Tax Commissioner in which the commissioner affirmed multiple commercial activity tax assessments against Crutchfield, relating to periods from July 1, 2005 through June 30, 2012. 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.”), and any written argument filed by the parties. We note that Crutchfield exhibits 9 and 11 and Commissioner exhibits 38, 39, 50, and 51 are received into evidence.

In its brief, Crutchfield, which is headquartered in Charlottesville, Virginia, describes itself as a

"direct marketer of consumer electronics, selling products to consumers across the United States, including consumers residing in the State of Ohio. *** With the exception of its retail stores located exclusively in the State of Virginia, Crutchfield sells its products online and by catalog. *** Its online sales are conducted via an Internet website, *** located on the Company's servers in Virginia. *** The company has a warehouse and distribution center located in Virginia; it has no fixed assets located in Ohio." Crutchfield Brief at 7. Before this board, Crutchfield presented extensive testimony and evidence relating to the operations of its website, its email promotions and online advertising, and its participation in comparison websites, as well as its non-internet based marketing efforts. Crutchfield Brief at 9-19.

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

"1. Because Crutchfield engages in no commercial activity within the State of Ohio and, likewise, neither owns nor leases property in the state, either directly or indirectly, the Company is not 'doing business in the state' under R.C. 5751.02. The Commercial Activity Tax, therefore, does not apply.

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

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

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

"7. Even if an 'economic presence test' were to be applied to this case, the imposition of the CAT against Crutchfield would be unlawful inasmuch as Crutchfield lacked an economic presence in Ohio, and, instead, merely communicated with customers in Ohio via interstate commerce from locations entirely outside of the state.

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

"9. The penalty should be abated. The Commissioner erred in arbitrarily and capriciously assessing penalties for each of the aforesaid reasons, and in light of Crutchfield's good faith reliance upon existing federal constitutional law in regard to the application of the 'substantial nexus' test to cases involving gross receipts taxes, as well as sales and use taxes and other state taxes." Notice of Appeal, 2012-926, at 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.

Crutchfield contends that "[t]he main issue before the Board of Tax Appeals *** is whether the Tax Commissioner *** can impose the Ohio Commercial Activity Tax *** - a tax on gross receipts imposed for 'the privilege of doing business in this state' – on Crutchfield, Inc. ***, a company that did not have a 'substantial nexus' with the State of Ohio within the meaning of the U.S. Constitution." (Footnote omitted.). Crutchfield Brief at 2. Specifically, Crutchfield 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. See R.C. 5751.01(F)(2)(z) (as such section was numbered in July 2005).

Upon review of the arguments raised, we find this board's pronouncement in *L.L. Bean, Inc. v. Levin* (Mar. 6, 2014), BTA No. 2010-2853, unreported, settled on appeal (Nov. 20, 2014), 11/20/2014 Case Announcements, 2014-Ohio-5119, to be controlling and dispositive of Crutchfield'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, Crutchfield was assessed commercial activity tax for the periods in question. R.C. 5751.02(A). The commissioner determined that Crutchfield 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). Crutchfield, like *L.L. Bean* and others before it, argues that the Commerce Clause of the U.S. Constitution "forbids the imposition of the Ohio CAT on Crutchfield, a non-resident direct marketer with no physical presence in Ohio." Crutchfield Brief at 20. It cites to several cases in support, including *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 to impose a gross receipts tax on the privilege of doing business upon a remote seller with no physical presence in the state and whose only contact with the state derives from making interstate sales to customers in that state." Crutchfield Brief at 25. Even without considering the constitutional aspects of Crutchfield'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*, it is the decision of the Board of Tax Appeals that the final order of the Tax Commissioner must be, and hereby is, affirmed.

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

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



Kathleen M. Crowley, Board Secretary